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REPORTS OF CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

FLORIDA:

JANUARY TERMS 1846--7

BY JOSEPH BRANCH, REPORTER

VOLUME I:

CONTAINING CASES IN 1846—7.

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JUDGES

OF THE

SUPREME COURT OF FLORIDA,

DURING THE PERIOD OF THESE REPORTS:

AT JANUARY TERM, 1846.

HON. THOMAS DOUGLAS, Chief Justice.
HON. THOMAS BALTZELL, } Justices.
HON. GEORGE S. HAWKINS, }

JOSEPH BRANCH, ESQ., Attorney General.

AT JANUARY TERM, 1847:

HON. THOMAS DOUGLAS, Chief Justice.
HON. THOMAS BALTZELL, }
HON. GEORGE S. HAWKINS, } Justices.
HON. GEORGE W. MACRAE,* }

JOSEPH BRANCH, ESQ., Attorney General.

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*The Commission of Hon. GEORGE W. MACRAE will expire at the end of the next Session of the General Assembly, he having been appointed by the Governor to fill a vacancy.

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This is a reprint, and the paging is precisely the same as the original volume. The omission of pages 283-288 inclusive and pages 465 and 466, was an error in paging the original edition. No matter has been omitted.

RULES OF PRACTICE

FOR THE

Supreme Court of the State of Florida.

RULE 1. It shall be required of an applicant for admission as an Attorney and Counsellor in this Court, that he shall have practised as such in a Circuit Court of this State, and have sustained a fair private and professional character, and that he take the following oath: "I, ———, do solemnly swear that I will demean myself as an Attorney or Counsellor of the Court, uprightly and according to law, and that I will support, maintain and defend the Constitution of the United States and of the State of Florida."

RULE 2. No cause standing for argument will be heard by the Court until the parties shall have furnished each member of the Court with a brief abstract of the cause pending, the substance of all the material pleadings, facts and documents on which the parties rely, and the points of law and facts, intended to be presented at the argument.

RULE 3. No original record shall be suffered by the Clerk to be taken from the Supreme Court room, or from the office of the Clerk thereof, otherwise to be responsible for it.

RULE 4. In every cause in which the defendant shall fail to appear, the plaintiff may proceed *"ex parte."*

RULE 5. If the defendant shall refuse to plead to issue, and the cause shall be called for trial, the Court may proceed to hear an argument on the part of the plaintiff, and give judgment according to the right of the cause.

RULE 6. Whenever pending a writ of error, or appeal in this Court either party shall die, the proper representatives in the realty, or personally of the deceased party, according to the nature of the case may, voluntarily come in and be admitted parties to the suit, and thereupon such suit shall be heard and determined as in other cases, and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon on motion in writing obtain an order, that unless such representatives shall become parties within the first three days of the ensuing term, the party moving such order shall (if defendant) be permitted to have the suit dismissed, and if the party so moving be plaintiff, he shall be entitled (a hearing being had) to have the judgment (if erroneous) reversed, provided that a copy of every such order shall be printed in some newspaper at the seat of government for three successive weeks, beginning at least sixty days before the first day of the term of the Supreme Court *then* next ensuing.

RULE 7. No cause shall be heard until a complete record shall be filed with the Clerk of this Court, containing in it without refer-
VIII ence *"aliunde,"* all the papers, exhibits, depositions and other proceedings which are necessary to a hearing in this Court.

RULE 8. All parties in this Court not being residents of the State, shall give security for the costs accruing in this Court to be entered on record.

RULE 9. If the Clerk of this Court shall produce satisfactory evidence thereto by affidavit, or the acknowledgement of the parties, or their sureties of his having served a bill of costs due by them respectively in this Court on such parties or sureties, and that such bill of costs has not been paid, an attachment may be issued against such parties or their sureties to compel payment of such costs.

RULE 10. Only two counsel shall be heard on either side of a cause, unless by special permission of the Court.

RULE 11. Whenever it shall be necessary or proper in the opinion of any Judge of a Circuit Court, that original papers of any kind should be inspected by this Court, on appeal or writ of error, said Judge may make such rule or order for the safe keeping, transporting or return of such original papers as to him may seem proper, and the Court will receive, and consider such original papers in connection with the transcript of the proceedings.

RULE 12. No *certiorari* upon a suggestion of a diminution of the record, shall be ordered in any cause, unless a motion shall be made therefor in writing setting forth the facts upon which the same is founded, verified by affidavit, and every such motion shall be made at the first term of the entry of the cause, otherwise it shall not be granted without special cause shown to the Court accounting for the delay.

RULE 13. In all causes brought up to this Court, it shall be the duty of the counsel for the plaintiff or appellant, to assign errors or file exceptions, as the case may be, and he shall not be permitted in argument to discuss any other matters on the record, save those in the errors assigned or exceptions filed.

RULE 14. Motions may be heard immediately after the orders of the preceding day are read, and the opinions of the Court are delivered in, but at no other time unless in cases of necessity, or in relation to a cause when called in course; all motions shall be heard in the order in which they stand on the motion docket.

RULE 15. That in all cases brought into this Court by appeal, writ of error or otherwise, either party may apply for and receive from the Clerk of this Court a copy of the records, the costs of which shall abide the event of the suit, and be taxed as other costs in the cause.

RULE 16. Upon the reversal of a judgment or decree of the Circuit Court, the party in whose favor the reversal is, shall recover his costs unless otherwise ordered.

RULE 17. The rules of practice of the Supreme Court of the United States, so far as the same are consistent with our constitution and statutes of force in this State, shall be the outline of the practice in this Court, in all cases not provided for by said statutes, or any rule of practice prescribed by the Supreme Court of this State.

RULE 18. The Clerk shall take charge of the Books of the Court, IX
endorse on each the words "Supreme Court of Florida," make a catalogue thereof, arrange them in a conference room which he shall have fitted up in a proper manner, shall have such reports bound as may be received in boards or unbound, shall keep a list of all the law reports and statutes in some conspicuous place in said room, and shall not permit such books to be taken therefrom, except by order of one of the Judges of the Court.

RULE 19. In all cases where any suit shall be dismissed in this Court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed for the defendant in error, or appellee, as the case may be unless otherwise agreed by the parties.

RULE 20. In all cases of affirmance of any Judgment or decree in this Court, cost shall be allowed for the defendant in error, or appellee as the case may be, unless otherwise ordered by the Court.

RULE 21. In all cases of reversal of any judgment or decree in this Court, costs shall be allowed in this Court for the plaintiff in error or appellant, unless otherwise ordered by the Court.

RULE 22. In all cases of dismissal of any suit, or the reversal of any judgment or decree of this Court, requiring further proceedings in the court below, it shall be the duty of the clerk to issue a mandate or other proper process, in the nature of a *procedendo*, to the Court below, for the purpose of informing such Court of the proceedings in this Court, so that further proceedings may be had in such Court, as to law and justice shall appertain.

RULE 23. When costs shall be allowed in this Court, it shall be the duty of the Clerk to insert the amount thereof in the body of the mandate, or other proper process sent to the Court below, and annex to the same the bill of the items in detail.

RULE 24. Rehearings must be applied for by petition in writing within fifteen days after the judgment or decree, setting forth the cause or causes for which Judgment or decree is supposed to be erroneous. The Court will consider the petition without argument, and if a rehearing is granted, direct it as to one or more points, as the case may require.

RULE 25. No copy of a judgment or decree of this Court shall be delivered, nor shall any mandate issue on such judgment or decree until after the final adjournment of the Court, without leave thereof; and that all rules heretofore adopted by the Court of Appeals of the late Territory, be, and they are hereby annulled.

RULES

ADOPTED BY THE SUPREME COURT, FOR THE GOVERNMENT OF THE CIRCUIT COURTS OF THE STATE OF FLORIDA.

1. A person making application for admission to the bar, shall apply by petition to one of the Judges, presenting evidence of his having attained the age of twenty-one, and being of good moral character; whereupon said applicant shall be examined in open court, as to his capacity and fitness.

2. That on his being found duly qualified, the following oath shall be administered to him:—You do swear or affirm, that you are duly qualified, according to the Constitution and Laws of this State, to exercise the office of Counsellor and Attorney at Law and Solicitor, and will, to the best of your ability, discharge the duties thereof, and truly and honestly demean yourself in your practice, and preserve and protect and defend the Constitution of this State, and of the United States. Whereupon, a license shall be given by the Judge, which shall entitle such person to practice in the Circuit and Supreme Courts of this State.

3. No Attorney, or other officer of the Court, shall enter himself or be taken as bail, in any criminal case, or as security in attachment, appeal, or writ of error, or other proceeding in Court, on pain of being considered in contempt, and of having the proceedings dismissed on account thereof.

4. Objections to the execution of the commission taking interrogatories, or to the manner in which depositions are taken, shall be made and disposed of before the parties go to trial.

5. Objections to the interrogatories, or to the form in which they are conceived, must be assigned in writing before the depositions are taken.

6. Motions required by law, or these rules, shall be in writing, and due notice given to the opposite party.

7. The Clerk shall keep a bench and bar docket, with the cases arranged under their appropriate heads; also, a motion docket.

8. Bills of exception shall be made up and signed during the term of the Court, unless by special order further time is allowed.

9. Depositions returned to the Clerk's office, may be opened at all times by consent of parties, or order of Court, or a Judge thereof.

10. No motion for a new trial shall be made unless in writing, and reasonable notice to the opposite party, with a statement of the grounds for the motion.

11. When a case is called in its order, the same must be tried, continued, or dismissed; but by consent, the cause may be placed at

XI the foot of the docket, to be again called, if there be time for the second calling of the docket.

12. In cases of application for a continuance, the party applying shall have his affidavit ready on the calling of the case.

13. The plaintiff shall in no case be compelled to submit to a non-suit; but if he desires to do so, he must do it before the jury retire.

14. The plaintiff may at any time discontinue his cause in the Clerk's office, by paying costs and entering a written discontinuance thereof.

15. All declarations must be filed on or before the first day of the term, and if not filed by the first day of the term thereafter, the suit shall be dismissed. All issues must be made up by the time the cases are called for trial.

16. If the plaintiff fail to file his declaration, on or before the first day of the term, the next shall be considered as the appearance term.

17. Amendments affecting the merits of a cause, may be ordered at the discretion of the Court, on such terms as they may think proper to impose.

18. When documentary evidence is introduced in a cause, it shall be filed with the Clerk, and considered in the custody of the Court, and not to be withdrawn except by their order.

19. Only one counsel on each side shall conduct the examination of witnesses, except by permission of the Court.

20. That a party applying for a continuance, shall state fully and clearly all the facts which he conceives may entitle him in law to such continuance, which shall be sworn to.

21. The right of concluding a criminal case belongs to the Solicitor, but may be delegated to other counsel.

22. The defendant shall cause his pleas to be filed sixty days before the first day of the trial term; and in case such plea, or any subsequent plea, require a replication thereto, the opposite party shall be allowed thirty days to reply, and the other issues shall be made up before the cause is called for trial; and when a case is called upon the trial docket, if either party is in default by reason of not pleading or answering any pleading which he was bound to answer, the opposite party may obtain such judgment or order as may be appropriate in such default.

23. The rules of practice of the Court of King's Bench, in England, so far as they are not repugnant to the Constitution and laws of this State, shall be the outline of the practice in cases not provided for by the rules for the government of the practice of the Circuit Courts of this State, or the laws of this State.

24. The rules of practice of the Courts of Equity of the United States, as prescribed by the Supreme Court of the United States, and when they are inapplicable, the rules of practice of the High Court of Chancery, in England, shall be rules for the practice of the Courts in this State, when exercising equity jurisdiction; and the rules of said Supreme Court shall be published with these rules, and with the laws of the last season.

Ordered, That the rules of practice heretofore provided by the XII Court of Appeals of the late Territory and not herein adopted, be, and the same are hereby annulled.

RULES OF PRACTICE,

IN SUITS IN EQUITY IN THE CIRCUIT COURTS OF THE UNITED STATES.

RULE 1. The Circuit Courts, as Courts of Equity, shall be deemed always open for the purpose of filing bills, answers and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules and other proceedings, preparatory to the hearing of all causes upon their merits.

2. The clerk's office shall be open, and the clerk shall be in attendance therein on the first Monday of every month, for the purpose of receiving, entering, entertaining and disposing of all motions, rules, orders and other proceedings, which are grantable of course and applied for, or had by the parties or their solicitors in all causes pending in equity, in pursuance of the rules hereby prescribed.

3. Any Judge of the Circuit Court, as well in vacation as in term, may, at chambers, or on the rule days, at the clerk's office, make and direct all such interlocutory orders, rules and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the Circuit Court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary at the next rule day thereafter, unless some other time is assigned by the judge for the hearing

4. All motions, rules, orders and other proceedings made and directed at chambers, or on rule days at the clerk's office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the clerk's office on the day when they are made and directed—which book shall be open at all office hours, to the free inspection of the parties in any suit in equity, and their solicitors. And except in cases where personal or other notice is specially required or directed, such entry in the order book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices and other proceedings entered in such order book, touching any and all the matters in the suits, to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the XIII Judges of the Circuit Court may, by rule, abridge the time for notice of rules, orders or other proceedings, not requiring personal service on the parties, in their discretion.

5. All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees, for filing bills, answers, pleas, demurrers and other pleadings; for making amendments to bills and answers; for taking bills proconfesso; for filing exceptions, and for other proceedings in the clerk's office, which do not, by the rules hereinafter prescribed, require an allowance or order of the court, or of any judge thereof, shall be deemed motions and applications, grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown.

6. All motions for rules of orders and other proceedings, which are not grantable of course, or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule day, and entered in the order book, and shall be heard at the rule day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court ex parte, and granted, as if not objected to, or refused, in his discretion.

PROCESS.

7. The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and unless otherwise provided in these rules, or specially ordered by the Circuit Court, a writ of attachment, and if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

8. Final process to execute any decree may, if the decree be solely for the payment of money, be by writ of execution, in the form used in the Circuit Court, in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land, or the delivering up of deeds, or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound without further service to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of non est inventus, to compel obedience to the decree.

9. When any decree or order is for the delivery of possession, XIV upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court

10. Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process, as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order, as if he were a party in the cause.

SERVICE OF PROCESS.

11. No process of subpoena shall issue from the clerk's office in any suit in equity, until the bill is filed in the office.

12. Whenever a bill is filed, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is to enter his appearance in the suit, in the clerk's office, on or before the day, at which the writ is returnable; otherwise, the bill may be taken pro confesso. Where there are more than one defendants, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife, defendants, or a joint subpoena against all the defendants.

13. The service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same, to the defendant personally, or, in case of husband and wife, to the husband personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some free white person, who is a member or resident in the family.

14. Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, toties quoties, against such defendant, if he shall require it, until due service is made.

15. The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise; in the latter case, the person serving the process shall make affidavit thereof.

16. Upon the return of the subpoena, as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

APPEARANCE.

17. The appearance day of the defendant shall be the rule day, to which the subpoena is made returnable; provided, he has been served with the process twenty days before that day; otherwise, his ap-

XV pearance day shall be the next rule day succeeding the rule day, when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order book on the day thereof by the clerk.

BILLS TAKEN PRO CONFESSO.

18. It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court upon motion for that purpose, to file his plea, demurrer, or answer to the bill in the clerk's office, on the rule day next succeeding that of entering his appearance; in default thereof, the plaintiff may, at his election, enter an order (as of course) in the order book, that the bill be taken pro confesso; and thereupon the cause shall be proceeded in ex parte, and the matter of the bill may be decreed by the court at the next ensuing term thereof accordingly, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to the process of attachment against the defendant, to compel an answer; and the defendant shall not, when arrested upon such process, be discharged therefrom, unless, upon filing his answer, or otherwise complying with such order, as the court or a judge thereof may direct, as to pleading to, or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

19. When the bill is taken pro confesso, the court may proceed to a decree at the next ensuing term thereof, and such a decree rendered shall be absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the costs of the plaintiff in a suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

FRAME OF BILLS.

20. Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship, of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the Judges of the Circuit Court of the United States for the District of ——. A. B., of ——, and a citizen of the State of ——, brings this, his bill, against C. D., of ——, and a citizen of the State of ——, and E. F., of ——, and a citizen of the State of —— And thereupon your orator complains and says, that &c."

21. The plaintiff, in his bill, shall be at liberty to omit, at his option, the part, which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the de-
XVI fendant is supposed to intend to set up by way of defence to the bill; also, what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter-averments, at his option, any matter or thing, which he supposes will be insisted upon by the defendant, by way of defence or excuse, to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief, to which the plaintiff supposes himself entitled, and shall also contain a prayer for general relief; and if an injunction, or writ of ne exeat regno, or any other special order pending the suit, is required, it shall also be specially asked for.

22. If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties there, the bill shall aver the reason, why they are not made parties, by showing them to be without jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons, who are without the jurisdiction, and may properly be made parties, the bill may pray, that process may issue to make them parties to the bill, if they should come within the jurisdiction.

23. The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon as justice may require, upon the return of the process. If an injunction, or a writ of ne exeat regno, or any other special order pending the suit, is asked for in the prayer for relief, that shall be sufficient without repeating the same in the prayer for process.

24. Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part, that upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

25. In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum, which is allowed in the State Court of Chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

SCANDAL AND IMPERTINENCE IN BILLS.

26. Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts or other instruments, in haec verba, or any other impertinent matter or any scandalous matter not relevant to the suit. If it does, it may on exceptions be referred to a master by any judge of the court for impertinence, or scandal, and if so found by him, the matter shall be expunged at the expense of the

plaintiff, and he shall pay to the defendant all his costs in the suit XVII up to that time, unless the court or a judge thereof, shall otherwise order. If the master shall report, that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

27. No order shall be made by any judge for referring any bill, answer or pleading, or other matter, or proceeding depending before the court for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages, which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule day, after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule day, or the master shall certify that further time is necessary for him to complete he examination.

AMENDMENTS OF BILLS.

28. The plaintiff shall be at liberty as a matter of course, and without payment of costs, to amend his bill in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filing blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course) after a copy has been so taken, before any answer or plea, or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall without delay furnish him a fair copy thereof free of expense, with suitable references to the places, where the same are to be inserted. And if the amendments are numerous, he shall furnish in like manner to the defendant, a copy of the whole bill as amended, that if there be more than one defendant, a copy shall be furnished to each defendant affected thereby

29. After an answer or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court, to amend his bill on or before the next succeeding rule day, upon payment of costs, or without payment of costs, as the court, or a judge thereof, may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court upon motion or petition, after due notice to the other party, and upon proof by affidavit, that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

30. If the plaintiff, so obtaining any order to amend his bill after answer or plea, or demurrer, or after replication, shall not file his amendments or amended bill as the case may require, in the clerk's XVIII office on or before the next succeeding rule day, he shall be considered to have abandoned the same, and the cause shall proceed, as if no application for any amendment had been made.

DEMURRERS AND PLEAS.

31. No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant, that it is not interposed for delay; and if a plea, that it is true in point of fact.

32. The defendant may, at any time, before the bill is taken for confessed, or afterwards with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case, in which the bill specially charges fraud or combination, a plea to such part must be accomapnied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the facts on which the charge is founded.

33. The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him, as far as in law and equity they ought to avail him.

34. If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to the costs in the cause up to that period, unless the court shall be satisfied, that the defendant had good ground in point of law or fact to interpose the same, and it was not interposed vexatiously or for delay. And upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period, as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him, pro confesso, and the matter thereof proceeded in and decree accordingly.

35. If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.

36. No demurrer or plea shall be held bad and overruled upon argument ,only because such dmurrer or plea shall not cover so much of the bill as it might by law have extended to.

37. No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much some part of the same matter, as may be covered by such demurrer or plea.

38. If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument, on the rule day, when the same is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of

XIX course, unless a judge of the court shall allow him further time for the purpose.

ANSWERS.

39. The rule, that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply, in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defence (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters, than he would be compellable to answer and discover upon filing a plea, in bar, and an answer in support of such plea, touching the matters set forth in the bill to avoid or repel the plea or defence. Thus, for example, a bona fide purchaser for a valuable consideration, without notice, may set up that defence by way of answer instead of plea, and shall be entitled to the same protection and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

40. A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories, which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill, to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

41. The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, &c.; and the interrogatories which each defendant is required to answer, shall be specified in a note at the foot of the bill, in the form or to the effect following: that is to say,—"The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3, &c." and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

42. The note at the foot of the bill, specifying the interrogatories, which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed, shall be considered and treated as an amendment of the bill.

43. Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words, "To the end, therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby pray, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and re-
XX spective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say,—

"1. Whether, &c.

"2. Whether, &c.

44. A defendant shall be at liberty, by answer, to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer.

45. No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

46. In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer, on or before the next succeeding rule day after that on which the amendment or amended bill is filed, unless the time therfor is enlarged or otherwise ordered by a judge of the court; and upon his default the like proceedings may be had as in cases of an omission to put in an answer.

PARTIES TO BILLS.

47. In all cases where it shall appear to the court, that persons, who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because of their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

48. Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

49. In all suits concerning real estate, which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the same manner, and to the same extent, as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real

estate, or rents and profits; parties to the suit; but the court may, XXI upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

50. In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party, where he desires to have the will established against him.

51. In all cases in which the plaintiff has a joint and several demand against persons, either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

52. When the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is set down shall be notified by an entry, to be made in the clerk's order book, in the form or to the effect following; (that is to say,) "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course, to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

53. If a defendant shall, at the hearing of a cause, object, that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court, (if it shall think fit,) shall be at liberty to make a decree saving the rights of the absent parties.

NOMINAL PARTIES TO BILLS.

54. Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer, he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer, he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

55. Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not not enter his appearance and plead, demur or answer to the same within the time prescribed therefore by these rules, the plaintiff shall be entitled as of course, upon motion without notice, to such injunction. But special injunctions shall be grantable only upon due notice, to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be exparte if the adverse party does not appear at the time and place ordered. In every case, where an injunction, either XXII the common injunction, or a special injunction, is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some order of the court.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

56. Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same; which bill may be filed in the clerk's office at any time; and upon suggestion of the facts, the proper process of subpoena shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule day, which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

57. Whenever any suit in equity shall become defective, from any event happening after the filing of the bill, (as, for example, by a change of interest in the parties,) or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead or answer thereto, on the next succeeding rule day, after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

58. It shall not be necessary in any bill of revivor, or supplemental bill, to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

ANSWERS.

59. Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any Circuit Court to take testimony or depositions, or before any master in chancery appointed by any Circuit Court, or before any judge of any court of a State or Territory.

AMENDMENT OF ANSWERS.

60. After an answer is put in, it may be amended as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document or other small matter, and be re-sworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters as by adding new facts or defences, or qualifying or altering the original statements, except by special leave of the court or of a judge thereof, upon motion and cause shown after due notice to the adverse

XXIII party, supported, if required, by affidavit. And in every case where leave is so granted, the court, or the judge granting the same, may, in his discretion, require that the same be separately engrossed and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

EXCEPTIONS TO ANSWERS.

61. After an answer is filed on any rule day, the plaintiff shall be allowed until the next succeeding rule day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court or a judge thereof; and if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

62. When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had by two or more of the defendants separately, costs shall not be allowed for such separate answers or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

63. When exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same, and file an amended answer on the next succeeding rule day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule day thereafter, before a judge of the court; and shall enter, as of course, in the order book an order for that purpose. And if he shall not so set down the same for a hearing, the exception shall be deemed abandoned, and the answer shall be deemed sufficient; provided, however, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

64. If, at the hearing, the exceptions shall be allowed the defendant shall be bound to put in a full and complete answer thereto, on the next succeeding rule day; otherwise the plaintiff shall as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer, and complying with such other terms, as the court or judge may direct.

65. If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof at the hearing upon the exceptions.

REPLICATION AND ISSUE.

66. Whenever the answer of the defendant shall not be excepted
XXIV to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereon on or before the next succeeding rule-day thereafter; and in all cases where the general replication is filed, the cause shall be deemed to all intents and purposes at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the Court or a judge thereof shall, upon motion for cause shown, allow a replication to be filed nunc pro tunc, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

TESTIMONY, HOW TAKEN.

67. After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same, in the clerk's office, ten days' notice thereof being given to the adverse party to file cross interrogatories before the issuing of the commission; and if no cross interrogatories are filed at the expiration of the time, the commission may issue ex parte. In all cases the commissioner or commissioners shall be named by the Court, or by a judge thereof. If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories.

68. Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition taken under the acts of Congress, if a Court or a judge thereof shall, under all the circumstances, deem it reasonable.

69. Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the Court or a judge thereof shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office by any judge of the Court, upon due notice to the parties, or it may be enlarged as he may deem reasonable under all the circumstances. But by consent of the parties, publication of the testimony may at any time pass into the clerk's office, such consent being in writing, and a copy thereof entered in the order-book, or endorsed upon the deposition or testimony.

TESTIMONY DE BENE ESSE.

70. After any bill filed, and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged or infirm, or going out of the country, or that any of them

is a single witness to a fact, the clerk of the Court shall, as of course, XXV upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the Court may direct, to take the examination of such witness or witnesses de bene esse, upon giving due notice to the adverse party of the time and place of taking his testimony.

FORM OF THE LAST INTERROGATORY.

71. The last interrogatory in the written interrogatories to take testimony now commonly in use, shall in the future be altered and stated in substance thus: "Do you know, or can you set forth any other matter or thing, which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? if yea, set forth the same fully and at large in your answer."

CROSS BILL.

72. Where a defendant in equity files a cross bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto, before the original plaintiff shall be compellable to answer the cross bill. The answer of the original plaintiff to such cross bill may be read and used by the party filing the cross bill, at the hearing, in the same manner and under the same restrictions as the answer, praying relief, may now be read and used.

REFERENCE TO & PROCEEDINGS BEFORE MASTERS.

73. Every decree for an account of the personal estate of a testator or intestate, shall contain a direction to the master, to whom it is referred to take the same, to inquire and state to the Courts what parts, if any of such personal estate are outstanding or undisposed of, unless the Court shall otherwise direct.

74. Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made, shall cause the same to be presented to the master for a hearing on or before the next rule-day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

75. Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed ex parte, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay; and either party shall be at liberty to apply to the Court, or a judge thereof, for an order to the master to speed the proceedings and to XXVI make his report, and to certify to the Court or judge the reasons for any delay.

76. In the reports made by the master to the Court, no part of any state of facts, charge, affidavit, deposition, examination, or answer, brought in or used before them, shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer, shall be identified, specified, and referred to, so as to inform the Court what state of facts, charge, affidavit, deposition, examination, or answer, were so brought in or used.

77. The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, viva voce, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office, or by deposition according to the acts of Congress, or otherwise as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matter before him, which he may deem necessary and proper to the justice and merits thereof, and the rights of the parties.

78. Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpœna in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in Court; and if any witness shall refuse to appear, or to give evidence, it shall be deemed a contempt of Court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the Court, or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the Court. But nothing herein contained shall prevent the examination of witnesses viva voce, when produced in open Court, if the Court shall in its discretion deem it advisable.

79. All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party viva voce, or upon interrogatories in the master's office, or by deposition, as the master shall direct.

80. All affidavits, depositions, and documents, which have been previously made, read, or used in the Court, upon any proceeding in any cause or matter, may be used before the master.

XXVII 81. The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories, or viva voce, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examination shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the Court, if necessary.

82. The Circuit Courts may appoint standing masters in Chancery in their respective districts, both the judges concurring in the appointment; and they may also appoint a master pro hac vice in any particular case. The compensation to be allowed to every master in Chancery for his services in any particular case shall be fixed by the Circuit Court in its discretion, having regard to all the circumstances thereof; and the compensation shall be charged upon and borne by such of the parties in the cause as the Court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the Court, he shall be entitled to an attachment for the amount against the party, who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the Court.

EXCEPTIONS TO REPORT OF MASTER.

83. The master, as soon as his report is ready, shall return the same into the clerk's office and the day of return shall be entered by the clerk in the order-book. The parties shall have one month from the time of filing the report, to file exceptions thereto; and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule-day after the month is expired. If exceptions are filed, they shall stand for hearing before the Court, if the Court is then in session; or if not, then at the next sitting of the Court, which shall be held thereafter by adjournment or otherwise.

84. And in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party, whose exceptions are overruled, shall, for every exception overruled, pay costs to the other party, and for every exception allowed, shall be entitled to costs —the costs to be fixed in each case by the Court, by a standing rule of the Circuit Court.

DECREES.

85. Clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment thereof, be corrected by order of the Court or a judge thereof, upon petition, without the form or expense of a rehearing

86. In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin in substance as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered adjudged and decreed as follows: viz. [Here insert the decree or order.] XXVIII

GUARDIANS AND PROCHEIN AMIS.

87. Guardians ad litem to defend a suit may be appointed by the Court, or by any judge thereof, for infants or other persons, who are under guardianship, or otherwise incapable to sue for themselves; all infants and other persons so incapable may sue by their guardians, if any, or by their prochein ami, subject, however, to such orders as the Court may direct for the protection of infants and other persons.

88. Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for; shall be signed by counsel; and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party, or by some other person. No rehearing shall be granted after the term at which the final decree of the Court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the Court, in the discretion of the Court.

89. The Circuit Court (both judges concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

90. In all cases, where the rules prescribed by this Court, or by the Circuit Court, do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the Court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

91. Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

92. These rules shall take effect, and be of force, in all the Circuit Courts of the United States, from and after the first day of August next; but they may be previously adopted by any Circuit Court in its discretion; and when and as soon as these rules shall so take effect, and be of force, the Rules of Practice for the Circuit Courts in Equity Suits, promulgated and prescribed by this Court in March, 1822, shall henceforth cease, and be of no farther force or effect. And the clerk of this Court is directed to have these Rules printed, and to transmit a printed copy thereof, duly certified, to the clerks of the several Courts of the United States, and to each of the judges thereof.

March, 1842.

RULES OF PRACTICE.

ADOPTED BY THE SUPREME COURT, FOR THE GOVERNMENT OF THE CIRCUIT COURTS OF THE STATE OF FLORIDA.

I—OFFICERS OF COURT.

1. PERSONS making application for admission to the Bar, shall apply by petition to one of the Judges, presenting evidence of his having attained the age of twenty-one years, and of his being of a good moral character; whereupon said applicant shall be examined in open court, as to his capacity and fitness.

2. That on his being found duly qualified, the following oath shall be administered to him:—"You do swear [or affirm] that you are duly qualified, according to the constitution and laws of this State, to exercise the office of counsellor and attorney at law and solicitor, and will, to the best of your abilities, discharge the duties thereof, and truly and honestly demean yourself in your practice, and preserve, protect and defend the constitution of this State, and of the United States." Whereupon a license shall be given by the Judge, which shall entitle such person to practice in the Supreme court and in the Circuit courts of this State.

3. No attorney or other officer of court shall enter himself or be taken as bail in any criminal case, or as security in attachment, appeal, or writ of error, or other proceedings in court, on pain of being considered in contempt, and of having the proceedings dismissed on account thereof.

4. Every attorney whose name shall be endorsed on any writ of summons, shall, on demand in writing, made by or on behalf of any defendant, declare forthwith whether such writ was issued by him, or with his authority or privity; and if he shall answer in the affirmative, then he shall also, in case a Judge shall so order and direct, declare in writing, within a time to be allowed by such Judge, the place of residence of the plaintiff, on pain of being guilty of a contempt of the court from which such writ shall appear to have been issued. And if he shall answer in the negative, all proceedings upon the same shall be dismissed.

II—DECLARATIONS.

1. All Declarations must be filed on or before the first day of the term, and if not filed by the first day of the term thereafter, the suit shall be dismissed.

VIII 2. If the plaintiff fail to file his Declaration on or before the first day of the term, the next shall be considered as the appearance term.

3. The name of the county may be stated in the commencement of a Declaration, and shall be taken to be the venue intended by the plaintiff, and no venue need be stated in the *body* of the Declaration, or in any subsequent pleading. Provided, that in cases where local description is now required, such local description shall be given.

The following forms of Declarations may be adopted in place of those now in use:

DECLARATION AFTER SUMMONS.

[Venue] A. B. by E. F. his attorney [or in his own proper person] complains of C. D.

SCHEDULE OF FORMS AND DIRECTIONS.

For whereas the defendant, on the ——— day of ——— in the year of our Lord, ——— made his promissory note in writing, and delivered the same to the plaintiff, and thereby promised to pay to the plaintiff ——— dollars ——— days (weeks or months) after the date thereof (or as the fact may be) which period has now elapsed, (or if the note be payable to A. B.) and then and there delivered the same to A. B. and thereby promised to pay the said A. B. or order ——— dollars, ——— days (weeks or months) after the date thereof, (or as the fact may be,) which period has now elapsed, and the said A. B. then and there indorsed the same to the plaintiff, whereof the defendant then and there had notice, and then and there in consideration of the premises, promised to pay the amount of the said note to the plaintiff, according to the tenor and effect thereof.

Whereas one C. D. on the ——— day of ——— in the year of our Lord ——— made his promissory note in writing, and thereby promised to pay to the defendant or order, ——— dollars ——— days (weeks or months) of the date thereof, which period has now elapsed, and the defendant then and there indorsed the same to plaintiff, (or the defendant then and there indorsed the same to X. Y. and X. Y. then and there indorsed the same to plaintiff;) and the said C. D. did not pay the amount thereof, although the same was then and there presented to him on the day when it became due; all of which the defendant there and then had due notice.

Whereas one C. D. on ——— made his promissory note in writing, and thereby promised to pay X. Y. or order ——— dollars ——— days (weeks or months) after the date thereof, (or as the fact may be) which period has now elapsed; and then and there delivered the said note to the said X. Y., and the said X. Y. then and there indorsed the same to plaintiff; (or, and the defendant then and there indorsed the same to the Q. R., and Q. R. then and there indorsed the same to the plaintiff); and the said C. D. did not pay the amount

IX thereof, although the same was then presented to him on the day when it became due; of all which the defendant then and there had due notice.

Whereas the plaintiff on ——— made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the plaintiff ——— dollars ——— days (weeks or months) after date, or sight thereof, which period has now elapsed; and the defendant then and there accepted the said bill, and promised the plaintiff to pay the same according to the tenor and effect thereof, and of his said acceptance thereof, and did not pay the same when due.

Whereas the plaintiff on ——— made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to O. P. or order ——— dollars ——— days (weeks or months) after the date (or sight) thereof, which period has now elapsed; and then and there delivered the same to the said O. P., and the said defendant then and there accepted the same and promised the plaintiff to pay the same according to the tenor and effect thereof, and of his acceptance thereof. Yet he did not pay the amount thereof, although the said bill was then presented to him on the day when it became due, and thereupon the same was then and there returned to the plaintiff; all of which the defendant then and there had notice.

Whereas one E. F. on ——— made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the said E. F. (or H. G.) or order ——— dollars, ——— days after date (or sight) thereof, which period has now elapsed; and the defendant then and there accepted the said bill, and the said E. F. (or the said H. G.) then and there indorsed the same to the plaintiff, (or, and the said E. F. or the said H. G. then and there indorsed the same to K. J., and the said K. J. then and there indorsed the same to the plaintiff); of all which the defendant then and there had due notice, and then and there promised to pay the amount thereof, according to the tenor and effect thereof, and of his acceptance thereof.

Whereas, one E. F. on ——— made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the plaintiff ——— dollars, ——— days (weeks or months) after the sight (or date) thereof, which period has now elapsed, and the defendant then and there accepted the same, and promisd the plaintiff to pay the same according to the tenor and effect thereof, and of his acceptance thereof.

Whereas the defendant on ——— made his bill of exchange in writing, and directed the same to J. K., and thereby required the said J. K. to pay to the plaintiff ——— dollars, ——— days (weeks or months) after the date (or sight) thereof, and then and there delivered the same to the plaintiff, and the same was then and there presented to the said J. K. for acceptance, and the said J. K. then and there refused to accept the same; of all which the defendant then and there had due notice.

X Whereas, the defendant on ——— made his bill of exchange in writing, and directed the same to J. K., and thereby required the said J. K. to pay to the order of the said defendant ——— dollars, ——— days (weeks or months) after the sight (or date) thereof, and the said defendant then and there indorsed the same to the plaintiff, (or, and the said defendant then and there indorsed the same to L. M., and the said L. M. then and there indorsed the same to the plaintiff;) and the same was then and there presented to the said J. K. for acceptance, and the said J. K. then and there refused to accept the same; all of which the defendant then and there had due notice.

Whereas, one N. O. on ——— made his bill of exchange in writing, and directed the same to P. Q., and thereby required the said P. Q. to pay to his order ——— dollars, ——— days (weeks or months) after the date (or sight) thereof, and the said N. O. then and there indorsed the said bill to the defendant, (or to R. S., and the said R. S. then and there indorsed the same to the defendant,) and the defendant then and there indorsed the same to the plaintiff, and the same was then and there presented to the said P. Q. for acceptance, and the said P. Q. then and there refused to accept the same; of all which the defendant then and there had due notice.

Whereas, one N. O. on ——— made his bill of exchange in writing, and directed the same to P. Q. and thereby required the said P. Q. to pay to the defendant or order ——— dollars, ——— days after the date (or sight) thereof and then and there delivered the same to the defendant, and the said defendant then and there indorsed the said bill to the plaintiff, (or to R. S., and the said R. S. then and there indorsed the same to the plaintiff,) and the same was then and there presented to the said P. Q. for acceptance, and the said P. Q. then and there refused to accept the same; of all which the defendant then and there had due notice.

If the declaration be against any party to the bill, except the drawee or acceptor, and the bill be payable at any time after date, and the action not brought till the time is expired, it will be necessary to insert, as in declarations on promissory notes, immediately after the words denoting the time for payment, the following words, viz: *which period has now elapsed;* and instead of averring that the bill was presented to the drawee for acceptance, and that he refused to accept the same, to allege that the drawee (naming him), did not pay the said bill, although the same was there presented to him on the day when it became due. And if the declaration be against any party, except the drawee or acceptor, and the bill is payable at any time after sight, it will be necessary to insert after the words denoting the time appointed for payment, the following words, viz: *and the said drawee (naming him,) then and there saw and accepted the same, and the said period has now elapsed,* and instead of alleging that the bill was presented for acceptance, and refused, to allege that the drawee (naming him,) did not pay the said bill, although the same was presented to him on the day when it became due.

If the bill or note be payable at sight, the form of the declaration must be varied so as to suit the case, which may be easily done.

Declarations on foreign bills may be drawn according to the prin- XI ciples of these forms, with the necessary variations.

COMMON COUNTS.

Whereas, the defendant, on ——— was indebted to the plaintiff ——— dollars for the price and value of goods then and there bargained (or sold,) and sold (or delivered,) by the plaintiff to the defendant at his request.

And in ——— dollars for the price and value of work then and there done, and materials for the same, provided by the plaintiff for the defendant, at his request.

And in ——— dollars for money then and there lent by the plaintiff to the defendant, at his request.

And in ——— dollars for money then and there paid by the plaintiff for the use of the defendant, at his request.

And in ——— dollars for money then and there received by the defendant for the use of the plaintiff.

And in ——— dollars for money found to be due from the defendant to the plaintiff, upon an account then and there stated between them.

And whereas the defendant afterwards, on, &c. and in consideration of the premises respectively, then and there promised to pay the said several moneys respectively to the plaintiff on request; yet he hath disregarded his promises and hath not paid any of the said moneys, or any part thereof; to the plaintiff's damages of ——— dollars, and thereupon he brings suit, &c.

If the declaration contains one or more counts against the maker of a note, or acceptor of a bill of exchange, it will be proper to place them first in the declaration, and then in the general conclusion to say, promised to pay the *said last mentioned several moneys respectively.*

5. In actions on policies of insurance, the interest of the assured may be averred thus: "That A. B. C. and D. (or some or one of them), were or was interested, &c." And it may also be averred, "that the insurance was made for the use and benefit, and on account of the person or persons so interested."

6. In actions of trespass *quare clausum fregit*, the close or place in which, &c. must be designated in the declaration by name or abuttals, or other description, in failure whereof, the defendant may demur especially.

7. The entry of pledges to prosecute at the conclusion of the declaration, shall be discontinued.

III—DEMURRERS.

1. In any demurrer, before it is signed by counsel, some matter of law intended to be argued, shall be stated, and if any demurrer shall be filed without such statement, or with a frivolous statement, it may be set aside as irregular, by the court: Provided, that the party demurring may, at the time of the argument, insist upon any further matters of law, of which notice shall have been given to the Court in the usual way.

2. The form of the demurrer shall be as follows:—"The said XII defendant, by ———, his attorney, or in person, &c. (or plaintiff,) says that the declaration (or plea) is not sufficient in law,"—showing the special cause of demurrer, if any.

3. The form of a joinder in demurrer, shall be as follows: "The said plaintiff (or defendant) says that the declaration (or plea, &c.) is sufficient in law."

4. To a joinder in demurrer, no signature of counsel shall be necessary.

IV—PLEAS AND SUBSEQUENT PLEADINGS.

1.—GENERALLY.

1. The defendant shall cause his pleas to be filed sixty days before the first day of the trial term, and in case such plea, or any subsequent plea, requires a replication thereto, the opposite party shall be allowed thirty days to reply; and the other issues shall be made up before the cause is called for trial; and when a case is called upon the trial docket, if either party is in default by reason of not pleading, or answering any pleading which he was bound to answer, the opposite party may obtain such judgment or order as may be appropriate in such default.

2. A defendant shall be allowed the same time for pleading after the delivery of particulars under an order of the court, which he had at the return of the summons.

3. The defendant shall not be at liberty to waive his plea without leave of the Court or a Judge.

4. No plea in abatement for the nonjoinder of any person as a defendant, shall be allowed, unless it shall be stated in such plea, that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated with convenient certainty, in an affidavit verifying the same.

5. To any plea in abatement for nonjoinder of another person, the plaintiff may reply that such person has been discharged by bankruptcy and certificate.

6. No plea in abatement for a misnomer shall be allowed in any personal action, but in such case the defendant shall be at liberty to cause the declaration to be amended at the costs of the plaintiff, by inserting the right name, upon an order of the Court, or Judge, founded on an affidavit of the right name; and in case such application shall be discharged, the cost of the same shall be paid by the party applying.

7. No formal defence shall be required in a plea, and it shall commence as follows:—"The said defendant by ——— his attorney, (or in person,) says that"—

8. No protestation shall hereafter be necessary in any pleading; but either party shall be entitled to the same advantage in that or other actions, as if a protestation had been made.

9. In a plea or subsequent pleading, intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any

allegation of *actionem non*, or to the like effect, or any prayer of judgment; nor shall it be necessary in any replication or subsequent pleading intended to be pleaded in maintenance of the whole action, to use any allegation of "*precludi non*," or to the like effect, or any prayer of judgment; and all pleas, replications, and subsequent pleadings, pleaded without such formal parts aforesaid, shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action, or in maintenance of the whole action; provided, that nothing herein contained shall extend to cases wherein estoppel is pleaded.

10. All special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country: Provided, that this regulation shall not preclude the opposite party from pleading over to the inducement when the traverse is immaterial.

11. When money is paid into court, such payment shall be pleaded in all cases, and as near as may be in the following form *mutatis mutandis*:—

C. D. ats. A. B. } The defendant, by ——— his attorney, (or in person, &c.) says that the plaintiff ought not further to maintain his action, because the defendant now brings into court the sum of ——— dollars, ready to be paid to the plaintiff; and the defendant further says, that the plaintiff has not sustained damages, (or in actions of debt, that he is not indebted to the plaintiff) to a greater amount than the said sum, &c., in respect of the cause of action in the declaration mentioned, and this he is ready to verify—wherefore he prays judgment if the plaintiff ought further to maintain his action.

12. In all cases in which a plea *puis darrien continuance* is now by law pleadable, the same defence may be pleaded with an allegation that the matter arose *after the last pleading*.

13. The plaintiff, after the delivery of a plea of payment of money into court, shall be at liberty to reply to the same by accepting the sum so paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in; or the plaintiff may reply that he has sustained damages, (or that the defendant is indebted to him, as the case may be,) to a greater amount than the said sum, and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit.

14. When the defendant shall plead a plea of judgment recovered, he shall in such plea, state the date of such judgment, and the book and the page on which such proceedings are entered, *and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea*, and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment, as therein stated, shall be at liberty to sign judgment as for want of a plea, by leave of the court.

PLEADINGS.

II—IN PARTICULAR ACTIONS.

1.—*Assumpsit.*

1. In all actions of assumpsit, except on bills of exchange and promissory notes, the plea of non-assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged, may be implied by law.

Ex. gr., In an action on a warranty, the plea will operate as a denial of the fact of a warranty having been given upon the alleged consideration, but not of the breach; in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with the warranties.

In actions against carriers and other bailees, for not delivering, or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach.

In actions of *indebitatus assumpsit* for goods sold and delivered, the plea of non-assumpsit will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

2. In all actions upon bills of exchange and promissory notes, the plea of non-assumpsit shall be inadmissible. In such actions, therefore, a plea in denial shall traverse some matter of fact—*ex. gr.*, the drawing, or making, or endorsing, or accepting, or presenting, or notice of dishonor of the bill or note.

3. In every species of *assumpsit*, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded: *ex. gr.*: infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, &c., bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, deviation, and various other defences, must be pleaded.

2 *In Covenant and Debt.*

1 In debt on specialty or covenant, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

2. The plea of *nil debet* shall not be allowed in any action.

3. In actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that "he never was indebted in manner and form as in the declaration alleged," and such plea shall have the same operation as the plea of *non assumpsit* in *indebitatus assumpsit*; and all matters in confession and avoidance shall be pleaded specially as above directed in actions of *assumpsit*.

4. In other actions of debt in which the plea of *nil debet* has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specially some matter of fact alleged in the declaration, or plead specially some matter in confession and avoidance.

3—*Detinue.*

The plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant; but not of the plaintiff's property therein, and no other defence than such denial shall be admissible under that plea.

4.—*In Case.*

1. In actions on the case, the plea of not guilty shall operate only as a denial of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea: All other pleas in denial shall take issue on some particular fact alleged in the declaration. In an action on the case for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house.

In an action on the case for obstructing the plaintiff's right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way: In an action for conveying the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods.

In an action of slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate precisely to the same extent as at present, in denial of speaking the words, or of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession or trade, but it will not operate as a denial of the fact of the plaintiff's holding the office or being of the profession or trade alleged.

In this form of action against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or for the purpose for which they were received.

2. All matters in confession and avoidance shall be pleaded specially as in actions of assumpsit.

5.—*Trespass.*

1. In actions of trespass *quare clausum fregit*, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or of his right of possession of that place, which if intended to be denied, must be traversed specially.

2. In actions of trespass *de bonis asportatis*, the plea of not guilty shall operate as a denial of defendant having committed the trespass alleged by taking or damaging the goods mentioned, but not of the plaintiff's property therein.

GENERAL RULES.

1. All issues must be made up by the time the cases are called for trial.

2. Objections to the interrogatories, or to the form in which they are conceived, must be assigned in writing before the depositions are taken.

3. Objections to the execution of the commission for taking interrogatories, or to the manner in which depositions are taken, shall be made and disposed of before the parties go to trial.

4. Depositions returned to the clerk's office may be opened at all times by consent of parties, or order of court, or a Judge thereof.

5. When documentary evidence is introduced in a cause, it shall be filed with the clerk, and considered in the custody of the court, and not to be withdrawn except by their leave.

6. When a case is called in its order, the same must be tried, continued, or dismissed; but by consent, the cause may be placed at the foot of the docket, to be again called, if there be time for the second calling of the docket.

7. That a party applying for a continuance, shall state fully and clearly, all the facts, which he conceives may entitle him in law to such continuance, which shall be sworn to.

8. In cases of application for a continuance, the party applying shall have his affidavit ready on the calling of the case.

9. The plaintiff may at any time discontinue his cause in the clerk's office, by paying costs and entering a written discontinuance thereof.

10. The plaintff shall in no case be compelled to submit to a nonsuit, but if he desire to do so, he must do it before the jury retire.

11. Amendments affecting the merits of a cause, may be ordered at the discretion of the court, on such terms as they may think proper to impose.

12. Only one counsel on each side shall conduct the examination of witnesses, except by permission of the court.

13. Motions required by law or by these rules, shall be in writing, and due notice given to the opposite party.

14. No motion for a new trial shall be made, unless in writing,

XVII and reasonable notice to the opposite party, with a statement of the grounds for the motion.

15. Bills of exceptions shall be made up and signed during the term of the court, unless by special order, further time is allowed.

16. The clerk shall keep a bench and bar docket, with the cases arranged under their appropriate heads, and also a motion docket.

17. The right of concluding a criminal case belongs to the solicitor, but may be delegated to other counsel.

18. No wager of law shall be allowed.

19. An action of debt on simple contract shall be maintainable by any executor or administrator.

20. The rules of practice in the Courts of Equity of the United States, as prescribed by the Supreme Court of the United States, shall be rules for the practice of the courts in this State, when exercising equity jurisdiction.

21. When any *nolle prosequi* shall have been entered upon any count, or as to part of any declaration, the defendant shall be entitled to, and have judgment for, and recover his reasonable costs in that behalf.

22. In all actions by and against executors or administrators, or persons authorized by statute to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued, shall not in any case be considered as in issue, unless specially denied.

23. Either party, after plea pleaded, and a *reasonable* time before trial, may give notice to the other in the form hereto annexed, marked A. to the like effect, of his intention to adduce in evidence certain written or printed documents, and unless the adverse party shall consent by indorsement on such notice, *within forty-eight hours*, to make the admission specified, the party requiring such admission may call on the party required, by summons, to show cause, before a Judge, why he should not consent to such admission, or, in case of refusal, be subject to pay the costs of proof; and unless the party required shall expressly consent to make such admission, the Judge shall, if he think the application reasonable, make an order, that the
XVIII costs of proving any document specified in the notice, which shall be proved at the trial to the satisfaction of the Judge, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause: Provided, that if the Judge shall think the application unreasonable, he shall indorse the summons accordingly: Provided also, that the Judge may give such time for inquiry or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit.

If the party required shall consent to the admission, the Judge shall order the same to be made.

No costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admission, or the Judge shall have indorsed upon the summons that he does not think it reasonable to require it.

A Judge may make such order as he may think fit respecting the costs of the application, and the costs of the production and inspection, and in the absence of a special order, the same shall be costs in the cause

[A.]

FORM OF NOTICE REFERRED TO.

IN THE CIRCUIT COURT OF ——
—— *County.*

A. B.
vs.
C. D.

TAKE notice that the plaintiff (or defendant) in this cause, proposes to adduce in evidence, the several documents hereunder specified, and that the same may be inspected by the defendant (or plaintiff) his attorney or agent at —— on ——, between the hours of ——, and that the defendant (or plaintiff,) will be required to admit that such of said documents, as are specified to be originals, were respectively written, signed or executed, as they purport respectively to have been; that such as are specified as copies, are true copies: and such documents as are stated to have been served, sent or delivered, were so served, sent or delivered, respectively saving all just exceptions to the admissibility of all such documents as evidence in this cause.

Dated, &c. G. H., *Attorney for plaintiff (or defendant.)*

To E. F., *Attorney, or Agent, for defendant (or plaintiff.)*

24. Upon the trial, where there is more than one count, plea, avowry, or cognizance, upon the record, and the party pleading fails to establish a distinct subject matter of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance, a verdict and judgment shall pass against him upon each count, plea, avowry, or cognizance, which he shall have so failed to establish, and he shall be liable to the other party for all costs occasioned by such count, plea, avowry, or cognizance, including those of the evidence, as well as those of the pleading.

25. No costs shall be allowed on taxation to a plaintiff upon any counts or issues, upon which he has not succeeded, and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs.

26. In all cases in which any particular number of days *not expressed* to be *clear days*, as prescribed by the rules or practice of the courts, the same shall be reckoned *exclusively* of the first day, and *inclusively* of the last day, unless the last day shall happen to fall on a Sunday, ("Christmas day, Good Friday, or a day appointed for a *public fast or thanksgiving*,") in which case the time shall be reckoned *exclusively* of that day also.

THE DECISIONS

OF THE

Supreme Court of the State of Florida,

AT

JANUARY TERM, 1846.

CHARLES D. STEWART, *vs.* THOMAS PRESTON, JR.

The Act of the General Assembly, "that all cases now pending in said Court of Appeals, shall be transferred to said Supreme Court, and tried and decided therein and thereby, except cases cognizable by the Federal Courts" as imperative, and there is no cause for questioning the power of the General Assembly to pass such a law.

An appeal suspends the judgment until some Superior Tribunal makes a rightful disposition of the case.

The laws of the United States, do not provide for the transfer by appeal or Writ of Error of a judgment rendered by the Superior Court of a Territory, to a District or Circuit Court, or to the Supreme Court of the United States.

This case having been docketed, and being called, Appellee by his Attorney, made and filed the following motion to dismiss the same which fully sets forth the facts.

And now on this 6th January, 1846, on the calling of this case, comes Thomas H. Hagner, an Attorney of this Court, and gives the Court here to understand and be informed, that the cause now placed upon the Docket of this Court, was heretofore, on the 31st December, 1844, docketed in the Court of Appeals of the Territory of Florida, being an appeal to that Court, from Gadsden Superior Court. That on the 14th January, 1845, the cause was argued and submitted to said Court of Appeals, and that afterwards on the 8th February, 1845, the said Court of Appeals announced that it would hold the same under advisement, and the said Court adjourned with said case in that posture—and now he moves to dismiss the cause from this Court:

1st. Because it has no rightful place here, and this Court has no
1 jurisdiction of the asme, the said cause coming here neither by Writ
2 of Error, nor Appeal, nor by agreement of parties; the agreement of appeal being to the Court of Appeals.

2d. Because the cause has not been legally transferred to this Court, from the Court of Appeals, nor has any mode been ordained by competent authority, whereby said cause has a day in this Court.

3d. Because the Judgment of Gadsden Superior Court, is final until reversed by the proper Appellate Tribunal to which the cause was by consent of parties transferred, and to which an appeal lay by the laws of the United States.

4th. Because this Court has appellate jurisdiction only over those inferior Courts, which the Constitution of the State of Florida hath established, and which compose with it, the Judiciary powers of the State.

T. H. HAGNER, for Appellee, said:

It would be necessary to take a view of the constitution of the late Superior Courts, and of the Court of Appeals of the Territory of Florida; and also of the effect of the formation of State Government upon those tribunals, in order to present the questions involved in this motion.

The whole system of government established by the United States over the Territory of Florida, owed its existence to the constitutional power of Congress, "to dispose of, and make all needful rules and "regulations, respecting the Territory and other property belonging "to the United States," and the Judiciary established as part of that system, "are not Constitutional Courts, but are *Legislative Courts,* "created in virtue of the general right of sovereignty, which exists in "the Government of the United States." Again, "the jupridiction "with which they are invested, is conferred by Congress, in the ex- "ecution of those general powers which that body possesses over the "Territories of the United States." By C. J. Marshall—Am. Ins. Co. vs. Canter. 1 Peters' S. C. Rep. 546.

The several acts of Congress, therefore, organizing the Territorial government in Florida, were but the repeated exercise of Constitutional power, of the general right of sovereignty; and though expressed merely by legislative enactment, was a legitimate government, which Congress alone was competent to organize, and which edew its duration, as well as its existence, to the continuance of the same constitutional power in Congress.

The Judicial power was "vested in two Superior Courts, (after- "wards increased in number.) and in such Inferior Courts, and Jus-
3 "tices of the Peace, as the Legislative Council of the Territory might "from time to time establish." And writs of Error and Appeal were at first allowed, *immediately,* to the Supreme Court of the U. S. Afterwards, by art of Congress, approved 26 May, 1824, the Court of Appeals was established, to which Appeals and Writs of Error were required to be made *in the first instance;* thence causes might be removed by like process to the Supreme Court of the U. S.—The judgments of the Superior Courts, both before and after that change, however, were complete and final, until reversed by the appellate tribunal constituted by the same power to which the Courts of original jurisdiction owed their existence, and forming with them an entire system.

The State of Florida was admitted into the Union on 3d March, 1845. No provision was made by Congress for the transfer, either to the State Courts, or to the District Courts of the United States, of the causes pending at the date of the admission; and the question arises: What was the consequence upon causes pending in the late Court of Appeals, of the act of admission? Did the causes then pending upon appeal abate? And do the original judgments stand as if no Appeal or Writ of Error had been sued out? Or are the State Courts competent to take up and decide pending causes?

It is clear that the admission of Florida into the Union at once deprived those Legislative Courts, established by Congress, of all vital energy, *as such*—for the general right of sovereignty which gave them birth, was gone, and the power of Congress over this soil, as Territory of the United States, became at once, "among the things that were." True, these Courts still existed as State Courts *ad interim,* by force of their adoption by the State Constitution; but they commenced by new tenure—they formed an entire system—not united to the new—not consolidated with the old, but adopted for the time for the convenience of the State—a provisional arrangement. To do all this, the power of the State of Florida was undoubtedly sufficient. But when the Schedule and Ordinance, declaring that, "all "actions at law, or suits in Chancery, or any proceeding pending, or "which may be pending in any Court of the Territory of Florida, "*may* be commenced in, or transferred to such Court of the State as "may have jurisdiction of the subject matter thereof," is held to demand, in the absence of any Legislative action by Congress, and of all consent between parties litigant, that the State tribunals shall take the place of the Superior Courts, and of the Court of Appeals, I insist that this is a wrong construction of the Schedule, or else that the State had no such power to confer this jurisdiction. All pending ac- 4
tions or proceedings "*may* be *commenced in* or *transferred to,*" &c. Why this alternative expression? Why not transfer *all* pending actions? Why are some pending proceedings to be commenced in the State Courts, while others are transferred to those tribunals? Clearly, because where the parties consent, they may be transferred as they are—without consent, must be commenced anew. Other interpretations involves the constitutional objection which I shall proceed to enforce.

I deny the authority of the State Government to transfer pending causes to her Courts! There is no affinity nor affiliation between the Legislative Courts, established by Congress, and the Courts established and ordained by the State Constitution. Different in origin —different in jurisdiction—different in their powers and capacities—subject to revision by different tribunals. They form parts of entire different systems of government, constituted by different authority. The one was temporary—the other perpetual—the one must end when the other begins. How can thy coalesce? From the Court of Appeals, a writ of error or appeal lay, in all cases of sufficient mere numerical amount, to the Supreme Court of the United States; from the Supreme Court of the State, questions of principle, or some constitutional provision, alone can warrant the supervision of the Federal Judiciary. The defendant had consented to the appeal, without security, which should take this cause to that Court, whence an appeal lay to the Supreme Court of the U. S. If his case is reversed here, he must submit to the sentence of this Court as a Court of last resort,—to the judgment of a Court not in existence at the period of his consent, and foreign to the whole system, under which the judgment in his favor was rendered—of a Court not bound, as was the Court of Appeals, by the decisions of the appellate tribunal, but a State Court, with power to declare the law as a Court of last resort. Surely no fair construction of that *consent,* can lead to consequences such as these.

If it be contended that the State Constitution has been approved by Congress, and that thus this Ordinance may be said to be the act of the National Legislature, we say that Congress has not passed upon the subject. In the preamble to the act for the admission of Florida into the Union, will be seen the extent of its action. It declared that the people of Florida did, by their delegates, on the 11th January, 1839, form for themselves a Constitution, *which said Constitution is Republican.* This is all Congress has done, and this is

5 all it had power to do, in passing upon that instrument. New States may be admitted into the Union, and the United States guarantees to every State a Republican form of government—and under these provisions of the Constitution, the action of Congress was had. The act of admission into the Union cannot supply the place of such legislation by Congress, if any were necessary, to prevent the abatement of causes, or to authorize their transfer to State Courts. In the case of Bermudez vs. Ibanez—3d Martin's Louisiana Rep. 2—the question was submitted to the decision of the Supreme Court of that State, whether there existed a right of appeal from a judgment of the Superior Court of the Territory, rendered since the adoption of the Constitution, and while the Court was *acting as a State Court*. The Court say: "The Superior Court of the late Territory of Orleans "was vested with original and appellate jurisdiction. Such were "the duties it exercised—such were its powers. That therefore "must be the jurisdiction in which it was continued, for it cannot be "pretended that its judgments have become subject to an appeal, "without admitting that there has been an innovation, and a change "in that branch of the former government—that is to say, without "admitting that which is expressly provided against by the Schedule. "But it has been contended that the right of appeal to the Supreme "Court being secured to the citizen since the day on which the Con-"stitution was approved by Congress, all the judgments rendered "since that time must be subject to it. This appears to the Court "to be a forced construction of the 2d sec. of the 4th art. The "right of appeal, no doubt, was guaranteed by the Constitution, but "when was it to take effect? Which were the tribunals over whose "decision the Supreme Court was to exercise the appellate jurisdic-"tion assigned to it by the Constitution? Undoubtedly those inferior "Courts which the Constitution directed to be established, and "which composed with it the Judiciary powers of the State. *The "Superior Court was no part of that system—it had no concern* with "it—its authority under the schedule was a continuation of its former "jurisdiction—it was independent of the future authorities, and its "judgments must stand as irrevocable as they were under the Ter-"ritorial Government."

True it is, that no appeal had been provided by Congress, from the Judgment of the Superior Court, but can this vary the case? Can this ward off the force of the argument? Was not the State powerless to graft upon the provisional system thus adopted, appellate juris-6 diction? Do not the Court declare *that* system must be continued as before? Must not the State take it as she finds it? Must not the judgments of the Superior Courts, stand as irrevocable as they were under the Territorial Government? Reversible only by the Appellate Tribunals, to which those Courts were amenable? Were they not independent of future authorities? Surely when our Court of Appeals was done away, then the judgments of the Superior Courts were as final and irrevocable as those of the Superior Court of Louisiana—as irrevocable as if no appeal had ever been allowed—as though an Appellate Tribunal in the Territory, had never been established, they stood then as they stood prior to 1824, and the State Government was quite as powerless to turn the causes into a new channel, as they would have been to destroy the judgments already rendered by an edict of the Constitution.

The case from Louisiana is in fact stronger than the case at bar; the decision *there* appealed from, was made by the Superior Court, *while a State Court*, adopted by the Constitution; *here* the judgment was rendered long before the admission into the Union, and before the Constitution of Florida had been called into life.

I have shown that the Courts of the Territory were Legislative Courts; as Legislative Courts created by written law, their jurisdiction is defined by written law and cannot be transcended. Exparte. Bollman and Swartout, 4 Cranch, 93.

Can that jurisdiction done away in the Court itself, be taken up and exercised by a State Tribunal, established by a different government, and called into existence only when the former has expired? The admission into the Union was a virtual repeal of the act creating those Legislative Courts, and it is a repeal without any saving of proceedings commenced and pending before it. In such case the whole power and authority cease, and the Court cannot proceed with what may have been commenced. 6 Pickering, 501.

If those Legislative Courts, the Courts of the Territory, could not proceed to finish what was before them, can it be that the State Constitution or State law, can eke out the expired jurisdiction, can supply omitted Legislation of Congress, can add the saving of proceedings commenced and pending? Indeed not only so, but can create and establish another tribunal, who shall commence where Legislative Courts established by Congress left off, and carry on the proceedings in a tribunal foreign to the jurisdiction which commenced them.

7 The consequence which I insist followed this admission into the Union, is not novel principle—the abatement of proceedings pending, unless saved by competent provision of a competent Legislation. It is a familiar principle that when an act of parliament is repealed, it must be considered, except as to transactions passed and closed, as if it had never existed. Prosecutions are thus oftentimes brought to a sudden end—condemnations of prize rightful when made reversed by the appellate tribunal—the discharge of bankrupts who had complied with all the requirements of the statute, refused because of the repeal of the statute; and no proceedings whatever can be pursued under a repealed statute, though begun before the repeal, unless such proceedings are authorized under a special clause in the repealing act. 1 Wash., C. C. R. 84. 4 Dallas R. 372.

So where the amendment to the Constitution of the United States was adopted, providing that the Judicial power of the United States, should not be construed to extend to suits against one of the States by citizens of another State, or by citizens or subjects of any foreign State, the Supreme Court of the United States *unanimously* decided that no jurisdiction could be exercised in such suits against a State, though they had been previously brought, and were depending when the amendment was adopted. Hollingsworth vs. Virginia; 3 Dallas' Rep. 378.

What was the principle of this decision? clearly that from the moment the power to sue a State was annulled and revoked, the power ceased to be a part of the Constitution—not existing there, the source of its origin, it could be found no where else; bearing in mind then that "the jurisdiction of the Court of Appeals was conferred by Congress," in virtue of the general right of sovereignty, which is now clearly gone, how can this case be proceeded in, under a jurisdiction not conferred by Congress? The State Government is incompetent to confer it. The appellate tribunal being done away the cause cannot rightly be proceeded in—the original judgment must stand—there is no appellate tribunal to review it.

S. W. Carmack, for Appellant.

Baltzell, Justice, delivered the opinion of the Court.

This is a case from the docket of the late Court of Appeals of the territory, having been transferred by act of the Legislature to the docket of this Court.

A motion is made to dismiss, on the ground that the appeal having been taken to that Court, this Court being a Court of the State, has 8 no jurisdiction to dispose of it.

A question to the jurisdiction is at all times a delicate one, and would have influenced the Court to pause and hesitate, before assuming it in this case, if the power had been at all doubtful. But we see no room to question the jurisdiction. The act of the Legislature of the State, organizing the Supreme Court, is imperative, "that all "cases *now pending in said Court of Appeals*, shall be transferred "to said Supreme Court, and tried, and decided therein, and thereby, "except cases cognizable by the Federal Courts." Acts 1845, p. 14, sec. 14.

We see no cause for questioning the power of the Legislature to pass this law, and none has been alleged in argument. There was obviously a necessity for it, from the fact that cases appealed from, must be disposed of by some tribunal, and who so appropriate as the jurisdiction, under the new organization, taking the place of, and substituted for the old one. We do not concur in the opinion of counsel, that if this Court does not take jurisdiction, the judgment of the Court below is revived; on the contrary, we strongly incline to the opinion that the appeal suspends the judgment, until some superior tribunal makes a rightful disposition of the case.

But the question occurs, is this case exempt from the jurisdiction of the Court, by being cognizable in the Federal Court. If so, it must be in a Circuit Court of the U. S. or a District Court having Circuit Court powers, vested with appellate jurisdiction. The law of Congress on the subject provides, "That final decrees and judg-"ments in civil cases in a District Court, when the matter in dispute "exceeds the sum or value of $50, may be re-examined and reversed "or affirmed in a Circuit Court on a writ of error," &c. Story's laws, 60.

Does an appeal lie to the Supreme Court of the United States? The act of Congress provides, "That final judgment and decrees in "civil actions and suits in Equity in a Circuit Court, brought there "by original process, or removal there from Courts of the several "States, or by appeal from a District Court, when the matter in dis-"pute exceeds $2,000, may be re-examined and reversed or affirmed "in the Supreme Court." Story, 61.

But it is alleged that the citizenship of the party, or alienage, in some of the cases pending before the Court, creates a difference in

9 favor of the application. The laws of Congress referring to the subject, contain the following provisions:

"The Circuit Courts shall have *original* cognizance concurrent "with the Courts of the several States, of all suits in a civil nature at "common law or in equity, where the matter in dispute, exclusive "of costs, exceeds the value of $500, and the United States are "plaintiffs or petitioners, or an alien is a party, or the suit is between "a citizen of the State where the suit is brought and a citizen of an- "other State." Story, 57.

"That if a suit be *commenced* in any State Court against an alien. "or by a citizen of the State in which the suit is brought against "the citizen of another State, the matter in dispute exceeding five "hundred dollars, and the defendant shall, at the time of entering "his appearance in such State Court, file his petition for the re- "moval of the cause for trial into the next Circuit Court, on giving "bail, &c.; the cause shall there proceed as if brought by original "process." Story, 58.

These two provisions are inapplicable to the case of an appeal from another tribunal, and were designed for suits in their original institution, and before judgment.

None of these laws of the U. S. nor any others we have been able to find, provide for the transfer by appeal or writ of error of a judgment rendered by the Superior Court of a Territory to a District or Circuit Court, or to the Supreme Court of the United States.

The case then must be tried by this Court, or not tried at all. Were it a case of admiralty, or other case exclusively cognizable by the United States Court, the Court would at once make the transfer, as has been already done in cases on the docket; but it is not of this character—on the contrary, being a case for the recovery of money, and within the ordinary common law jurisdiction of Courts, it is clearly within the appellate jurisdiction of this Court.

For these reasons, we think the case is rightfully before the Court, and the motion is therefore overruled.

Per Curiam. Motion overruled.

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10 CHARLES D. STEWART, *vs.* THOMAS PRESTON, JR.

A mortgage, by A to indemnify his endorser B, from loss or damage in consequence of his endorsement, and stipulating that if A shall fail in payment of said Note, and suffer the same to be protested or remain over due, in whosoever hands the same may be found, then that B, on making affidavit of such non-payment and the amount, may foreclose, &c., and which mortgage was afterwards transferred by B, "without recourse" to C, the endorsee of the note by B, also "without recourse"—held that the mortgage is valid in the hands of C, and may be foreclosed by him, and the mortgaged property subjected to the payment of the debt due C on the note.

In construing an instrument of writing a Court cannot consider one part of the exclusion of another, but must look at the whole to perceive the design of the maker.

As a general rule, the endorsement of the notes secured by a mortgage carries with it the mortgage

Whatever interest would pass by a general or full endorsement, it seems, will pass by a qualified endorsement.

An interlineation or erasure apparent on the face of a deed, does not of itself avoid it; to produce this effect it must be shown to have been made under circumstances which the law does not warrant.

All defences not made in the pleadings are considered as waived, especially such as are connected with the facts of the case.

Held that the mortgage in question created a trust for the payment of the notes, and that the mortgagees who had assigned "without recourse," might have been decreed to allow the use of their names, if necessary to a suit, to have the mortgaged property applied to their payment.

APPEAL from Judgment rendered in late Superior Court for the County of Gadsden, at its Fall Term, 1844, on petition to foreclose a mortgage under the statute.

The motion to dismiss this case having been overruled, the Court proceeded to consider the same. The facts are these:

Preston on the 2d January, 1839, made six several promissory Notes, payable to the joint order of Edward Carey, James R. Jones, Thomas Hoxey and Hines Holt, Jr., which the said Carey and others, as the joint sureties of Preston, endorsed in blank, and of which appellant became the holder. The endorsement on each of the Notes, is, "we endorse the within, 'without recourse,' to Charles D. Stewart," signed Carey and others, and is without date; and on each of the notes there are credits by Stewart.

The defendant Thomas Preston, Jr., on the same day of the making and endorsing of the notes, executed and delivered to Edward Carey, and others, the endorsers, an indenture of mortgage on certain 11 property therein described, "for the purpose of securing the said Edward Carey, James R. Jones, Thomas Hoxey and Hines Holt, Jr., jointly and severally from any damages, loss or liability, in consequence of their said endorsements." The indenture of mortgage further recited, that "all of which said several promissory notes are endorsed in blank," and that Carey and others, by such endorsements became the joint securities of the said Thomas Preston, Jr., for the payment of the several amounts of money specified in the said several promissory notes, at the time they severally became due." The condition of the mortgage is as follows: "Provided, always that the fore- "going is subject to the conditions and stipulations herein after "written to wit: That if the said Thomas Preston, Jr., shall pay all "and each of the several promissory notes herein mentioned as they "severally become due and payable, and shall not make default in "any or either of the same, then the above obligation to be void, "and the title thereby conveyed. And it is further expressly stipula- "ted and understood that if the said Thomas Preston, Jr., shall fail "in the payment of any or either of the said promissory notes, and "shall suffer the same to be protested or to remain over-due and un- "paid, in whosoever hands the same may be found, then the said Ed- "ward Carey, James R. Jones, Thomas Hoxey and Hines Holt, Jr., "or either of them, upon making affidavit of such non-payment and "the amount thereof, shall be permitted to foreclose the said mort- "gage and take out execution and bring to sale the said negroes or "any portion thereof necessary to payment of such sum as may re- "main due and unpaid, notwithstanding the said sum due may not "have been paid, or any part thereof, by the said Edward Carey, "James R. Jones, Thomas Hoxey and Hines Holt, Jr.

On the 20th October, 1840, Carey and others, the mortgagees, assigned and transferred to Stewart, the Petitioner, the mortgage with all their rights under the same as fully as they could exercise the same, "without recourse" on them. In the assignment of the mortgage the words "the Bank of Columbus" are stricken out, and the name of Charles D. Stewart interlined; the petition was filed by Stewart, under the statute, "to regulate the foreclosure of mortgages by the Courts of Common Law, and for other purposes."

The plea of Preston, by way of objection to the foreclosure, alleged that the mortgage, (if executed at all by him,) was executed and delivered to Carey and others, to indemnify them as his endorsers on the notes therein named, and was intended to operate only as a 12 personal covenant of indemnity, and was not therefore subject to the operation of the assignment as set forth in the petition; and that the assignment does not convey to petitioner such an interest as would give him a right to foreclose the said mortgage.

On the trial of this cause in the Court below, the original mortgage, and the original notes filed, and the endorsements on the notes, were all proved, and the same given in evidence. The signatures to the assignment on the mortgage were proved, but no evidence was offered, explaining the erasure and interlineation in the assignment. The admission of the assignment was objected to by defendant, on account of no such evidence being adduced, but the Court admitted it in evidence. The defendant also objected to the admission of the mortgage in evidence, on the ground that it was variant from the petition. The defendant also objected that the mortgage was a mortgage for indemnity merely, from certain endorsements, that it appeared the endorsement of the notes to petitioner was "without recourse" on the endorsers and mortgagees, and that thereby the endorsers being released and exonerated, they could not be damnified, or the condition of the mortgage forfeited, and that thereby the mortgage was extinguished: and that the same could not be assigned to petitioner by mortgagees, and that petitioner had no right under the same. The petitioner contended that the assignment was made in consideration of the release by petitioner of the endorsers, (but no evidence was given thereof except the papers,) and that therefore the assignment was valid.

The Court sustained the objection of defendant, and dismissed the petition on that ground; to which petitioner excepted.

S. W. CARMACK, for appellant:

1st. A transfer of the debt carries with it the mortgage as an incident; there is no necessity for a written transfer of the mortgage; the possession of the mortgage by the assignee of the debt secured by it is sufficient; he is entitled to the benefit of it. Green vs. Hart, 1 John's Rep. 580.

But here we have a transfer of both the mortgage and the debt which it was intended to secure; this is proved by the deposition of Arthur B. Davis, which from any thing that appears on the record was admitted to be received without objection. The case of the City of Pensacola vs. ————————, decided in 1840, shows that the deposition cannot now be objected to.

13 Again the assignment of the mortgage is stated in the petition, and it is not put in issue by any one of the pleas; no objection then can be taken to the assignment,

2nd. If property is conveyed by mortgage for the payment of a particular debt, or for the indemnity of any one of the parties who are bound for the debt, it is immaterial with whom the contract contained in the mortgage is made; a person not a party to the mortgage, may, if interested in having it applied to the payment of the debt, have it so applied.

1st. If a surety pays the debt of the principal, he is entitled to have the benefit of all the sureties that the creditor has received from the principal debtor; he has the right to be substituted in the place of the creditor with respect to them; to be subrogated to all his remedies. 17 John, 384; 2 John, ch. Rep. 554; 2 Yerger, 346; McNairy vs. Eastland, 2d Yerger, 310; Scantland vs. Little, Meig's Rep. 168; 9 Cowen Rep. 206.

2nd. This right is reciprocal, the creditor is entitled to all the securities which the surety has received from the principal debtor; the surety holding them is but a trustee for the use of the creditor. Moses vs. Murgatroyd, 1 John's, ch. rep. 119; Breedlove, *et al* vs. Stump *et al*, 3 Yerger, 257; Wright vs. Marley, 11 Vesey, Jr., 262; 7 Cranch 97; Nelson vs. Blight, 1 John, cases 205; Philips vs. Thompson, 2 John ch. rep. 418; 2 American, ch. Dig. 511, citing 4, Dana, 27.

If therefore, this was a mortgage merely for indemnity and reimbursement of the sureties, like the cases in 1 John, ch. rep. and 3 Yerger, a Court of Equity would compel the sureties to assign it to the creditor, or allow the creditor to have the property sold, and the proceeds applied to the payment of his debt; and this too, before the sureties were damnified, and consequently before they would have a claim to reimbursement.

This brings us to the question:

3d. May not the parties do that by contract which a Court of Equity would do for them? In other words, if a Court of Equity would compel the sureties to assign the mortgage to the creditor may they not do so without such compulsion? and if the sureties have done so, may not the creditor, having the entire interest in the mortgage by the assignment, proceed to foreclose it.

But this is not a mortgage for indemnity and reimbursement merely, but it is likewise, by its very terms, a mortgage to secure the pay-
14 ment of the debt for which the sureties were bound; see the condition of the mortgage; it is to be void if the mortgagor shall pay the debt. Also, if the notes are protested for non-payment, the sureties may proceed to foreclose and sell to pay the notes; to whom? to the creditor certainly. Here then is an appropriation of a particular fund by contract, for the payment of a particular debt, and by operation of the assignment the creditor becomes the mortgagee, and has the same right to proceed to have a foreclosure, as if the mortgage had been originally made directly to him as the mortgagee. See Stat. DuVal.

4th. It will not be denied that if this mortgage had been made directly to Charles D. Stewart, the creditor, to secure the money due on the notes in his hands, that he would have had the right to proceed, under the Statute, to foreclosure. Now, I ask, in what consists the difference between that case, and this? Here the mortgage is made to sureties *to pay the debt*. Does not the transfer, by operation of law, make Stewart, the creditor, the mortgagee, just as effectually as if he so appeared in the face of the mortgage?

5th. If this view of the subject be correct, it is wholly immaterial whether the sureties had any interest in the mortgage at the time of the assignment or not. If they had none, the creditor, Stewart, had a right to have his debt paid out of the mortgaged property. His right is independent of the right of the sureties, and does not depend on the question whether they were ever bound as sureties; or if bound, whether they were afterwards discharged.

Every case of the subrogation of sureties to the rights of the creditor, proves the truth of this position. As soon as the sureties pay the debt to the mortgagee creditor, the debt is extinguished, and the mortgage is discharged—the creditor being the mortgagee, has no longer any claim or interest in the mortgage—and yet the sureties may set up this extinguished mortgage by substitution of themselves as mortgagees. See 17 John. 2 John Ch. Rep. 2 Yerger already cited. The right of the sureties, then, does not depend on the question whether the mortgagee's interest is extinguished. So say I in this case, the right of the creditor Stewart, does not depend on the question whether the rights of the sureties, the present mortgagees, is extinguished by their release from the payment of the debt.

If the notes were endorsed without recourse before the assignment of the mortgage, the assignment is good; the law regulating such transfer would make it good without any new consideration. It is absurd to say that a consideration is necessary to support an assign- 15
ment to a man who is entitled to have it by law.

6th. Through the endorsement on the notes are not dated, yet it is proved from the circumstances of this case, that the assignment of the notes were filled up over the blank endorsement on the same day that the mortgage was assigned, to wit: 20th October, 1840; and the one assignment, without recourse, was the consideration of the other.

7th. No variance between the petition and mortgage; it is referred to and made a part of the petition.

8th. The rasure and interlineation do not affect the assignment—it is not under seal, and need not be explained by parol evidence. 1 Peter's Rep. 369. 2 Starkie Ev. 271—2. 1 Dallas 69. But a decisive answer to this objection is, there is no plea putting in issue the assignment.

T. H. Hagner, for appellee, argued:

That there is no error in the judgment of the Court below, for the petitioner was not entitled to a decree of foreclosure of the instrument of writing proceeded on. For it is shown:

I. That the deed was made and delivered upon a state of circumstances, developed by the proofs in the cause, which afterwards became changed and altered, and to effect purposes afterwards abandoned; and *that in truth the deed was delivered upon condition* NOT PERFORMED.

The recital of the deed shows its object, "for the purpose of securing" the payees of the notes who had, *"by their endorsements become the joint securities of the said Thomas Preston,* junior." And the notes themselves, were not securities of any debt due to the payees, but were to have been negotiated *on the strength* of the names of these mortgagees.

Now that the mind of the parties changed,—that the original intention was not consummated,—that the condition to become liable never was performed,—is all shown by the proofs adduced by the petitioner himself.

The notes are endorsed by them without recourse—that endorsement was cotemporaneous with the making of the notes in point of law, and thus evinces an entire change of the original design of the parties; it shows a non-performance of the condition precedent, until performance of which the estate could not vest. If not absolutely null and void in the outset, it exhibits a cancellation of the instru- 16
ment of writing in point of law.

To show that this change was made, and the design of the parties altered, we come to the consideration of the design of this mortgage. If not already made apparent, let us examine more fully the deed of mortgage, and the accompanying proofs.

That the saving harmless was *the gist* of the matter, look at the condition of the deed. The *recital* shows the purpose to be for securing the parties from all loss, damage or liability. Saved harmless the condition is saved—whether by payment, by release of the obligation, or by failure to incur the intended liability—by whatever mode, they are saved from all loss, damage or liability. It likens itself to the case of a condition to be discharged by any one of several acts; *and one act*, which shall save harmless from all loss, damage or liability, is a discharge of the condition. In this mortgage, the statement of payment *required to be made*, at a day named, is only *one* mode—the ordinary but not the only mode—of discharging the condition; a time must be limited, and a day fixed when the defeasance shall take effect.

The essence of the condition here is the saving harmless; and thus we prove that indemnity against securityship intended to be undertaken, was the object, scope and purpose of the deed.

That condition precedent must be shown to be performed, before the Estate vests. See Dallas Reports, 317.

Upon the 1st point, I would refer the Court to the case of Johnson and others vs. Baker—4 Barnwell & Alderson, 441. Where a deed, though delivered to one of the grantees, upon a condition previously expressed, although not introduced into the act of delivery, was held sufficient to make the delivery as an escrow, THOUGH TO A PARTY TO THE DEED. And as it appeared that the condition had not been complied with, *Abbott*, Chief Justice, held that the plaintiffs were not entitled to recover.

II. Coming then to the next view of the case, imagine the counsel right in the true date of the assignment being 20th October, 1840, what then is the posture of the case?

A mortgage in fee is defined to be, "An estate upon condition de-
"feasible by the performance of the condition, *according to its legal*
"effect."

As the estate cannot vest till performance of the condition precedent, so the estate terminates the moment the condition is per-

17 formed. That this principle is incontrovertible, we are well assured, and no authority can be necessary to satisfy the Court of these principles.

Now quite equivalent to *the performance of the condition,* in any of the modes enumerated, is *the saving of the condition;* and this by any means operating in law to the discharge of the liability, the indemnity against which was the purpose of the instrument.

The condition may be saved in sundry modes; either by the non-performance of the condition precedent by the other party, or, by the exoneration and discharge of the sureties in this case.

The sureties are to be saved from *loss*—they are to be saved from *damage*—they are to be saved from *liability.* If, *by any act, their indemnification* is MADE COMPLETE, THE CONDITION IS SAVED.

This was the case in that cited, Luther Abbot vs. Nancy Upton, 19 Pickering, 334. There the condition of the mortgage was in the alternative, *either* to pay the money, *or* to indemnify the surety. The debtor substituted with his creditor another note, in lieu of that embraced in the mortgage. Surety held to be exonerated, *and the condition of the mortgage saved.* The estate upon condition is defeated, the defeasance takes effect. The estate of the mortgagor is again complete, *ipso facto,* by the saving of the condition.

The grantor being in the possession of the property, it being personalty, his title is again complete without conveyance. This is a familiar principle of law.

Thus, it will be seen, that if this deed of mortgage was at any time valid and binding, it has been cancelled and destroyed; if at any time of vital energy, that energy is gone. To save from liability its purpose, their exemption from liability extinguished its existence. It lived but for *one* object, *that* accomplished died.

III. The condition of the mortgage was never forfeited, for they have never been hurt. *No loss, damage* or *liability* has ever happened to them. Their assignees can stand in no better situation than the assignor.

In 2 Gallison, 564, Judge Story lays it down as a broad general principle, that the assignee of a chose in action can stand in no better situation than the assignor. If this be so, the condition has never been fortified; the estate of Preston is not forfeited.

Now it is urged that these mortgagees stand also in the posture of trustees, for whomsoever shall become owners of the promissory notes. This is derived singly from the fact, that the payment of the
18 notes at or before a day named, is set forth as a mode of extinguishment of liability; is "the saving harmless from loss, damage or liability." When we show, from the fair meaning of the instrument, that its object and intention was this indemnity; that this is the purpose of the deed; that the notes were not the property of the endorsers, nor they in any wise interested therein, *except as sureties* in the outset; and this interest extinguished by their discharge; *in no mode interested at all*—what interest could they assign to the present holder of the mortgage?

The numerous cases shown are all cases of the action of a Court of Equity to compel the application of the *debtor's property,* in the hands of the surety *still bound,* to the satisfaction of the debt due the creditor. And it is held that a surety shall be compelled to make application of the property held by him *on deposit,* for the payment of the debt of his principal.

Here the possession of the property never was with the mortgagees—*the liens* only was granted to them for a special purpose. The general rights of property, and the possession also, remained with the mortgagor. Here is no application to make a surety *disgorge,* but a claim made by the holder of promissory notes to the benefit of a lien never granted to him—never *operative* for any person's benefit—or if ever operative, extinguished and released as soon as made. There is no *substitution*—there can be none. If any, it is to be *the endorser, without recourse* of the mortgagor, and to hold an EXTINGUISHED SECURITY.

The creditors never held any interest in this mortgage, *independently* of the sureties. Had that suretyship been in existence, and the property of *their* debtor held by the endorser, the creditor might have compelled its application to the debt.

To apply this property to the payment of the money raised upon Preston's sole liability, when it was his act and deed, to apply it only to the indemnification of the mortgagees, if they became his sureties, is to make a new and different contract and engagement for the grantor.

Now it is no answer to say that *sureties* may extinguish mortgages, and then set them up, and have themselves paid out of the property.

If the surety pays the debt he is damnified; the condition of the mortgage is broken; the estate becomes complete in the mortgagee.

If the surety is liable, (where the indemnity, as in this case, is against all loss, damage, or *liability,*) and the debt due, the surety is 19 damnified.

The cases of 17 Johnson, Rep. 384, 2 Johnson Chy. 560, 2 Johnson, 554, 2 Yerger, 346, are all of this class; and the general rule laid down by appellee's counsel, that the mortgage must in every such case remain *unextinguished,* is not infringed.

Now to afford the relief here asked for, is to give the assignee that recourse the assignor never had; is to declare the condition of the deed broken as against *Stewart,* when it never was, and is *not now* broken, as against Hines, Holt and others, the mortgagees.

They, (the mortgagees,) could not at this hour proceed upon it, either *for themselves,* (if they had, after Preston negotiated the notes,) become the holders for value. Nor could they proceed upon it, (not being bound as endorsers,) *for the benefit of the holders* of the notes, whomsoever they are.

Now if they, (the endorsers without recourse,) could not proceed upon this mortgage, how can their assignee?

This is no proper case for subrogation, nor substitution. There is nothing to operate upon. The grantees never did comply with the condition precedent; the estate never vested.

If in face of the endorsement of the notes, it can be considered as having vested, it was afterwards divested; the condition of the mortgage is saved, and the mortgagor is in, of his original estate.

IV. The objection was taken, in the Court below, to the mortgage going in evidence under the petition. The Court will find that this is not the mortgage set up in the petition.

V. Again, the petitioner claims in his petition through *the* assignment on the mortgage of 20th October. *He can only claim through that* assignment.

The objection to that assignment is *patent.* There is an alteration on its face, of no less moment than involving the very right of *action itself.* If the assignment was shown to have been made to the Bank of Columbus, and is now set up as made to Charles Stewart, is it not apparent that the assignment fixed the title in that bank, and how does it come out again? Is it enough for the petitioner to draw black lines across the paper and insert his own name. The Court will see that the objection was made in the Court below, and no evidence *offered* by the petitioner to do away the objection. The Court then must presume it *cannot* be done away, and if unexplained, it would be fatal. Then it is fatal to this case, and the 20 judgment of the Court below must stand.

Carmack, in reply:

It is true that a note endorsed without date is presumed to have been endorsed on the same day, and at the time it was made. This is true in regard to the notes secured by this mortgage. It may not only be presumed, but the mortgage made contemporaneously with the notes, states that the endorsements were on the notes and in blank; the mortgage proves that the endorsements were made, and it also proves that they were afterwards filled up.

When was the endorsement filled up? It is not dated, but the endorsement on the mortgage is dated; it was filled up then on the same day that the mortgage was assigned; the one endorsement was the consideration of the other; the very nature of the transaction shows this.

As a general rule, it is true that the assignee can stand no better situation than the assignor. But, it is true only in this sense; the assignee after the assignment is in the same, and no better situation than the assignor was before; it was never designed to mean that they are both in the same situation at the same time, viz: after the assignment; because if it was true in that sense, the assignor having parted with all his rights by the assignment, the assignee being in the same situation would be without rights also; under this application of the rule there would be no situation to occupy by any body—the rights of both assignor and assignee, would be destroyed by the assignment. We are willing to take the situation of the assignors under our construction of the rule; and indeed we have, by taking the whole risk of the debt and the right of the assignors under the mortgage.

BALTZELL, Justice:

This is an appeal from a judgment of the late Superior Court for the County of Gadsden, rendered on a petition filed by appellant to obtain the foreclosure of a mortgage, under the Statute "to regulate "the foreclosure of mortgages by the Courts of Common Law, and "for other purposes."

The plea filed by defendant is, "that the mortgage was executed and delivered to Edward Carey and others, to indemnify them as endorsers on certain notes therein named; that it was intended by the terms thereof to operate only as a personal covenant of indemnity,

and therefore not subject to the operation of the assignment set forth 21
in the petition, nor does the assignment convey such an interest as would give him the right to foreclose against the respondent."

An examination of the deed will at once show the fallacy of the position that it was given for indemnity merely. It is true the recital of the instrument expresses its "purpose to be the securing Carey and the other endorsers from any damage, loss or liability, in consequence of their endorsements," but the conveyance is made subject to "the conditions and stipulations, that if Preston shall *pay* all and "each of the notes as they become due, and not make default in any "of them, then the above obligation to be void, and the title thereby "conveyed; and it was further expressly stipulated, that if Preston "shall fail in *payment* of said notes and suffer the same to be protes-"ted, or to remain over due *in whosoever hands the same be found*, "then the said Carey and others, on making affidavit of such *non-*"*payment*, and the amount thereof, shall be permitted to foreclose the "mortgage, take out execution and bring to sale the said negroes, or "any portion necessary to the payment of the sum due, notwithstand-"ing said sum may not have been paid or any part thereof, by said "Carey and others."

We are not permitted in the construction of this or any other instrument, to consider one part to the exclusion of another, but must look at the whole to perceive the design of the maker of it. Indemnity was certainly its purpose, but there was an object beyond this, plainly expressed, by which indeed it was to be accomplished, which was to provided for *"payment of the notes,"* and payment *in whoso-"ever hands the same might be found."* It is on *payment alone* of the notes that the "title conveyed and the obligation are to be void," and extraordinary means are provided to coerce *payment* even before the endorsers sustain any damage. Now if indemnity had been the *sole* object, these provisions would have been excluded, and others introduced to the effect that the title and obligation should be void on the endorsers being relieved or released from their responsibility. Such however is not the case.

It is then in the opinion of the Court not a mortgage of indemnity to the endorsers merely, but to secure the payment of the notes in addition. The decision of this point carries with it the other one taken by defendant's counsel dependent upon it, that being for indemnity merely, the mortgage was not assignable. As a general rule the endorsement of the notes secured by a mortgage carries with it the
mortgage; this has not been denied in argument and it has not been 22
deemed necessary to cite authorities in support of it. In the present case there is an endorsement by Carey and others to the plaintiff "without recourse," and we proceed to inquire as to its effect upon the transfer of the mortgage.

"A qualified endorsement in no respect affects the negotiability of "the instrument, but simply qualifies the duties, obligations and res-"ponsibilities of the endorser resutling from the general principles "of law. Thus for example an endorsement of a note to A, without "recourse will not restrain the negotiability of the note, but will sim-"ply exclude any responsibility of the endorser on the non-accep-"tance or non-payment thereof." Story on Prom. notes 160, Section 146.

The form of such an endorsement best expresses its nature and character: "James Atkins sans recourse or James Atkins with in-"tent only to transfer my interest, and not to be subject to any liability "in case of non-acceptance or non-payment." Story on Notes, 149; Chitty on Bills, 250—251.

Whatever interest then would pass by a general or full endorsement, it seems will pass by a qualified endorsement. If right in this respect, the endorsement in this case carried with it the right and interest of the mortgage, as it certainly did the right to the note itself. This however is not so material, as there is a direct assignment and transfer of the mortgage by Carey and others, the grantees, to the plaintiff. It is alleged that this is invalid on account of the erasure of the words Bank of Columbus, and interlineation of the name of plaintiff, but the law is too well settled to admit of controversy on this point: "An interlineation or erasure apparent on the face of "the deed," said Chief Justice Marshal, in the case of Speake and others vs. The United States, does not of itself avoid it. To pro-"duce this effect it must be shown to have been done under circum-"stances that the law does not warrant." 9 Cranch, 28; 3 Condensed rep. 244.

In that case the facts were distinctly put in issue by the plea of *non est factum*, whereas in the case under consideration, there is neither averment nor proof that the alteration was illegally or improperly made.

We might here close our examination of the case, having disposed of the objections raised by defendant in his pleading, and show a clear and sufficient right in the plaintiff to recover. All other defences, according to the rules of pleading, are considered as waived, 23
especially such as are connected with the facts of the case; and the rule in this respect is founded upon principles of justice and propriety. Where a defence is made in appropriate season, the opposing party may prepare to meet it, to explain and remove whatever may be prejudicial to his case. But when made at an unsuitable time, it may surprise, and if received, do injury and injustice.

With these remarks, we proceed to notice objections urged in this Court by defendant's counsel with great zeal, and on which great reliance has been placed, which though not presented by the defence below, it may be more satisfactory to have considered. "That the mortgage was made and delivered upon a state of circumstances which afterwards became changed and altered, and to effect purposes afterwards abandoned, and that in truth the deed was delivered upon conditions not performed. The notes were endorsed by them without recourse, that *endorsement was contemporaneous with* the making of the notes in point of law, and thus evinces an entire change of the original design of the parties. In argument it was said that Carey and others, never were bound, they did not become liable on Preston's account, they never were sureties at all, they never run any risk on his account."

If all this be true, it was certainly most material to Preston's defence: it must have been known to him at the time of filing his plea and his failure to rely upon it, if not entirely at variance with its existence, to say the least, is wholly inexplicable. The position "that Carey and others, were never sureties nor liable on Preston's account, nor run any risk for him," is rather broad, considering the character of the deed and its provisions, declaring expressly that they had endorsed for him, and had become his secureties." The other points are based on the assumption that "the endorsement of Carey and others, was *contemporaneous with the making of the notes in point of law,"* and that Preston derived no benefit or advantage from it.

Such a presumption would be a very forced one, opposed as it is to the recital of the deed, dclaring that they had endorsed in blank, to its objections and purposes—its delivery and possession by plaintiff, and the direct object and end of Preston in making and procuring them all. The notes are payable at either of the Banks in Columbus, and were obviously designed for discount. The fact of the endorsement shows that he could not get money on his own credit or the discount without endorsers may have been against the rules of the Bank; hence he procured them—that he could not get it on endorse- 24
ment alone; hence he gave security on property. Now that Preston, after completing his arrangements and before presenting the notes for discount, should have filled up the endorsement so as to destroy the liability of the endorsers, is wholly incredible; the more so if the effect of the act were to invalidate the mortgage also. He would then, according to the argument of defendant's counsel, have presented his notes for discount with no security. But if the endorsement was of no use to him nor the mortgage either, why not destroy them and substitute his individual note in their place? He certainly could not in honesty and fairness have presented a note secured apparently with endorsement and mortgage, for discount, which he knew at the time to be invalid and worthless. We will not presume a state of facts so injurious to fair dealing and common honesty. On the contrary the fair and rational inference is, that these instruments were made for an object which was attained, and that they were of use to him. The fair presumption is that the notes were discounted whilst the endorsements were in blank, on the faith of them and the mortgage, and that the endorsers either took them up by payment or otherwise, and afterwards transferred them to the present holder, he taking them with the qualified endorsement; or that the endorsers, the notes having been discounted at Bank, bargained for their exoneration from the endorsement by giving an assignment of the mortgage, an arrangement which they had a right to make, and which Preston could not object to, as by it his purpose of saving his endorsers through means of a deed made expressly for that object, was fully attained.

We have seen, however, that the effect of the qualified endorsement was to transfer the right and interest of the mortgage, so that the effect would be the same, whether the endorsement was filled up contemporaneously with the note or afterwards. If the Bank, or party negotiating the notes, dispensed with the endorsement, so far as to take it without recourse, their design must have been to rely on the mortgage; and from the fact that it was not discharged, or in any way cancelled, but placed on the record found in possession of plaintiff, the inference is conclusive that Preston regarded it as valid and a subsisting security. Strong as the above positions are, they are fortified by the fact that credits appear on the note for monies received by plaintiff of defendant, to nearly half his indebtedness.

We fully concur in the position taken by defendant's counsel, that the mortgage created a trust for the payment of the notes, and that

Carey and others might, in a proper case, have been decreed to allow the use of their names, if necessary to a suit, to have the mortgaged property applied to their payment. This was not necessary in this case, as they have assigned their mortgage to plaintiff.

Upon the whole, we are of opinion that the judgment of the Court below was erroneous, and should be reversed. It is therefore considered by the Court, that the judgment of the Superior Court be, and the same is hereby reversed and set aside, with costs. And it is further ordered, that this case be remitted to the Circuit Court for the county of Gadsden, for further proceedings to be had in conformity to this opinion.

Per Curiam. Judgment reversed.

RICHARD WHITAKER, vs. CHARLES MORRISON.

IN an action against the endorser, the true and correct enquiry seems to be whether the holder of the note has made use of due and reasonable diligence to bring home notice of the dishonor of the note to the party whose contingent liability depends upon having such notice. Due diligence on the part of the holder to obtain payment from the maker, being a condition precedent on which the liability of the endorser depends, it is well settled, must be proved, to enable the party to recover.

Proof of demand and notice of dishonor of a bill or note, must not rest on mere inference or light presumption, but must be of a stronger and more affirmative character.

Reasonable notice is a compound of law and facts, and when the facts are clearly ascertained, becomes a question of law and is to be decided by the Court.

The testimony of a notary that it was his invariable habit to give notice, and believes he gave it in this case, but that he had no recollection of the present case except from the papers shown him, and that the answers he gave were not from knowledge or recollection but from his habits of doing business; held to be insufficient evidence of notice to fix liability of endorser.

A payment on a note, or a promise to pay, after full knowledge of the default, precludes the party making the one or the other from insisting on a want of notice; but the promise must be *clear, explicit* and *unconditional*, and the facts of such a nature as clearly to warrant a presumption of a waiver.

A part payment of a note by the endorser, not explained or qualified by any accompanying circumstances, will be held to be sufficient evidence of waiver of notice. But where the payment by the endorser was made with the money of the maker, and by his request, the endorser acts as mere agent of the maker, and the transaction is so qualified and explained as to preclude all idea of an actual or intended waiver on the part of the endorser.

It is a general rule that an endorser once discharged by want of notice, or laches of the holder, is always discharged, and cannot again be rendered liable except by some voluntary act or agreement; if an act, it must be clear and unequivocal and incapable of explanation or qualification; if an agreement, it must be so clear that a new promise is inferred, and the original liabilities by force of this promise incurred anew.

APPEAL from Leon Superior Court.

The facts are fully stated in the opinion of the Court.

J. & L. Branch, for appellant:

1st. That the maker of the note having become endorser subsequent to appellant, *extinguished* the liability of all prior endorsers, and cited:—Bayley on Bills, page 153. Chitty on Bills, pages 248—265. Blake vs. Sewal, 3 Mass. 556. Long vs. Bank of Cynthiana, 1 Litt. 290.

2d. That sufficient notice of non-payment was not given by holder to defendant, to fix his liability as endorser; and that it is incumbent on the holder to prove by distinct, positive and precise evidence, that due notice of non-payment was given to party sued; and that it cannot be left to inference or presumption, and cited:—Lawson vs. Sherwood, 1st Starkie, 314. Hetherington vs. Kemp, 4 Camp. 193. Chitty on Bills, 511—12—646—7. Taylor vs. U. Bank, decided by Court of Appeals of Florida. Flack vs. Green, 3 Gill & Johns. 474. Bank of U. S. vs. Corocoran, 2 Peters, 121.

3. That sufficiency of notice is a question of law, the facts being ascertained. Taylor vs. U. Bank, decided by the Court of Appeals of Florida. Chitty on Bills, 506—642—3. Darbishine vs. Parker, 6 East. R. 3. Hussey vs. Freeman, 10 Mass. R. 84. Bank of Columbia vs. Lawrence, 1 Peters, 578. Bryden vs. Bryden, 11 Johns. R. 187.

4. That the payment by Whitaker as credited *on* the note cannot, under the circumstances, be construed to be a waiver of his right to demand due notice, it having been made with the money, and by the request of the maker, and in effect, only as his agent. And that even had the payment been made by Whitaker with his own money and of his own accord, it does not appear that it was made after a *full*

knowledge of all the circumstances necessary to apprize him of his discharge from responsibility by the laches of the holder, which is necessary to constitute a waiver. And furthermore, that the facts attending the payment, are not sufficiently clear and unequivocal to warrant the presumption of a new undertaking being voluntarily and intentionally made. Chitty on Bills, 540—1. Thornton vs. Wynn, 12 Wheat. 187. Ritcher vs. Selin, 8 Sergt. & Rawle, 425. Tower vs. Durell, 9 Mass. R. 332. Crogher's vs. Wolf, 2 Monroe, 88. Garland vs. Salem Bank, 9 Mass. R. 408. Story on Bills, 362—367. Goodall and others vs. Dolley, 1 T. R. 712.

T. H. Hagner, for appellee, argued:

Objected to entering into the argument of the first error assigned. It had not been taken in the Court below. Undoubtedly if a note after being in circulation, is taken up by the maker, it is extinguished, and if put into circulation again by him, creates no liability against the prior endorsers. But the mere fact of the name of the maker by his agent having been endorsed on this note, and then erased, does not establish the fact of such putting into circulation a second time. It may have been, and doubtless was, endorsed by mistake, and had the plaintiff below been there called upon, it might have been explained.

Upon the ground taken by him that this Court could not inquire into objections not made in the Court below, he cited:—9 Peters, 731. 10 Peters, 208. 3 Howard's Mis. Rep. 105. 1 Mass. 208. Rule XVI Court of Appeals of Florida, adopted by sec. 3d of an act to organize the Supreme Court of the State of Florida.

He argued the 2d error assigned—the question of the sufficiency of notice to charge the endorser, and relied upon the fact of the two payments made by Whitaker, as acts done importing clearly admissions of the right of the holder to restore against him. He cited Rogers vs. Stephens, 2 Durnford & East, 719. Opinion of Ashhurst, Justice, where it was held that the defendant's subsequent acknowledgement, "that the bill must be paid," amounts in law to a promise that it shall be paid, and does away the necessity of considering the question relative to the want of notice.

He insisted that the act of payment was an admission of liability—a declaration that all had been done which need be done, to fix the liability—like any other acknowledgement of an existing fact, precluded the party from denying it. Gibbon vs. Coggon, 2 Campbell, 188. Or if viewed as a waiver of laches, it is an admission that he received no damage from want of notice. Thornton vs. Wynn, 2 Wheaton, 187. Buller's N. P. 276. 6 East. 16. 2 Strange, 1246. 2 Starkie's Evid. 272.

Lord Mansfield in Borradaile vs. Lowe, 4 Taunton, 97, mentions the several cases where defendants have been held liable by their own act, and he distinguishes express from implied promises. He says, "In most of the cases where the defendants have been held liable, they have either made an *express promise* to pay, or a promise when they had a full knowledge at the time that they were discharged, or where there was a real debt binding in conscience due from them." And Story on Bills, p. 363, declares that payment of a part of the money due on the bill, is an express promise. And on p. 365, the author distinguishes the ground of the decision—"the act done must be of a nature clearly importing a like admission of the right" of the holder.

Conscious of the force of this fact of payment, the counsel for appellant sought in the Court below to avoid its effect, by introducing proof that the money paid was paid by Maner, the maker, into his endorsers hands, and by him paid into the Bank. Now, so far from this fact lessening, it actually strengthens the admission which the act of payment clearly imports. There is no proof that Whitaker was Maner's general agent. Maner was largely indebted to the bank. Why then should Maner pay to the endorser on this note the money, except to be applied to its liquidation particularly? And why should Whitaker be interested to apply it there, unless Whitaker was bound? The note had been discounted on Whitaker's responsibility—had been protested for non-payment—and upon no other supposition than that of his being bound, can the payment to him be accounted for. The proof shows that two payments were made at different periods, and each were applied to this note. If the payments were made by Whitaker with Maner's funds as insisted on, then Maner's supplying his accommodation endorser with funds wherewith to discharge the note, proves Maner's knowledge of the existing liability, while Whitake's receipt of funds on two occasions, and applying them to this note, are renewed acknowledgements of the same fact; "admissions that the note had been rgularly presented and protested, and that due notice of dishonor had been given."

In Chitty on Bills, ch. 10, p. 533—538, (8th edit.) this is the light in which such partial payments are viewed, and this "even in cases where the party who paid or promised, afterwards stated that in fact.

29 he had not had due notice," &c.; and he then states the reason of the rule, to which I call the attention of the Court:—"because, (says he,) it is to be inferred that the part payment or promise to pay *would not have been made,* unless *all circumstances had concurred to subject the party to liability,* and induce him to make such payment or promise." And on page 536, he says, "it seems to have been once considered that a misapprehension of the legal liability would prevent a subsequent promise from being obligatory," and that "from subsequent cases it appears such docrine is not law."

The ground contended for here, however, is, that a *failure to prove* notice given, settles the fact of a failure *to give the notice;* and the counsel establishes thereby, as he contends, a *laches;* and that the payment, if made in ignorance of the facts of the discharge does not bind him. But this is not the true position of the matter—the appellant has, by two unequivocal admissions, declared his liability. It is for him to show that he did it in ignorance of the facts. If it be true that whenever the plaintiff fails to prove notice, or relies upon the admission, he must go on and prove that notice was indeed duly given, then the endorser's admission even in writing, is held of no force or effect, and in every case, the very fact which he has admitted is obliged to be proved. The more unqualified the admission, the worse for the holder. He may rely on the party's own act —he is told on the trial, you must prove all the admission contains—in other words, the admission means nothing.

HAWKINS, Justice:

Assumpsit by the appellee, Morrison, as the endorser of the following promissory note, against the appellant, Whitaker, as an endorser thereof:

"No. — TALLAHASSEE, August 18th, 1837.

"Sixty days after date, I promise to pay to the order of Thomas "Brown, at the Central Bank of Florida, Thirty-five hundred Dol- "lars and —— cents, value received.

"WILLIAM MANER,
"$3500 Per L. P. TAYLOR.

(Endorsed,)

"THOMAS BROWN,
"RICHARD WHITAKER,
"WILLIAM MANER, per
"L. P. TAYLOR.

30 "May 10th, 1843—Rec'd from R. Whitaker on acc. $140o 51-
"100 dols. H. L. R. May, 10, 1838. Rec'd on acc. $891 75
"—rec'd 24th March, 1838."

The declaration contains a count on the note, setting out the endorsement from Brown to Whitaker, and from him to the plaintiff, and the usual money counts. It also avers that the note sued upon, was duly presented to Maner, the maker, and payment demanded, which was refused, and that (the appellant) Whitaker, had notice thereof.

The defendant pleaded *non-assumpsit,* issue joined, and a verdict was rendered for the plaintiff.

In support of his action, the plaintiff offered in evidence the original note and protest. John J. Rowles, a witness for plaintiff, testified to the truth of the facts as set forth in the protest, viz:—That he duly presented for payment the note sued upon, at the time it fell due, at the Central Bank, where it was made payable; which was refused. That it was his invariable habit to give notice to endorsers, when a note was protested by him; in case they lived in town to give personal notice, and if in the country, directed to the nearest post office. Believing that notice was given to the endorser, Whitaker, through the post office, directed to Tallahassee, the one at which he received his letters. That it was his habit to make a memorandum on the copy of the protest kept by him, and not on the one now exhibited. That this copy was lost. That he did not remember an instance in the whole course of his life, in which he failed to give notice, on refusal to pay by the maker. That his usual way of doing business, induced him to believe that notice was given defendant, but could recollect no circumstances about this case, and that he did not recollect to have put a notice in the post office for Whitaker, or to have presented the note and demanded payment thereof. That he had no recollection of the matter whatever, except from the papers shown him. That he recollected to have put letters containing notice of notes falling due, or of protest, in the post office for defendant, but had no recollection of this case. That the answers which he had given were not from knowledge and recollection, but from his habit of doing business, and that he had no knowledge as to the post office of defendant, and that he did not then know where he resided.

Henry L. Rutgers, also swore for the plaintiff, proved the credit given upon the note on May 18, 1838, and that he received the money from the defendant, Whitaker. 31

On the part of the defendant, Leslie A. Thompson was called, who testified that he was cashier of the Central Bank at the time of the transfer to the Union Bank. That in 1837, William Maner, the maker of the note, was indebted to the Central Bank in a large sum of money, and that it had received from Maner, heavy collateral security which was good. The defendant also instructed William Maner, the maker of the note, who testified, that the money credited upon the note, as received from Whitaker, was his. That he furnished Whitaker with the same, with the request that he would pay it to the Union Bank, (at that time) the holder of the note.

The defendant at the trial prayed the Court to instruct the Jury, that the plaintiff was not entitled to recover against the defendant, because sufficient legal notice of the non-payment had not been given defendant, nor due diligence used to fix the endorser. This instruction the Court refused to give, and instructed the jury, that due and legal notice of non-payment of the note sued on, was sufficient to establish the liability of the defendant as endorser.

The defendant excepted, and the verdict and judgment being against him, he appealed to his Court.

It is contended for by the appellant:

That upon the record, the plaintiff in the Court below was not entitled to recover against the defendant.

2d. That the liability of appellant as endorser on the note sued on, was *extinguished* by the maker becoming an endorser thereon, subsequent to the endorsement of defendant, and that no recovery could be had against him on his said endorsement.

3d. That sufficient notice of the non-payment of the note, at its maturity, was not given by the holder thereof to defendant, to fix his liability as endorser.

4th. That upon the evidence, the Court should have instructed the jury, that plaintiff was not entitled to recover.

On the part of the appellee, it is contended.

That the evidence of notice to the defendant in the Court below, was sufficient, and that due diligence had been used, and that even if not sufficient, the payment by Whitaker to the Bank, the holder previous to the appellee, was an admission of notice, and *waiver* of his rights as endorser as to the requirement of notice of the demand upon the maker, and his refusal to pay, and as such, sustained the 32 averment of notice as set forth in the declaration.

It is also contended for the appellee, that inasmuch as the second point, viz:—the re-endorsement to the defendant, was not taken in the Court below, and does not come up to this Court in the bill of Exceptions, it is not the province of this Court to notice it, and adjudicate thereupon, and in support of this, cites 16 Peters' U. S. R. 618.

The Court will, in their decision, only notice those points which appear directly decisive of the case.

The first question is: Whether Whitaker, the appellant, has received due and proper notice of the dishonor of the note sued upon? And,

Secondly: If such notice was not given, whether there has been any act on the part of Whitaker, amounting to a waiver of proof of demand and notice.

The true and correct inquiry, in all cases of this nature, seems to be, whether the holder of the note has made use of due and reasonable diligence to bring home notice of the dishonor of the note, to the party whose contingent liability depends upon his having such notice. Due diligence on the part of the holder to obtain payment from the maker being a condition precedent, on which the liability of the endorser depends, it is well settled must be proved, to enable the party to recover. The attention of the Court has been called by the counsel for the appellant to Chitty on Bills, page 646, (9 Am. ed.) where it is laid down, in speaking of the *requisite proof* of the fact of notice to the endorser, that the notice must be "proved precisely, and not left to *inference,* at what time and in what manner, the letter (containing notice) was sent.

The law in relation to this matter seems clearly laid down. In an action by the endorsee against the endorser of a bill of Exchange, a witness testified, that either two or three days after the dishonor of the bill, notice was given by letter to defendant. Notice in two days being sufficient and in time, but notice on the third too late. Lord Ellenborough said: "The witness say, two or three days, but "the third day would be too late. It lies upon you to show that notice was given in due time, and I cannot go upon *probable evidence,* "without positive proof of the fact." Byles on Bills, 163, citing Lawson and another, assignee of Shifner vs. Sherwood, 1 Starkie R. 314.

33 In Hetherington vs. Kemp, 4 Campbell's nisi prius cases, 192, the only question was, whether the defendant had received due notice of the dishonor of a bill of exchange. Lord Ellenborough lays it down in this case, that even general evidence of a *course of business*, is not sufficient to carry with it proof of the dishonor of a bill: The facts were proved, that the plaintiff, after the bill was due, wrote a letter containing a statement of its dishonor to the defendant; that this letter was put on a table, where according to the *usage* of his counting house, letters for the post were always deposited, and that a porter carried them from hence to the post office. But the porter was not called, and there was no evidence as to what become of the letter after it was placed upon the table.

In Flack vs. Green, 3 Gill & Johnson, page 475, it was proposed to give in evidence, and prove as to the giving of notice, "that it was "the invariable and uniform practice of the endorsers house and "counting room to which the notices had been directed, to forward "such notices immediately upon their receipt, and the witnesses "who were employed in such counting room, had no doubt, and "believed from the *course of their business*, that they had forwarded "one of the notices to the other endorser." This being the only evidence adduced as to the notice of dishonor, it was ruled out in the Court below, as being *incompetent* and *inadmissable*, and the opinion of the Court below was sustained by the Court of Appeals of the State of Maryland.

From these and the general current of authorities, there seems no doubt, that proof of demand, and notice of dishonor of a bill or note, must not rest on mere inference or light presumption, but must be of a stronger and more affirmative character.

Reasonable notice is a compound of law and fact; but when the facts are clearly ascertained, becomes a question of law, and is to be decided by the Court. 3 Wendell, 75. 2 Peter's U. S. R. 100. The facts in this case are of a nature as to render them a question of law. The inquiry now arises, was the proof of notice in the Court below, of a character to bring it within the purview and spirit of the rules of evidence as laid down, as to the requisite notice to be given in cases of dishonor of a bill or note? Rowles, the sole witness as to the notice, testifies that it was his invariable habit to give notice, and *believes* that he gave it in this case—that he could recollect no circumstance as to the present instance—and had no recollection except from the papers shown him—and winds up his testimony by
34 saying, that the answers he gave were not from knowledge or recollection, but from his habits of doing business.

His evidence is based on *belief*, without knowledge or recollection, and that belief arising too from the simple incident, *his habit of doing business;* and indeed by a close inspection, it seems but little more than vague conjecture, or at most, slight presumption.

The law requires something of a more *explicit* and *definite* character, and we are clearly of opinion that the Court below erred in not giving the instruction as prayed for by the defendant's counsel, as to the insufficiency of the testimony in relation to the notice.

The next question remaining for the consideration of the Court is: Whether as contended for by appellee, there has been a *waiver* of want of notice, or laches of the holder of the note, by appellant —that payment by Whitaker was a direct admission of notice.

To support the affirmative of this proposition, the appellee relies on the evidence of Rutgers, while the appellant assumes the negative, and endeavors to rebut the evidence of Rutgers by that of Maner.

There can be no doubt, that payment on a note or a promise to pay, after full knowledge of the default, precludes a party making one or the other, from insisting on a want of notice; but the promise must be *clear, explicit* and *unconditional*, and the facts of such a nature as to *clearly warrant* the presumption of a waiver; and in 2 Starkie on evidence 272, it is said that part payment amounts to the strongest of all evidence as to waiver, affording presumptive proof, that all things have been *rite acta*, Vaughn, vs. Fuller, 2 Strange, 1246; Buller N. P. 276; 5 Burr, 26, 70. Thornton, vs. Wynn, 12 Wheat. 183; 16 John, R. 152; 1 Martin and Yerger, 74. Judge Story on speaking of the doctrine of waiver says: "If he makes such a waiver in "ignorance of facts he will not be bound thereby—but if with full "knowledge, he will. Indeed, a promise by the party entitled to no- "tice, to pay the bill, is deemed a full and complete waiver of the "want of notice, and payment of part of the money due on the Bill "will have the same effect. But then in all cases of this sort, the "promise must be *unequivocal*, and *amount to an admission of the "right of the holder;* or the act done must be *of a nature clearly im- "porting a like admission of his right*. If it be *defective in either "respect*, or if it be a conditional offer of payment, then and in such "case, the holder has no right to insist upon it as a waiver." Story on Bills, page 363, 4, 5 and 6; Cayuga Bank, vs. Dill, 5 Hill, 103.

The part payment of a note not *explained* or *qualified* by any accompanying circumstances, will be held to be sufficient evidence of 35
waiver of notice; 450 Story on promissary Notes; and on page 454 of the same work, he lays it down among the cases which will not constitute sufficient excuse for the want of due notice of the dishonor of a note, where the maker in contemplation of his inability to pay the whole at maturity, has lodged money with the Indorser for part payment thereof, when due.

The evidence of Rutgers, certainly makes out a *prima facia* case of payment, with its legal consequences, on the note by Whitaker, and but, that it is rebutted by the direct and positive evidence of Maner, would entitled the appellee to all the benefits arising from a waiver on the part of Whitaker, were it shown likewise that the payment was not made under a mistake or ignorance of facts. But Maner's testimony is clear and direct; he says that the money was *his, not* Whitaker's, and paid in accordance with his request; and we think, that this evidence, using the words of Judge Story, so "qualifies and explains" the transaction, as to preclude all idea of an actual or intended waiver on the part of Whitaker.

There was no evidence showing that a promise of payment on the part of Whitaker, and the bare fact of his *delivering* the money is not enough—as to this, Whitaker seems to have acted as the *mere agent* of Maner, and it would be at variance with all ideas of justice, explained as the occurrence is, that Whitaker, acting in the capacity of an agent simply, should be rendered subject to legal liabilities, by the virtual act of his principal.

Liabilities for the acts of others may be created either by a direct authority given for their performance, or it may flow from the adoption, or in some instances from acquiescence in those acts. But presumptions can only stand when they are compatable with the conduct of those to whom it may be sought to apply them; and still more must give place, when in conflict with clear, distinct and convincing proof; 16 Peter's U. S. R. 331.

Could Whitaker, by any possibility, recover the money endorsed upon the note in an action, for so much money paid for the use of Maner? It is true the payment enured to the benefit of Whitaker, in lessening his liability *protanto* upon the note; but a payment by any body else would have the same effect, and we cannot think, that there existed that privity between Maner and Whitaker, as to have produced that identity, contended for by the appellee. The evidence of Rutgers does not extend beyond the receiving of the money from

Whitaker, and his indorsing it by way of credit upon the note; but 36
there is no evidence to shew that Whitaker intended, wished, or directed, that the delivery of the money should be considered as a payment specifically made by him, thereby rendering himself liable to the legal consequences arising from the act.

But the presumptions which might otherwise arise in this case from the face of the paper sued upon, must give way to facts clearly and unequivocally stated in the evidence of Maner; and this Court cannot permit the inferences arising from the act of a party opposed in interest, however innocently done, to weigh against positive and direct proof.

It is a general rule, that an endorser once discharged by want of notice or laches of the holder, is always discharged, and he cannot again be rendered liable, except by some voluntary act or agreement. If an act, it must be clear and unequivocal, and incapable of explanation or qualification; if an agreement, it must be so clear, that a new promise is inferred, and the original liabilities by force of this promise incurred anew.

In this case at least, the waiver should have been established, in clear evidence, and not upon suppositions arising from the act of third persons, or the peculiar and adventitious situation of parties.

With these views, the Court is of opinion, that the Court below erred in not giving the direction to the jury as prayed for, in relation to due diligence and requisite notice on the part of the plaintiff Morrison; and that the facts, as before us, do not constitute a waiver, on the part of Whitaker, of such diligence and notice, or an admission of notice by Whitaker.

It is therefore Ordered, that the judgment in the Court below be reversed, and that *a venire de novo* be awarded.

Per curiam. Judgment reversed, and *venire de novo*.

37 FREDERICK R. COTTEN, *vs.* ROBERT W. WILLIAMS, Trustee, &c

WHERE a plea alleged, that long after the signing, sealing and delivery of the bond, as a joint and several obligation, and after it had been endorsed and assigned, and also, after the death of one of the obligees, the said bond was altered and changed materially, by the assignee thereof procuring the name of N. T. to be added thereto as one of the obligors; and also, that about one year after the procuring of the name of N. T. to be added, the said bond was again altered and changed materially, by the assignee thereof procuring the name of defendant to be added thereto, as one of the obligors, but did not allege that the alterations were made without the knowledge license or consent of defendant; held that a demurrer was well taken and that the plea was defective.

It by no means follows, because the allegation, that the alteration was made without the knowledge, license or consent of defendant, is of a negative character, that it is not essential the validity of the plea; or that the defendant, had he have made the allegation, would have been required to prove it, there being many negative allegations which must be made in the pleading, but which the party pleading them, is not by law required to prove.

A plea alleging merely that seals were affixed to a bond without the consent of defendant, without also alleging that it was done with the knowledge, or by the authority or direction of the plaintiff, is not sufficient.

A plea, having on its face two intendments, ought to be construed most strongly against the party who pleads it.

If several persons sign an instrument concluding with "witness our hands and seals," some putting seals opposite their names, and others not, such as did not affix seals, will be presumed to have adopted the seals already there.

If the name of an obligor be added to a bond after it has been executed and delivered, whatever effect it may have on the rights of parties who signed it before him, the person who thus signed cannot avail himself of it to defeat his own deed—such an instrument is good as to him.

The 34th section of the "act regulating judicial proceedings," does not place the several classes of instruments therein mentioned upon a footing, in all respects, with commercial paper, yet the effect of it is to make them negotiable by assignment or endorsement.

It is not necessary that the assignment of a bond, or writing obligatory, should be under seal.

APPEAL from Leon Superior Court, transferred from the late Court of Appeals. The facts and pleadings are fully set forth in the opinion of the Court.

J. & L. Branch, for the Appellant.

1st. There being neither a scrawl nor a seal to Cotten's name, it was not his bond.

38 2nd. Cotten having signed the instrument after its negotiation, and after the death of one of the obligees (Nuttall,) his contract must have been either with the original obligees, Nuttall, Braden and Craig, or with the present holder. If with the former, the instrument was void as to him *ab initio* by the law of nature, as well as the law of the land, because one of the obligees was dead, and there could be no delivery to him. If his contract was with the present holder, then the proof not only does not support the declaration, but is utterly irreconciliable with its allegations, because he is declared against as having executed the instrument "jointly and severally," with others, and "delivered it to Nuttall, Braden and Craig, who then and there endorsed and delivered it to" the present holder.

3rd. The addition of the name of an obligor, not originally such, without the consent of all the parties, is such a material alteration as vitiates the bond, and it rests on the person claiming under it to show that the alteration was made with the consent of the parties Bayley on Bills, 44, 45, 92. Chitty on Bills, 211. O'Neal vs. Long, 4 Cranch, 60. Speake et al vs. United States, 9 Cranch, 28. Selwyn, N. P., 547, 549. Shep. Touchstone, 69.

By a statute of this State, Duval's Comp., 103, co-sureties can recover *pro rata* contribution of each other by action at law; suppose A executes a bond for 1,000, with B and C as sureties. If B is compelled to pay the whole, he can recover back $500 from C. But foreseeing that, B, will be compelled to pay it, C, by collusion with the holder, procures the names of two insolvent persons to be added to the instrument; B, then can recover only one fourth of the debt, or $250 from C. Would it not be equivalent to permitting a party to an instrument to increase or diminish the amount of it at his pleasure?

4th. If the above position is correct, it follows that the bond was rendered utterly void, as to all prior obligors, by the addition of Thompson's name, long before Cotten became a party to it; whatever obligation Cotten's signing it subsequently, imposed on him, it certainly could not revive it as to them. Then how can he be recovered against as a joint and several maker with them?

5th. The case is not at all changed by the fact that the special pleas were defective, (if they were so). It was not necessary to plead specially. All the facts of the case on which appellant relied, could be proved under *non est factum;* Selywn, N. P., 569, *et passim.*

The case was tried on that plea; appellant offered to prove that the addition of Thompson's name was made; that it had been made 39 *without the knowledge or consent of the obligors;* that the bond had been transferred by Nuttall's endorsement two years after Nuttall's death, and that Cotten had signed it after it had been so transferred, and the whole evidence was rejected by the Court as immaterial.

6th. The Court erred in rejecting the testimony of Rutgers, because, even if the facts proposed to be proved by him, did not constitute a legal defense to the action, they were relevant to the issues, and ought to have gone to the Jury, along with proper instructions as to their effects.

7th. It will require three legal anomalies to support the judgment rendered in this case. 1. A dead man must be made to enter into a contract. 2. A dead man must be made to indorse an instrument with his own hand. 3. A living and a dead man must be made to endorse and deliver over a bond, long before the bond itself is executed or delivered to them.

Long & Walker, for Appellee.

T. H. Hagner, for Appellee, in reply to the point *first* made, viz:—That there being no scrawl or seal to Cotten's signature, he was not bound—said:

That the adoption of a seal already made, is as good as making a new seal for himself. That a recognition of the impression already made is sufficient—and he cited: Hurlestone on Bonds, p. 7. 3 Scammon's Rep. 41—and again 51. And one seal is enough for several parties. 1 Espinassi Rep. 97.

Upon the second point, that the contract of Cotten was made after Nuttall's death, and so was made with a dead man, he argued:—That Cotten adopted the contract as made. He became surety to the holder of the obligation. That obligation had been made during Nuttall's life-time; had been endorsed by him, and was then held by a third party; payable as a bond or note to bearer. Cotten's signing and sealing it, made him surety for the performance of the obligation of the former obligors, that they would pay to the order of Nuttall, Braden & Craig, which order he, Cotten, knew had already been made thereon, for it was held by a third party. The legal effect of his act was, to oblige himself to pay the money to whomsoever should become the holder of that obligation. He referred to the case of *deeds,* and to the doctrine of *relation.* That deeds may have *double delivery*—and such shall take effect, and have relation to *first delivery,* or not, as circumstances may require—"*ut res valeat*"—for if 40 relation may hurt, and for some cause make void the deed, then it shall not relate. Shepard's Touchstone, 72. Butler & Baker's case, 3 Reports, 25. Jennings vs. Bragg, Croke Eliz. 446—7. That where an obligation is made by two, and the one seals at one time, and the other at another time, yet it is one entire deed, and shall relate to the time of the first delivery, and the party shall declare accordingly. And he cited: Colling's vs. Harding, Croke Eliz. 622. Lord Coke declares that the relations depends on the nature of the transaction, and the presumable intention of the parties "*Semper ita fiat relatio, ut valeat dispositio.*"

Upon third point: That the adding new names is a material alteration—he admitted it was a material alteration to vitiate the bond as to parties not consenting—but contended that there was no alteration here—but the making an obligation by another party. So every new name added by endorsement to a note or bill of exchange creates a new obligation. That the case cited from Bayley on Bills, and Chitty on Bills, were of alterations made within the province of the revenue laws—to defraud the exchequer—to make a new contract out of an old one without paying stamp duties, and void because of that fraud. Yet admitting, for the sake of the argument, that this is an alteration which the defendant could set up, yet the demurrer must be held good, because there is no averment that the alteration was made *without the knowledge of defendant.* A reference to the citations made by appellant's counsel proves this. In 4 Cranch, 60—an alteration made without the knowledge of a party, declared to make the contract void as to that party. 9 Cranch, 28—the erasure of one name and substitution of another, "*without the knowledge* of the party sought to be held bound." Selwyn's N. P. p. 547, (258,) bill of exchange altered without the knowledge or privity of the defendant—citing 4 Term Rep. 320; and Grose, J. cited Pigot's case, 11 Rep. 27.

It is alleged that there could be no endorsement to the plaintiff, to sustain the allegation in the declaration—because there could be no delivery to the obligee—Nuttall being dead. The case of Adams vs. Jones, 12 Adolphus & Ellis, shows that a blank endorsement, with a delivery of the obligation to any party as such endorsee, would be a sufficient delivery to any subsequent holder. It becomes as a note payable to bearer.

On the whole case, he contended that there was nothing antago-

41 nist to sound principles of law in the judgment below. To have decided otherwise would have been to allow the obligor to defeat at will, by mere parol, his own solemn deed. He thought there was nothing strange or inconsistent in a man's adopting an obligation already made by others; and his signing and sealing the obligation, placed him just where he would have been, had he signed and sealed it at its date. That date he cannot controvert.

He instanced the case of a deed, signed, sealed and delivered. Suppose that, subsequently, and after the assignment of that deed, another party, who claimed an interest in the land, should also sign and seal the same deed, then in possession of the assignee, would it not be a valid conveyance? Would it not be an acknowledgment and adoption of every antecedent act? Could the party be allowed to invalidate it by parol proof of what was contradicted by his seal, *without* averment of fraud, or deception, or failure of consideration?

J. & L. Branch, in reply:

It is admitted that any number of persons may adopt a single scrawl or seal, but there must be something in the relative positions of the names, or some other circumstance, from which such an intention may be inferred.

It may be true, that Cotten made himself liable to the holder for the payment of the debt; it is not necessary for us to deny that in this case. But if so, it was a new and substantive contract between him and the holder, and should have been sued on as such. He never made such a contract as that described in the declaration. Who ever heard of a bond or note being endorsed specially or in blank, and passing about from hand to hand, payable to bearer, before the note or bond itself was executed?

How can the doctrine of *relation* and *double delivery* be made applicable? The doctrine of *relation* only applies when there has been a *double delivery*. But the whole difficulty in this case arises from the fact, that there has not been a *single*, must less a *double*, delivery to Nuttall, Braden & Craig, by Cotten. If a party execute and deliver a deed, and at the time some disability exists, as that the grantor is a *minor, femme covert. &c.*, and afterwards the disability ceases, as that the grantor has attained his majority, and the grantor makes a new delivery, then the second delivery relates back to the first. These are precisely the cases cited for the appellee.

42 We admit, and all the authorities we have cited prove, that if it was part of the original contract that a new obligor should be added, it may be done without injuring the deed. We do not understand the case from Croke Eliz. to prove anything more.

If it is admitted that the addition of the name of an obligor vitiates the instrument as to all prior signers not consenting to it, the Court clearly erred, in rejecting testimony going to prove that Thompson's name had been added, without the consent of the prior obligors. If the addition of Thompson's name invalidated the instruments as to the prior signers, it had ceased to be their bond before Cotten signed it. When he did sign it, whatever obligation it imposed on him, it certainly could not revive it as to others and his contract could not therefore, be jointly and severally with them, having ceased before that time to be their bond.

If we have failed to prove that the instrument sued on, is of no validity as to Cotten, it is sufficient for our purpose, if it has been shown that he is not bound, jointly and severally, with Taylor and others—that he did not execute and deliver his bond to Nuttall, Braden and Craig—and that Nuttall, Braden and Craig, did not assign *his* bond to the appellee. He insists that he made no such contract as that declared on; and it is not sufficient for the appellee to show that he made some other contract as onerous to himself, and as beneficial to the appellee.

DOUGLAS, Chief Justice:

This is an action of debt, instituted by Robt. W. Williams, Trustee, &c., against Frederick R. Cotten, in the Superior Court of the Middle District of Florida, for Leon County, upon a written instrument, a copy of which is contained in the bill of exceptions, that makes a part of the record in this cause.

The declaration contains two counts—the first upon said written instrument, and the second upon an account stated.

The pleas are—*First*: Non est factum—(not sworn to.) *Second*: A special plea, alleging: "That long after the said writing obligatory had been signed, sealed and delivered, by John S. Taylor, John Taylor, and Henry B. Bradford, to Wm. B. Nuttall, Hector W. Braden and Wm. P. Craig, as their joint and several deed, and long after it had been endorsed and assigned by the said Braden, Nuttall and Craig, to the Union Bank of Florida, and long after the death of Wm. B. Nuttall, one of the obligees, the said Union Bank procured him, the said defendant, to sign and *seal* the same, as one of the joint and several obligors or makers thereof; whereby it is not, and never 43 was of any force or effect whatever, as the joint and several bond of this defendant"—concluding with a verification. *Third:* Another special plea setting forth that long after the making, sealing and delivery of the said writing obligatory, by John S. Taylor, John Taylor and Henry B. Bradford, to said Wm. B. Nuttall, Hector W. Braden and Wm. P. Craig, as their joint and several obligation, and after the assignment and endorsement thereof by said Nuttall, Braden and Craig; to wit: about five years—and long after the death of Wm. B. Nuttall, one of the obligees, to wit: about four years—the said writing obligatory was altered and changed materially, by the said Union Bank, the endorsee thereof, procuring the name of one Noah Thompson to be added thereto, as a joint and several maker thereof and also that afterwards, that is to say, after the procuring the name of the said Noah Thompson to be added thereto as aforesaid—to wit: one year—the said Union Bank again altered and changed materially the said writing obligatory, by procuring the name of this deefndant to be added thereto, as a joint and several maker and obligor; whereby, and by means whereof, the said writing obligatory has become, and was rendered void"—concluding as before. *Fourth*: Nil Debit.

To the second and third pleas, the plaintiff demurred specially. To the *second*: "Because the same is inconsistent, insensible, irregular, and defective, and is equivalent to the general issue." To the *Third*: Because the same is defective in this—that it avers the said bond sued on, was altered and materially changed, without stating that the same was done without the consent of the defendant; and because the same is inconsistent, argumentative, irregular and defective. To this demurrer there was a joinder; and after argument had thereon, the demurrer was sustained in the Court below. The case was submitted to a jury, upon the issues made upon the other two pleas; who returned a verdict for the plaintiff, viz: "That the defendant owed the debt in the declaration mentioned—three thousand two hundred and six dollars and twenty-five cents, and nine hundred and forty-eight dollars and sixty-one cents damages; making together the sum of four thousand one hundred and fifty-four dollars and eighty cents, (besides his costs)—and for this sum judgment was entered. On the trial of this cause in the Court below, the defendant tendered his bill of exceptions, which was signed, sealed, and ordered to be made a part of the record, in the words following:—

"Robert W. Williams, Trustee, vs. Frederick R. Cotten." "In 44 Leon Superior Court, December Term, 1844. Bill of Exceptions."

Be it remembered, that on the trial of this cause, the plaintiff proved the signatures of John S. Taylor, John Taylor, Henry B. Bradford, Noah Thompson, and Frederick R. Cotten, (the defendant,) to the bond; and the hand writing of Hector W. Braden, William B. Nuttall, and William P. Craig, to the endorsement on the bond, and offered the said bond in evidence.

3206 25-100. On or before the first day of January, one thousand eight hundred and forty-two, we and each of us promise and oblige ourselves, our heirs, executors, and administrators, to pay to William B. Nuttall, Hector W. Braden and William P. Craig, or their order, the just and full sum of three thousand two hundred and six dollars and twenty-five cents, lawful money of the United States with interest thereon, at the rate of ten per cent per annum from the time the same shall become due until paid, for value received.—Witness our hands and seals, Tallahassee, the first day of January, one thousand eight hundred and thirty-four.

JOHN S. TAYLOR, [SEAL]
JOHN TAYLOR, [SEAL]
H. B. BRADFORD, [SEAL]
NOAH THOMPSON,
F. R. COTTEN.

Endorsed:

WM. B. NUTTALL.
H. W. BRADEN.
WM. P. CRAIG.

Defendant objected to the said bond being read in evidence to the jury: Because there was no seal or scrawl to the name of Henry B. Bradford, Noah Thompson and Frederick R. Cotten, to the bond: and the writing was therefore variant from the instrument declared on, not being the bond or writing obligatory of said persons, or of said Cotten, as declared on.

The Court overruled the objection, and admitted the said instrument in evidence, to which said defendant excepted; and this bill is signed, sealed, and ordered to be filed, and made a part of the record.

Here the plaintiff rested his case.

Defendant had offered to prove by Henry L. Rutgers, that he was an officer of the Union Bank of Florida, in the months of January and February, 1838, when the bond in suit was negotiated to and

delivered to the Union Bank, by Braden and Craig, with the endorsements of themselves and Nuttall; that the bond was subsequently passed by the bank to plaintiff; that while the Bank had and owned the same, the names of Noah Thompson and Frederick R. Cotten were added thereto; witness does not know of any consent on the part of John S. Taylor, John Taylor and Henry B. Bradford, or either of them, to the addition of the names of Noah Thompson and Frederick Cotten, to the said bond, or of any knowledge on their part thereof; nor does he know of any objection being made by the said John S. Taylor, John Taylor and Henry B. Bradford. Witness thinks Col. Wm. B. Nuttall died in the spring of 1835. James D. Westcott was then called by defendant to prove that Col. Wm. B. Nuttall died on 26th April, 1836; which being overruled was excepted to. This was all the evidence in the case, and to the admission of which plaintiff objected; and the objection being sustained, defendant excepted thereto.

Defendant's counsel thereupon requested the Court to instruct the jury:

1st. That unless the jury are satisfied, from the evidence, that the addition of the names of Cotten and Thompson to the bond, was by the consent of John S. Taylor, John Taylor, and Henry Bradford, it vitiates the bond, and plaintiff cannot recover thereon in this action.

2d. That unless the jury are satisfied, from the evidence, that such addition was by consent of John S. Taylor, John Taylor and Henry B. Bradford, the plaintiff cannot recover in this case, as the proof is variant from the declaration.

3d. That if the jury shall believe that, Wm. B. Nuttall died in the spring of the year 1836, and that the defendant signed said bond after his death, the said bond is void as to this defendant, and plaintiff cannot recover in this action.

4th. That defendant and Noah Thompson, having signed the bond after the death of Wm. B. Nuttall, there could be no delivery of the bond to him, and consequently the proof is variant from the declaration, and plaintiff cannot recover in this action.

5th. That if the jury shall be satisfied that the name of the defendant was added to the bond after it had been assigned to the Union Bank, that then the plaintiff cannot recover in this action.

6th. That unless the jury shall be satisfied that the name of Thompson was added to the bond by the consent of John S. Taylor, John Taylor and Henry B. Bradford, the bond was vitiated, and rendered void thereby, and the addition of the name of Cotten afterwards would not validate the same.

7th. That there being no seals or scrawls to the names of Henry B. Bradford, Noah Thompson and defendant, the proof is variant from the declaration, and plaintiff cannot recover in this suit by reason thereof.

8th. That upon the whole evidence the jury should find for the defendant.

The Court refused said instructions, and charged the jury, that upon the evidence, they should find for the plaintiff. To which decision and opinion of the Court, refusing, and giving said instructions, and in refusing to admit said testimony, deponent excepted; and this bill of exceptions is accordingly signed, sealed, and made a part of the case.

(Signed) SAML. JAS. DOUGLAS, (SEAL.)

Dec. 17th, 1844.

Whereupon the defendant prayed an appeal to the Court of Appeals of the territory of Florida which was granted. The cause was carried up to that Court, and was transferred therefrom into this Court, pursuant to the provisions contained in the last clause of the 17th article, (Schedule and Ordinance,) of the Constitution of the State, which is as follows: "And *all* actions at law, of suits in Chancery, or any proceedings pending, or which may be pending in any Court of the Territory of Florida, may be commenced in, or *transferred*, to such Court of the State as may have jurisdiction of the subject matter thereof." And also in pursuance of the provisions of the 14th section of the act of the General Assembly of this State, of July 25th, 1845, entitled, An act to organize the State of Florida, which was passed to carry into effect the above mentioned constitutional provision, so far as regarded cases pending in said Court of Appeals, and is in the following words, viz: "That all cases now pending in said Court of Appeals *shall* be transferred to said Supreme Court, and tried and decided therein and thereby, except cases cognizable by the Federal Court, which may be organized in this State, which *shall* be transferred to such Court." And all writs of error or appeals from Judgments, decrees or decisions heretofore given, or rendered by any of the Superior Courts of the Territory, *shall* be returned to said Supreme Court, and tried, and decided therein, and thereby."

On the first day of the present term of this Court a motion was

made by the plaintiff's counsel, to dismiss this cause, upon the following grounds, to wit:

First: Because it has no rightful place in this Court; and this Court has no jurisdiction of the same, no appeal or writ of error having been sued out, or taken to this Court; and this Court has no appellate jurisdiction in this cause.

Second: Because the judgment of Leon Superior Court is final, until reversed by the proper appellate tribunal, constituted by the acts of Congress of the United States.

Third: Because this Court has appellate jurisdiction only over those Inferior Courts, which the Constitution of the State of Florida hath established, and which compose with this Court, the judiciary powers of the State."

This motion, after a full discussion, at the bar, of the questions involved in it, was overruled; and it was intimated that, when the opinion of the court should be pronounced upon the merits of the case, the reasons for the decision upon the motion would be stated. But since that time, Judge BALTZELL has delivered the opinion of the Court, upon a similar motion, upon the same grounds, in the case of Charles D. Stewart, vs. Thomas Preston, junior, and it has consequently became unnecessary to do more now than to refer to that opinion, in which all the members of the Court concurred.

We proceed, therefore, to consider the errors assigned, which are as follows, to wit:

First: That the Court sustained the demurrer to the two special pleas, and the plea of Nil Debit, improperly.

Second: The Court erred in permitting the instrument in writing, offered by the plaintiff, to be read in evidence.

Third: The Court erred in rejecting the evidence of Henry L. Rutgers, as set forth in the bill of exceptions.

Fourth: The Court erred in refusing to give the instructions prayed for by the defendants, as set forth in the bill of exceptions.

Fifth: The Court erred in instructing the jury that, on the evidence, they must find for the plaintiff.

The first error assigned, involves the validity of the two special pleas. In one of these pleas, the appellant alleged that the bond was altered by the addition of his own name; and the other, that it was altered by the addition of the name of Noah Thompson, and also of his own; but he does not allege in either of them, that the alteration complained of, was made *without his knowledge*, license or *consent*. He was the *last* signer of the bond, and so far as the addition of his name produced any alteration therein, it could not, in the nature of things, having been done *without* his license and consent, unless his signature thereto was obtained by surprise, fraud or duress, neither of which is alleged or pretended. But it is insisted by the counsel for the appellant, that he was not bound to make this allegation in his plea, because it being a negative one, he could not, (if alleged,) be required to prove it; and that he was only required to allege, what it would have been incumbent upon him, (if alleged,) to prove.

But it by no means follows, that because this allegation was of a negative character, it was not essential to the validity of his pleas or that if he had made the allegation, he would have been required to prove it. There are many negative allegations which must be alleged in pleading, which the party pleading them, is not by law required to prove. There is no difference, as to the rules of evidence, between criminal and civil cases; what may be received in one, may be received in the other; and what is rejected in the one, ought to be rejected in the other. 2 Russell on Crimes, 588. The King vs. Watson, by Abbott Justice. 2 Starkie's Reports, 155. And yet, in the case of The King vs. Hanson, where there had been a conviction for selling ale, without an excise license, the information *negatived the* defendants having a license; but there was *no evidence* to support this averment; the only evidence to support the conviction being, that the defendant had, in fact, sold ale. The question was, whether the informer was bound to give evidence to negative the existence of a license. In support of the conviction, it was contended that such evidence was unnecessary, and that it lay upon the defendant to prove that he had a license; for it is a rule, both of the *civil* and common law, that a man is not bound to prove a negative allegation; and the case of the King vs. Turner, was cited, as an express authority upon the point. Abbott, Chief Justice, said: I am of opinion that the conviction is *right*. It is a general rule that the proof of the affirmative lies upon the party who is to sustain it. In the case of the King vs. Turner, *all* the learned Judges concurred in that principle. 2 Russell on Crimes, 693. 1 Hawkin's Pl. of the Crown, chap. 19, section 17. The United States vs. Hayward, 2 Gallison's Reports, 499. Upon the same principle, a very late case, the Apothecary's Company vs. Bently, was decided: "That was an action for a penalty on the Statute of

49 55th George the Third, section 194, for practicing as an Apothecary, without having obtained the certificate required by that act. All the counts in the declaration contained the allegation, that the defendant did act and practice as an Apothecary, &c., *without having obtained such certificate, as by the said act is directed.* No evidence was offered by the plaintiffs to show that the defendant had *not* obtained the certificate. The plaintiffs having closed their case, the counsel for the defendant submitted that there must be a non-suit. Abbott, Chief Justice, said: "I am of opinion that the affirmative must be proved by the defendant." Ry. & Mood, N. P. C. 159, S. C. 1 Car & P. 538. Spiere's vs. Parker, 1 Term Rep. 144—and Jelfs vs. Ballard, 1 Bossanquet & Puller, 468, are also authorities in point. A plea alleging merely that seals were affixed to a bond, *without the consent* of the defendant, without also alleging that it was done *with the knowledge,* or by the *authority* or *direction* of the plaintiff, is not sufficient. The United States, plaintiff in error, vs. William Linn, et al, defendants in error. 1 Howard's S. C. Reports, 104—110. This last case is an authority directly in point, for neither of these pleas contain any positive averment that the Union Bank, at the time when it is alleged that Noah Thompson and the defendant put their names to the instrument in question, had any interest in it, or authority over it; nor is there any averment in either of the pleas, that their names were not so put, with the knowledge or consent of the plaintiff; all that is said in those pleas about the Union Bank, is said by way of inducement, rehearsal or argument. Every thing, therefore, in relation to the Union Bank, is left to inference merely; and it is a rule in pleading, that when a plea has on the face of it two intendments, it ought to be construed most strongly against the party who pleads it. To this point, the case last cited is also direct authority.

In the case of Speake and others vs. the United States, 9 Cranch, 37, Mr. Justice Story, who delivered the opinion of the Court, said: "It is clear at the common law, that an alteration or addition in a deed, as by adding a new obligor or an erasure in the deed, as by striking out an old obligee, if done with the *consent and concurrence of all the* parties to the deed, does *not* avoid it; and this principle equally applies, whether the alteration or erasure be made in pursuance of an agreement and consent, prior or subsequent to the execution of the deed; and the cases in the books, in which erasures, interlineations and alterations in deeds, have ben held to avoid them. 50 will be found on examination to have been cases in which *no such consent* had been given." The plea upon which this opinion was pronounced, contained the negative allegation, that after the execution of the bond on which the suit was founded, it was *materially altered* and changed, &c., (setting out the alteration,) without the license, consent, or authority of the defendant, &c. To which the United States replied, that the bond was so altered and changed, *with the assent,* and by the concurrence, license, direction and authority of all the defendants. To this replication there was a demurrer, and joinder in demurrer, and upon this issue the cause turned. Now, as the pleas under consideration, do not contain either the allegation that the alteration complained of, was made *without* the consent of the defendant, or the allegation that it was done with the knowledge, or by the authority, or direction of the plaintiff, we are warranted in the conclusion, that it was done with the consent and concurrence of all the parties, upon the principles above cited, "that a plea which has upon the face of it two intendments, ought to be construed most strongly against the party who pleads it; and if such were the case, surely they contain no matter of defense, and the Court below did not err in sustaining the demurrer to them. To the plea of Nil Debit, (which is confined to the second count of the declaration,) there does not appear to have been any demurrer.

The second error assigned, is that, "the Court erred in permitting the instrument of writing offered by the plaintiff, to be read in evidence."

One ground of exception relied upon in argument, was, that there was no scrawl or seal affixed to the signature of the appellant thereto, consequently it was not his deed, and therefore was variant from the one declared upon. There were five signers to this instrument, to the names of three of whom a scrawl was respectively affixed as a seal—to the other two there was no scrawl or seal affixed opposite to their respective names. But the appellant, by signing the instrument, after those to whose names a scrawl was respectively affixed as a seal, and which, by our statute, is equivalent to a seal—(see the act to amend an act regulating judicial proceedings, approved 23d Nov. 1828, by the 36th section of which it is provided, that "a scrawl, affixed as a seal, shall be as *effectual* as a *seal;* Duval's Comp. page 96)—adopting the existing seal. Two persons may make use of one seal in the execution of a bond, and it will be the deed of both. Flood vs. Yander, 1 Blackford's Rep. 102. In Shep- 51 herd's Touchstone, page 56, it is laid down that, "if there be twenty to seal one deed, and they all seal with one seal, yet if they make distinct and separate prints, this is a sufficient sealing, (as to all,) and the deed is good enough.

In the case of Lord Lovelace, Sir W. Jones, 268, it was admitted by the prosecution that, "if one of the officers of the Forest put one seal to the rolls by consent of all the verderers, regarders, and other officers, it was as good as if every on had put his several seal; and if divers men enter into one obligation, and they all consent, and put *but one seal* to it, it is a good obligation of them all."

It was held, in the case of Ball vs. Demsterville, 4th Term Reps. 313, "that if one partner in a transaction seal a deed with one seal, for himself and partner, with his consent and in his presence, it is a good execution of the deed for both." This is acknowledged to be the rule in the case of Ludlow, et al., vs. Simond, 2d Caine's Cases, 1—42 and 55.

In the case of McKay, et al., vs. Bloodgood, 9 John. Reps. 284, in debt on bond, it was held that, where one partner signs a bond in the name of the firm, and affixes *one seal,* it will bind the other who saw and approved it before the signing and sealing, but who was *not present* when done. The principle of the two cases last cited is sustained by Philips on Evidence, page 416.

But it was insisted in argument, on behalf of the appellant, that to make the *seal* of one obligor the seal of another, it must appear by the instrument itself, that those who sign with that view, recognized the seal of the other party. If it be so, (and it is *unnecessary* to the decision of this case to inquire into the soundness of this position,) the document before us concludes with these words: *"Witness our hands and seals."* All who signed it, therefore, recognized it as a *sealed* instrument. The case of Hatch vs. Crawford, Admr. 2 Porter, 54, is in point. It was an action of assumpsit upon a written agreement, which concluded as follows, viz: *Given under our hands and seals."* One signed and sealed, and immediately below his name, the other signed, but made no separate seal. Plea, the general issue.

The Court below excluded the instrument from being read as evidence; under the issue in that form of action, on the ground that it was the deed of both. The Supreme Court of the State of Illinois, in the case of Davis vs. Burton and others, 3d Scammon's Rep. 44, which is cited and reaffirmed in the case of Wilcox vs. Ward, et al., 52 3d. Scammon's Reps. 51, said, that in reviewing the authorities upon the doctrines of seals, in questions the most analagous to the one before us, we see a steady and progressive relaxation of the ancient and strict doctrine on this question. We find no ancient decision at common law precisely in point; but without such authority, we are disposed, (says the Court,) to lay down such a rule as will be consonant to reason and justice, and comport with the obvious intention of the parties. We recognize the principles assumed in this case, and feel, (to us the language of that Court,) warranted by common sense, by justice and sound reason, as well as the principles of law, to presume that all the signers of an instrument of writing, indicating upon its face an intention to seal it, adopted any seal or scrawl, which may have been affixed to the name of any one of them. If there is any country where the *ancient and strict* doctrine upon this question may, with propriety, be relaxed, it is our own, since the Legislative Council of the late Territory of Florida, by the 24th section of the act regulating judicial proceedings, above cited, which is of force in this State, has expressly enacted that: "All promissory notes, and other instruments of writing, *not under seal,* shall have the same force and effect, as bonds and instruments *under seal;"* thereby rendering the difference between them rather matter of form than of substance.

The *third* error assigned is that: "The Court erred in rejecting the testimony of Henry L. Rutgers, as set forth in the bill of exceptions.

The defendant put in a plea of *non est factum,* upon which issue was joined, and this raises two questions; *first,* whether the instrument declared upon is, or is not his bond; and *second,* whether if it is his deed, he is not estopped from saying in this suit, that it is not the bond of all who signed it. What the effect may be as to the rights of the parties who signed the bond before him, and at a different time, (if any of them did thus sign it,) we are not called upon now to enquire or decide; that it is good as to him we entertain no doubt. He had a right to sign it at the time and under the circumstances that he did so, or at least he cannot have any right to set up his own act in this regard, to avoid his own deed. In this opinion we are borne out by the case of The United States vs. Linn *et al* before cited, which was an action of debt instituted upon the official bond of a Receiver of Public monies. Upon the trial of that cause, after read-

53 ing the bond to the jury, the defendant called a witness who testified in substance that he saw the bond after it had been signed by the obligors in the hands of William Linn, (the obligor first named therein,) after it had been returned from the District Judge, with his certificate endorsed of the sufficiency of the sureties. That the District Judge, in a note in writing accompanying the bond, pointed out the omission of the seals to the names of the signers of the instrument, and said Linn, saying he would obviate that difficulty, took a pen, and in the presence of the witnesses, added scrawls by way of seals to each name subscribed as makers of the instrument. All the defendants united in a joint plea of *"non est factum,"* and the Court held that the adding of the scrawl by Linn, to his own name, did not vitiate the instrument as to him; that he had a right to add the seal, or at least he could have *no* right to set up his own act in this respect to avoid his own deed. It was therefore his deed, and the plea *"non est factum,"* as to him was false, and the Court sustained the demurrer to it, upon the familiar principle, that a joint plea, which is false as to one, is false as to all the parties pleading it.

By the 34th section of the act "regulating judicial proceedings, before referred to, Duvals Com. p. 96; it is (in substance) declared "that the assignment or endorsement of any *bond*, note, covenant, *deed*, bill of exchange, or other writing, whereby money is promised, or secured to be paid, shall vest the assignee or endorsee thereof, with the same rights, powers and capacities, as might have been possessed by the assignor or endorser; and the assignee or endorsee, may bring suit in his own name; nor shall it be necessary for the assignee or endorsee of any instrument assignable by law, to set forth in his declaration the consideration upon which such assignment was made, nor prove such consideration, unless the same shall be impeached by the defendant, under oath."

It is not supposed that the object of this provision was to place these several classes of instruments, upon a footing (in all respects) with commercial paper, yet the effect of it is to make them negociable by assignment or endorsement. If this were a new Statute, this Court would be inclined to confine the word assignment in the section last cited to such instruments as at common law did not pass by endorsement, and to extend the word endorsement *only* to other classes of written instruments; but the provision is a convenient one as generally understood and acted upon. The practice of applying it alike to all these various classes of instruments, has long prevailed in the
54 ordinary transactions of business, and we are not now disposed to disturb it. The present holder of this instrument is an endorsee, and brought this suit as such under that act. "There is not upon the face of the instrument any thing indicating an alteration, or casting a suspicion upon its validity, that should have put the appellee upon enquiry." He took it, for aught that appears, in good faith. The appellant, by putting his name thereto, gave value to the instrument; "non constat," but the appellee took it upon the faith and credit of his name alone. The testimony of Henry L. Rutgers, if it could have been received, would show that this is the very instrument which the appellant intended to execute; and we think that under all these circumstances he is estopped from setting up his own act in regard to this alleged alteration, even to avoid this suit.

The rule, said Lord Denman, in delivering the judgment of the Court in the case of Pickard vs. Sears, 6 Adolphus and Ellis, 475, is, that where one by his words or conduct, wilfully causes another to believe in the existence of a certain State of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things existing at the same time; and this principle is affirmed, also, in the cases of Coles vs. The Bank of England, 10 Adolphus & Ellis, 439. Hearne vs. Rogers, 9 B. & C, 586. Groves vs. Kev, 3 B. & Ad. 144.

No man can avoid his own deed by which an estate has passed, on account of his own fraud in executing it. *Doe ex dem* Roberts vs. Roberts, 2 Barnwell & Alderson, Rep. 367. He is estopped from so doing. "Contrary to the feeling which appears to have pervaded the Courts with regard to other classes of estoppels, their inclination seems to have been to *extend* the lost of estoppels in pais, especially in mercantile transactions, where men are obliged to trust much to appearances. Jenys vs. Fowler, Strange Rep. 946. These authorities are directly in point, for notwithstanding the instrument in question is not strictly mercantile paper, yet it is in the nature (to a certain extent) of such paper. The act referred to makes it negociable. In dealing in it, men are obliged to trust much to appearances. It requires amongst those who deal in it, the utmost fairness and good faith, and the principles deducible from the cases last cited are deemed applicable to it, and the question before us.

If we are right in the views which we have taken of these matters, (and we entertain no doubt about them,) neither the third, fourth, 55
or fifth errors are well assigned.

There was another point taken for the appellant, upon the argument of this cause, which deserves a passing notice. It was that the assignment should have been under *seal*. The remarks heretofore made, respecting the 34th section of our judiciary act, and its bearing upon this class of cases, would seem to be a sufficient answer to that position. But lest it may not be so considered, we refer to the case of Clark vs. Rogers, 2 Greenleaf's Rep. 148; in which Chief Justice Mellen, in delivering the opinion of the Court, remarked, that "for many years, Courts of Justice have been gradually becoming more and more inclined to protect equitable interests. Less form is necessary now than formerly as to the mode of creating such an interest. The object is to ascertain that it is an interest founded in equity and justice, and on good and adequate consideration," and for the correctness of that opinion, he cites Perkins vs. Parker, 1 Mass. Rep. 123. Dix vs. Cobb, 4 Mass. Rep. 508. Brown vs. Maine Bank, 11 Mass. Rep. 153. Quiner vs. Marblehead Insurance Company, 10 Mass. Rep. 482. Mowry vs. Todd, 12 Mass. Rep. 281. Jones vs. Witter, 13 Mass. Rep. 304, and particularly Dunn vs. Snell, 15 Mass. Rep. 481, (which very fully sustain the position assumed,) and in the case of Vose vs. Handy, 2 Greenleaf's Rep. 334, he repeats the remarks; again cites the same authorities, and adds, that the Chief Justice in the case of Jones vs. Witter, (above cited) says, "there are cases in the old books, which show that debts, and even *deeds*, may be assigned by parol, and we are satisfied, (he says) that there is *no* sensible ground upon which a writing shall be held necessary to prove an assignment of a contract, which assignment has been executed by delivery, any more than in the assignment of a personal chattel.

In the case of Jones vs. Snell, the Court went still further, and decided that the mere *delivery over* of an execution, was an assignment of it, and of the judgment. And in the case of Prescott vs. Hall, 17 John Rep. 284; Spencer Chief Justice, delivering the opinion of the Court, and speaking of the validity of assignments, says, "I do not consider the want of a *seal* essential, the mere delivery of the *chose* in action would be sufficient, even were it a *specialty*," and we fully concur in this view of the law.

The assignment of the bond in this case was in writing, and by virtue of the statute referred to, vests in the appellee the legal interest. The consideration is not denied. He was authorized to insti- 56
tute this suit (as he has done,) in his own name. The proofs sustain it. The errors are not well taken.

The Judgment of the Court below is affirmed with costs.

Per totam curiam.

Noah Thompson *vs.* Robert W. Williams, Trustee, &c.

Where a party signed a bond as a joint and several obligor, after it had been sealed and delivered by other parties, as their joint and several obligation; and also after it had been transferred to a third party, by the endorsement of the obligees, and after one of the obligees had died; held, in a suit against the party so signing, that he, being the last signer, was estopped from availing himself of these facts, to avoid his liability as a joint and several obligor of the bond.

The case of Cotten vs. Williams, Trustee, &c., decided at this Term, cited, and fully confirmed.

This was an appeal from Leon Superior Court, to the Court of Appeals of the Territory of Florida, which was transferred from that to this Court. A full statement of the pleadings and evidence, except of the causes of action, are contained in the opinion of the Court. The following are copies of two of the bonds declared on; the other two are similar, in all respects material to a proper understanding of the case; except that seals are attached to the names of each party, and that Noah Thompson is the last signer of each of them.

$3206 25. On or before the first day of January, one thousand eight hundred and forty-two, we, and each of us, promise and oblige ourselves, our heirs, executors and administrators, to pay to William B. Nuttall, Hector W. Braden, and William P. Craig, or their order, the just and full sum of three thousand two hundred and six dollars and twenty-five cents, lawful money of the United States, with interest thereon, at the rate of ten per centum per an-

57 num from the time the same shall become due until paid, for value received.

Witness our hands and seals, at Tallahassee, the first day of January, one thousand eight hundred and thirty-four.

(Signed) JOHN S. TAYLOR, [SEAL]
JOHN TAYLOR, [SEAL]
H. B. BRADFORD, [SEAL]
NOAH THOMPSON, [SEAL]
F. R. COTTEN, [SEAL]

(Endorsed)
WM. B. NUTTALL,
H. W. BRADEN,
WM. P. CRAIG.

$3855. On or before the first day of January, one thousand eight hundred and forty-two, we, and each of us, promise and oblige ourselves, our heirs, executors and administrators, to pay to William B. Nuttall, Hector W. Braden and William P. Craig, or their order, the just and full sum of three thousand eight hundred and fifty-five dollars, lawful money of the United States, with interest thereon, at the rate of ten per centum per annum, from the time the same shall become due until paid.

Witness our hands and seals, at Tallahassee, the fifteenth day of May, one thousand eight hundred and thirty-five.

(Signed) J. R. DORSEY, [SEAL].
HOPEWELL DORSEY, [SEAL]
NOAH THOMPSON.

(Endorsed)
WM. B. NUTTALL,
H. W. BRADEN,
WM. P. CRAIG.

A. E. Maxwell, for Appellant.

Long & Walker, for Appellee.

T. H. Hagner, (on same side,) for Appellee:

Said that, this case stood upon nearly the same footing with the case of F. R. Cotten vs. R. W. Williams—argued at this term. There was a special plea in this case, setting up similar matters, in pretty must the same way—and for like reasons as those before argued, he held the judgment of the Court below to be correct.

Upon the question made in this Court, as to the validity of the 58 assignment of this bond, by endorsement, without seal, he cited, Duval's Comp. p. 96, sec. 33 and 34—and he urged the admitted course of practice in the Territory, under the statute, and uniform decisions of the Superior Courts, as settling the construction. That construction had never been questioned in the appellate tribunal, although more than one case had occurred in his practice, where the point had arisen, and might have been carried up.

He insisted that the leaning of the Courts was to aid assignments —even equitable assignments—and he cited: 15 Mass. R. 485. 2 Greenleaf R. 334. 3 Greenleaf, 349. 16 Johnson, 52. 17 Johnson, 284.

DOUGLAS, Chief Justice:

This is an action of debt, instituted by Robert W. Williams, Trustee, &c., against Noah Thompson, in the Superior Court of Leon County, in the Middle District of Florida, upon four several single bills, or writing obligatory. The declaration contains five counts, one upon each of the bills of writings obligatory, and one upon account stated; a copy of each of the said bills, or writings obligatory, is annexed to the declaration. The pleas are, *first* Nil Debet; and after oyer upon the said bills or writings obligatory, *second, "non est factum." Third,* a special plea—alleging in substance, that he the said defendant, did not make or sign, seal or deliver the said writings obligatory, in the said declaration, mentioned as to each note respectively, either jointly or severally, or at the days, and times specified; nor did the said Nuttall, Braden & Craig, endorsee, order, deliver or assign the said supposed writings obligatory to plaintiff, on the days and times specified in the declaration, *but the said other parties* supposed, made the said supposed writings obligatory *on the days and times specified;* and the said Nuttall, Braden & Craig, transferred the same to the Union Bank of Florida, to wit: on the days and years in the declaration mentioned; and that said William B. Nuttall, afterwards, to-wit: on the twenty-ninth day of April, in the year 1837, in the County of Jefferson, departed this life; and this defendant after the death of Nuttall, to wit: on the 21st day of November, in the year last aforesaid at Leon County, aforesaid, signed, and sealed the said supposed writing obligatory in *possession of said Union Bank of Florida,* then and there being, and to the said Union Bank of Florida, then and there belonging, by virtue of said endorsement, and so the said defendant says, that said several supposed writing obligatory are not his deeds, and this he is ready 59 to verify, wherefore, &c.

To the *first* and *second* pleas the plaintiff joined issue, but demurred specially to the third, "because it amounts to general issue, and is uncertain, informal and insufficient. The defendant put in a joinder to the demurrer. The Court, after argument, sustained the demurrer, and the cause was afterwards submitted to a jury upon the two issues of facts above set forth, who returned a verdict in favor of the plaintiff, for the sum of fifteen thousand two hundred and fifty-two 30-100 dollars, to be discharged by the payment of ten thousand one hundred and five 92-100 dollars; for which last sum and costs, judgment was entered.

On the trial, the plaintiff offered in evidence the original bonds (or bills,) and proved the hand writing of Nuttall, Braden and Craig, in the endorsement of the original bonds, and the hand writing of John R. Dorsey, John S. Taylor, John Taylor and H. B. Bradford, only.

And defendant objected to the introduction of said papers in testimony, as variant from the copies of bonds filed and declared upon, but the Court overruled the objection and admitted, said papers in evidence to which opinion defendant excepted. The defendant then offered Hector W. Braden, a competent witness of lawful age, one of the endorsers of the bonds or writing obligatory, who proved that he delivered all the writing obligatory offered in evidence to the Union Bank after the death of William B. Nuttall, and that when he so delivered them, neither the signature or seal of Noah Thompson was upon them. Whereupon the defendant's counsel objected to the bonds being received in evidence, on the ground, that the declaration alleged a direct assignment and transfer of a joint and several bond made by defendant, and the other parties respectively to Nuttall, Braden and Craig, and transferred and assigned by those persons then and there, (in Nuttall's life time,) to the plaintiff; and the testimony proved *that the bonds introduced were signed and sealed by the other parties without the defendant,* and assigned after Nuttall's death to the Union Bank, *and then signed by defendant;* and there was no evidence of transfer to Robert W. Williams; but the Court overruled the objection and admitted the evidence, to which defendant by counsl excepted.

And the defendant by his counsel then moved the Court to instruct the jury:

First, That the mere endorsement in Nuttall's lifetime, without 59 delivery, gave no title as to Nuttall, and does not sustain the allegations in the declaration of assignment to Williams.

Secondly, That the signature of Thompson, of the bonds in the hands of the bank, could not make it a joint and several bond as declared upon.

Thirdly, That the bonds having been declared upon as joint and several bonds, they must be proved to be joint and several with all parties, before the plaintiff can recover in this action.

Fourthly, That there being no seal to the name of Thompson and some others, on several of the bonds which are declared upon as sealed with their *seals,* is a fatal variance as to all those bonds.

The Court refused all of said instructions except the third, which was granted, but with an instruction and opinion, that the signature of the bonds in the hands of the bank, related back to the original signing, and made the bond joint, and as well as several. To which several refusals, opinions and instructions (the defendant by his counsel excepted, and prayed that this his bill of exceptions might be signed and sealed by the Court, which was done.

(And signed) S. J. DOUGLAS, Judge. [SEAL.]

The defendant prayed an appeal to the Court of Appeals of the late Territory of Florida; the case was carried up to that Court, and was transferred to this Court under the provisions contained in the last clause of the schedule and ordinance of the Constitution of the State, and in the 14th section of the act of the General Assembly, "to organize the Supreme Court of the State of Florida," approved July 25th, 1845.

A motion was made on the first day of the present term by the counsel for the appellee to dismiss this suit upon the following grounds, viz:

First, Because it has no rightful place in this Court, and this Court has no jurisdiction of the same, no appeal or writ of error having been sued out or taken to this Court, and this Court has no appellate jurisdiction of the cause.

Second, Because the judgment of the Leon Superior Court is final, until reversed by the proper appellate tribunal, constituted by the acts of Congress of the United States.

Third, Because this Court has appellate jurisdiction only over those inferior Courts, which the constitution of the State of Florida has established, and which compose with this Court the judiciary

69 *think* Joab Horn, when he made this instrument, as is proved from the face of it.

This instrument is not only more like a will than any of the deeds poll, above referred to, for they were in all things like deeds of conveyance, except in the time the gift was to take effect—in possession of the donor—viz: "after the death of the grantor." But this is upon its very face, more like a will than a deed. It is like a deed in nothing except, "he positively deeds," and signs it with a seal at the end of his name; neither of which has much tendency to prove it to be a deed; as wills are often made with a seal, and generally are in the present tense, "I give." 1st William's Executors, 55—95.

The whole face of the instrument, with this exception, shows that it is a will, and was so intended.

But if it is a will, it is revocable—if revocable it has been revoked by a subsequent will.

Walker Anderson, for appellee, submitted the following:

I. First exception—Want of delivery:—Delivery of the property in specie, was not necessary to the consummation of the gift or grant—because:—1. A present delivery was not consistent with the nature of the interest conveyed, which was a remainder after, a life estate. And because: 2. The delivery proved was a sufficient delivery in law.

1. "Delivery must be according to the nature of the thing." 2 Kent's Com. 439.

2. The fact of the delivery to Gartman was for the jury to determine; and in this Court it is to be presumed the delivery to him was complete—(as was the fact.)

"A delivery to a third person, as the servant or bailee of the grantee, will be valid." Soubervye & Wife vs. Arden, et al. 1 J. Ch. R. 240. 9 Mass. R. 307—10. Verplank vs. Sterry, 12 J. R. 536. 15 Wendell, 656.

"Delivery to a third person, though not an agent of grantee, sufficient."—1 Tom. Law. Dicty. 523. 8 B. & C. 671.

"A formal delivery (of a deed) is not necessary, if there be acts evincing an intent to deliver." Goodrich vs. Walker, 1 J. C. 250.

But the exception does not seem so much to negative the original delivery, (that fact having been established by the jury,) as to intimate that the subsequent possession of the deed by the grantor, amounted to a revocation.

70 This position is opposed by numerous authorities, and is adverse to well established general principles. A gift, once consummated by actual or constructive delivery, cannot be recalled, without the consent of the grantee.

"If a deed has been once delivered, so as to take effect, a second delivery can be of no avail." V. vs. Sterny, 12 J. R. 536.

"If a deed be duly delivered in the first instance, the subsequent "custody of it by the grantor will *not* destroy the effect of the delivery." Soubervye & Wife, vs. Arden, et al. 1 J. C. R. 256.

"Even non-delivery, unless accompanied by other circumstances, "will not avoid a deed."

Ib. 257, quoting 2 Vern. 473, and 1 Atk. 625, in which Lord Hardwick held, that a voluntary deed, formal as to its execution, and without a power of revocation, and kept by the grantor, uncancelled, was not to be defeated by a subsequent will.

He went even further, in the case of Johnson vs. Smith, (257,) in 1 Ves. 314.

"A voluntary settlement, without power of revocation, cannot be revoked"—ib. 258, referring to Villers vs. Beaumont, 1 Vern. 100; and Bole vs. Newton, 1 Vern. 464—"though retained by the grantor in his possession, until his death." Ib. Bunn, et al., vs. Winthrop, et al., 1 J. C. R. 329—30—31—36—37.

The delivery of the deed to Gartman having been shown to be sufficient and irrevocable, it is scarcely necessary to adduce any authority to show, that a gift or grant by deed, is equivalent to the actual delivery of the chattel. This point was conceded on the trial, and no longer admits of any doubt.

I refer the Court, however, to a few authorities on this head.

"As between the parties, a voluntary transfer, *by deed,* of a chat-"tel interest, is valid, without any consideration appearing." Bunn vs. Winthrop, 1 J. C. R. 329—330—331—336—7.

Delivery, though in general necessary to the validity of a gift, may be supplied by deed or writing. 2 Kent's Com. 438. Flower's case, Noy's Maxim's, 57. Irons vs. Smallpiece, 2 Barn. & Ald. 551.

"Written obligations to give, even where there is no consideration, will be enforced." 2 Bl. C. 446.

In this case, there was a good consideration moving the grantor, which makes the case stronger than where the deed is purely voluntary.

II. We come now to the second exception, which denies that a

a remainder may be limited, after a life estate, in personal property. 71

This may have been law once, but it is long since exploded; and no point is better established by authority, than the one opposed by this exception.

Chattels may be limited over by way of remainder, after a life estate. 2 Kent's Com. 352. Smith vs. Clever, 2 Vern. Rep. 59. Hyde vs. Parrot, 1 P. Wms. 1. Tissen vs. Tissen, ibid, 500. Bandall vs. Russell, 3 Mer. R. 190. And such a remainder may be created equaly by grant or devise. Note on 2 Kent, C. 352. Childs vs. Baylie, Cro. J. 459. Powell vs. Brown, S. C. Law Journal, 442

I refer also, as to the general principle, to the following cases:—Moffat vs. Strong, 10 J. R. 12. Westcott vs. Cady, 5 J. C. R. 334. Scott vs. Price, 2 Sergt. & Rawle, 59. Royall vs. Eppes, 2 Munford, 470. Mortimer vs. Moffat, 4 H. & M. 503. Madden vs. Madden, Ex'rs, 2 Leigh, 377.

"The rule that a remainder may be limited, after a life estate in "personal property, is as well settled as any other principle of our "law. The attempt to create such limitation is not opposed by the "policy of the law, or by any of its rules." Smith vs. Bell, 6 Peter's Rep. 78.

Blackstone is conclusive on this point. He says: "By the an-"cient common law, there could be no future property, to take "place in expectancy, created in personal goods and chattels—but "yet in last wills such limitations were permitted, though originally "that indulgence was only shown, when merely the use of the "goods, and not the goods themselves, was given to the first legatee. "But now that distinction is disregarded; and therefore, if a man, "either by will or deed, limits his books or furniture to A, for life, "with remainder over to B, this remainder over is good." 2 Bl. Com. 398.

The case before the Court is precisely such a one. Joab Horn conveys a remainder to Gartman, after a life estate to himself; or it is more closely assimilated to the gift of the use, of a first legatee, with remainder over.

In contradiction of all these authorities, a single case was relied on at bar, from McCord's reports, which I have not before me. I think its tenor was opposed to the creation of an estate *in futuro,* without an intervening interest. It is obvious, I think, that this case is not one of that kind—a present interest is conveyed by the deed, which attached upon the delivery of the deed, though its enjoyment 72 was postponed to a future time. In the case of Lightfoot's Ex'rs, vs. Colgin & wife, this point is clearly established. At the 77th page, 5 Munford's Reports, Judge Roane, in expressing his concurrence with the Court, speaking of a certain conveyance, which was the subject of controversy, says: "Considered as a grant, it is of no importance that a remainder only is granted, while the life estate is retained. That remainder is a vested interest—in a real advancement, and may be alienated."

Other parts of this case are good authority, on the subject of the retention of the property by the donor, not defeating a gift, to take effect in future.

III. The third exception alleges, that the deed is testamentary in its character.

To this objection I oppose: 1. The evident intention of the donor. And 2. The terms of the instrument itself.

1. Joab Horn did not regard it as a will, for otherwise he would not have delivered it to Gratman, to have had it recorded. He would not have made provision in the instrument for the property remaining in his possession, if he had regarded it as a will, which could have no effect, till after his death. He speaks in the instrument of it, as *"this deed"*— term too familiar, even to the unlearned, to have been applied by him to a paper designed for a will. And above all, he makes no disposition of the residue of his property, nor mentions his other children, and appoints no executors. In short, there is nothing about the whole instrument to support the exception, but the single word bequeathed, used in connection with the binding phrase, *positively deed.* This is a word, (bequeath,) not so familiar to the unlearned; and here it evidently conveys no meaning, adverse to the well understood word *deed,* used more than once.

The whole structure of the instrument—its singleness of character, (being confined to a conveyance of a single piece of property, to a single individual,) with all its incidents, intrinsic and extrinsic, negative the idea that Joab Horn designed it for a will.

But I contend that, whatever mnght be the intentions of Joab Horn, the terms of the instrument are such as to conrol that intention.

"A deed is a writing, sealed and delivered by the parties." 1 Tom. Law Dict. Title Deed.

73 The delivery makes it differ from a will. "A deed may be good without all the formal parts." Ibid, 523.

There was a grantor—a grantee—a thing granted—a good consideration, (though this last was not essential)—and sufficient words, such as *deed,* and *positively deed,* and *is to become the property of,* &c., to convey an interest present, and irrevocable.

Again: a gift may be made without deed, and any words used to signify an intention to give, suffice. The only object of a deed is, to serve as an evidence of the gift; and in some cases, to answer in lieu of a present delivery of the property. No greater formality is necessary in a gift by writing, than in a verbal gift; if the intention is manifest, that is all that is required.

Besides, "an uncertainty shall be taken in favor of the grantee." Jackson on Dem. Butler vs. Gardiner, 8 J. R. 394.

Joab Horn's subsequent declarations in his will, cannot nullify his antecedent gift, if it ever was such.

"Declarations of the intentions, or understanding of a grantor, "different from the intent apparent on the face of a deed, to be effec- "tual, must be made at the time of executing it." Soubervye & wife vs. Arden, 1 J. C. R. 240.

Joab Horn reserving a life estate in the negro, cannot be regarded as in any wise converting the grant into a will.

"A deed of trust, if not revocable by the grantor, is *not* to be considered a will in disguise, on the grounds that nearly all his personal estate is thereby conveyed, and that he reserves to himself the possession and control of the property during his life." Lightfoot's Ex'rs vs. Colgin & wife, 5 Munford's Rep. 42—69. See judgment of the Court in same case, passim, commencing page 80.

IV. The fourth exception relies upon the statute of limitations, as a bar to this action."

This statute was made to bar stale claims, and punish negligence. Joab Horn died in 1840—who could have sued him for the negro mentioned in this deed, while living? Certainly not David Gartman, or any claiming under him. He had no right to the possession of the negro till the old man's death; and within a year after that occurred, suit was brought.

The cause of action accrued to David Gartman in 1840, and not sooner; and the statute, as to him, began to run only from that time. If he was barred by the statute, then would every remainder man be
74 barred, when the particular estate happened to be of longer duration than five years.

There must be an adverse possession too, to enable a person to bring an action surtrover; and the statute commenced to run only from the time when the adverse possession began. Surely it will not be contended that the possession of Joab Horn, during his life, was adverse.

I do not deem it necessary to trouble the Court with any authority on this obvious point, beyond the familiar one, in Tidd's Practice, at page 17. A right of action cannot be barred till six years after there has been a complete cause of action; as if, I promise to pay a man £100 after he returns from Rome—the statute will not begin to run, till after his return.

(I have not Tidd before me, but this is the substance of the authority.)

V. The last objection made, is to the exclusion of Jeremiah Saville's disposition.

Saville is one of the Executors, and a party defendant on the record. The simple statement of the objection conveys a sufficient answer to it.

The respectability of the counsel making the objection, induce me to refer to an authority or two—otherwise I should consider it almost disrespectful to the Court to argue the point.

"A party to the record, though merely a nominal party, is not "allowed to testify on the trial of the case, though he be willing, if "objected to by the party in interest." Benjamin vs. Vocentry, 19 Wend. 353. Frear vs. Everston, 20 J. R. 142. Chenango Supervisors vs. Birdsall, 4 Wend. 453. Brown vs. Howard, 14 J. R. 122.

Addendum.—"A gift of chattels, to take place after the donor's "death, passes only those which remain in specie at the time of the "gift." 2 Tomlin's Dict. 32, quoting 3 Swan R. 400.

T. H. Hagner, for Appellee:

The appellants bill of exceptions presents objections to the sufficiency of the Plaintiff's title, as well upon his *own evidence,* as also, when that evidence is *met* by the proofs *offered by the defendants.* I shall examine these points separately.

And I. As to plaintiff's title upon his own evidence. The plaintiff offered in evidence the deed or instrument of writing, signed and sealed by Joab Horn, on 29th June, 1829; so declared on its face by the witnesses, in these words: "In witness whereunto I have 75
set my hand and seal, this 29th June, 1829, and in the presents of

Jeremiah Savill,		*his*
Reuben N. Barrow	}	Joab × Horn, [seal.]
Rich'd. J. Compton,		*mark*

The witness Compton, made oath before a Justice of the Peace, "that the *within deed* was fairly assigned and *delivered* in his *presents,*" and being thus proved, the instrument was recorded on 14th September, 1839, in the life time of the donor.

The point made by the appellants is, that this instrument was not and is not a *deed,* but a mere contract to give in future, or at best a testamentary disposition.

The Court will be aided in the correct exposition of this instrument, by recurring to the principal rules for the understanding of deeds laid down in *Plowden,* p. 160— they are:

"*First,* That they shall be taken most beneficially for the party to whom they were made.

"*Second,* That a deed shall never be void, where the words may be applied to any intent to make it good on the principle, *ut res magis valeat quam pereat.*"

"*Third,* That the words shall be construed according to the intent of the parties and not otherwise, and the intent directs gifts more than the words."

The words used here are, 1st, *bequeath,* admittedly a term implying a disposition by will, but its inaptitude here is repeatedly admitted by the donor himself—calling the act over and over again *a deed.* 2nd. *Covenant,* a word as clearly indicating a disposition *by deed.* 2 Black's Com., 338. Shepard's Touchstone 511—12. Saunders on Uses, 566. 3 Comyn's Digest, Cov. G.

This term too, more entirely comports with the consideration expressed; *a covenant* must not be in consideration of money, for that would be a bargain and sale. 2 Wilson's Reports 22.

A person may *covenant* to stand seized to an use *in futuro,* as from Christmas next; or a deed which may take effect as a covenant, to stand seized, is good, though the use is to arise after the decease of the covenantor. Doe vs. Whittingham, 4 Taunton 20. And were the covenant is to stand seized to a *future use,* the use, till it may vest, results to the covenantor. Same case.

Resort must be had to the meaning of *these* terms, if we are to be met by the argument, that the term *bequeath,* is of testamentary disposition. And let us look again at the third term used in this instru- 76
ment:

3rd. Deed—"*positively deed;*" "a certain portion of my property;" and again, "the stipulated property in *this deed* composed." The grantor "*deeds the property.*" Now as is well argued by Mr. Anderson, this word is of more general acceptation than any other used—it is significant in the fullest sense; and that the grantor understood its meaning, is clear from the subsequent recognition of the act by himself—"in this deed composed, "the property in this deed composed."

Now "*a deed ex vi termini,* means a writing sealed and delivered." Hammond vs. Alexander, 1 Bibb, 333.

It is no manner of objection to the Courts carrying into effect his instrument, or rather to the Court's recognition of its legal bearing and effect, that it is not drawn with accuracy or conformably with precise precedent. See 5 Peters' Sup. Co. Rep. 580.

The intention is to be collected from the paper itself, from the undertaking of the parties; and taking the whole instrument together, if the clear design of the grantor appears to be, to "*deed*" the property, the effect follows of consequence.

In 1st Masachusetts' Rep. 219, is a case where the Court gave effect to an instrument having *no words of grant* in the premises, and held sufficient to pass a fee to land, from the words used in other parts of the deed. The Court recognizing the great rule of law to be, to effectuate the intention of the parties at the time; "if it can be done consistently with the rules of law." In that paper the term "*granted,*" occurred—"granted premises," and a right "*to convey*"—and from these, the Court concluded the intention and carried it into effect. Again, Patterson Justice, in delivering the opinion of the Circuit Court for the Pennsylvania District, in 4 Dallas Reports, 347, speaks to like effect, that to effectuate the intention, is the great rule of interpretation. Examining this paper then with the manifest intention of the parties, let us inquire what was the manifest intention of Joab Horn, when he signed and sealed it? He declares himself "mindful *this day* to make a distribution of his property," &c.; he does "*this day bequeath, covenant, and positively deed*" property, he then has "in possession and owner of, *clear of any enthrallments.*"

Now did not the party intend to give a *present effect* to his *present purpose?* Does he not declare his ability *at that hour* to make the distribution, while he is clear of debt? Does he not exhibit a plain

77 purpose to vest a *present* interest in this specific property? And he couples with the active power of the clause, which *positively deeds* the property to Gartman, THE PROVISO, that it is to remain in the possession of the donor during life, and then with *its increase* to be the property of the donee in *good faith*.

Let us test the question of present interest; and to that end let me ask, would not this conveyance to Gartman, have protected the property against the creditors of Horn, who might have become such, subsequent to the deed? Suppose afterwards that Horn had become involved, all the world having notice of this transfer, would not the estate vested in David Gartman have been protected from such subsequent creditors? There cannot be a doubt, because when Joab Horn was "clear of any enthrallments," he had *that day* made distribution by deed of gift among his children? When he had *no* creditors, when he was clear of the world, he had distributed his estate as he had a right to do, and there remained in him, but the use of the property during the brief remnant of his days.

This point has been judicially determined by the Court of Appeals of the State of Maryland in 1826, the case of Bohn vs. Headley, 7th Harris & Johnson, p. 257 to 272.

"A deed of gift of personal property from a father (who was not indebted at the time) to his child, executed, acknowledged and recorded, according to law; conveying the property to the child, WITH A PROVISION, that the donor was to remain in its possession and use during life. Held to be valid both at common law and under the Statute of 13th Eliz. 1.

An examination of that case will show the Court, that all the objections here taken were insisted on, before the Court of Appeals of Maryland. It was contended the gift was void by the Statutes 13 and 27 Eliz., that it was void at common law; that the gift was *revocable* on its face, and that by the subsequent sale of the negroes to a third person, the grantor did revoke it. Each of these points was met by the Court, and decided in favor of the grantee under the deed. The Court will note further, that the decision is placed not upon the Statute of Maryland, but upon the Statutes of England and the common law. The subsequent purchaser was there the plaintiff *below*, suing for the negroes; and the grantee held the negroes against the subsequent purchaser from the Grantor.

Another case from the same Court, is yet nearer in analogy to the case at bar; and presents the distinct question, whether a donor can
78 retain to himself the possession and use of the chattels for life, by the same deed of gift which passes the title to the property. In the case of Hope, Administrator of Hope vs. Hutchings, 9th Gill and Johnson 77; the defendants intestate executed and delivered to the plaintiff Thomas Hutchings, a bill of sale dated August 21, 1818, and for, and in consideration of the natural love and affection she bore to the grantee and his wife, (her daughter,) and for the better maintainance, support and preferment of them, made the bill of sale of negroes, and all the household furniture of which she may be possessed at the time of her decease;" *Provided*, the said Hannah shall not be debarred or prevented, holding, using and enjoying the said property above as aforementioned, and all profits arising therefrom during her natural life."

Upon the construction of the deed the Court by *Stephen* Judge declared, "that from the terms of "the instrument itself, *the legal "title upon its execution immediately passed to the grantee*, and that "nothing more than a mere usu-fructuary interest or right of enjoy-"ment, was intended to be reserved by the grantor in relation either "to principal or profits."

So in the case from 1 Murphey's law and equity, rep. 466, in North Carolina, it was decided in 1810; and in Caines & Wife vs. Marley, 2nd Yerger's *Tennessee* Reports p. 582, the deed of gift reserved the possession, use and labor of said slaves for and during the natural life of the donor, and after his death, the said grantee was to have the actual possession with the absolute title;" see also, 1 Humphrey's R. 171. Johnson vs. Mitchell. And in each of these cases it will be seen that the principle is recognized of *"the power of the owner to dispose of the remainder of a chattel reserving to himself a life estate,"* as considered in the 31st year of George III, to be good law, evinced by the judgment of the Court, in 1 Henry Blackstone. p. 535, in the case of Doe vs. Polgrean. I consider that the Court below struck the right path, when they declared, that David Gartman by the deed took "a present interest in the property," and the case from Blackstone fully confirms it—that was the case of a *present gift* by deed vested *possession* in a certain event, and the case turned upon the point.

In Grantham vs. Hawley, Hobart 132, it was held that a grant of "such corn as should be growing on the ground at the end of a term;" was a good grant, and it mattered not that it was not in possession, no! nor in existence at the time of the grant.

It is not my purpose to enter upon the question of delivery of the 79
deed—or the delivery of the property; nor to show the authorities on this point. They are fully and ably presented by Mr. Walker Anderson in his brief. To a few additional cases, I will however call the attention of the Court, Comyn's Digest, p. 272, title a. 2 Dyer's Report, 167, B. 1 Croke 7, Shelton's Case. Shepard's Touchstone 57. And of modern date: 12 Pickering, 145. Banks vs. Markesberry, 3 Litt, 275. Gardner vs. Collin, 3 Mason, 398. Caines & Wife vs. Marley, 2 Yerg 582. Pennington vs. Gittings, 2 Gill & Johns, 216.

II. As to plaintiffs title upon defendants evidence.

Upon the trial the executors offered in evidence, Joab Horn's last will and testament insisting that he had thereby *revoked* this disposition of his estate.

In order to give an effect to this will as a *Revocation*, the counsel insist that the paper under which we claim is a *testamentary disposition*—and how do they prove it? By showing that *even less formal* papers than this, have been admitted to probate. I deny that this is any proof at all, and an examination of the cases cited, will show that the true principle is this, viz:

☞ "Instruments of Writing when *nugatory in the character* intended, are often set up as wills by the parties in interest, and are admitted to probate *in order to carry into effect*, the maker's object which must other wise fail of accomplishment."

In 4th Eng. Eccle. rep. 108, Sir John Nickoll declares this general principles as settled law.

Also see Rigden vs. Vallier, 2 Vesey Senior, 255, deed void for want of livery, set up as a will. See Masterman vs. Baberly, 4 Eng. Eccle. Rep. 108.

The case cited in the notes to 1 Williams on executors, p. 55, note n. Bartholemy vs. Henry, 3 Philimore 318, and found in 1st English Eccle. Rep. 406, is the assertion of the mere general expression that the Court will give effect to dispositions of property to be consummated by death, although the deceased might not be aware that he performed a testamentary act;" and the text of Williams is in precise conformity with the principle coupled with this adjunct—that the Courts never give such effect to a paper on its face in *different form*, until it has *failed to operate in that form*. In 1 Jarman on Wills p. 13, note 1. "A paper which purported to be a deed and was executed as such, but which was not to take effect until after the death of the grantor *was construed as a will in order to give it effect*. 80
Millege vs. Lamar, 1 Dess 617.

So then the Court will thus see, that the question whether this *might not* be construed as a will, and given effect to as such, cannot well arise here, until the Court have come to the conclusion that it is ineffectual as a deed.

If effectual as a deed, we are out of Court. In *another suit* it may be contended that a paper may be testamentary in its character, and yet irrevocable by the Testator's last will, as Lord Hardwicke in Peacock vs. Monk, 1 Vesey, Sen. 127, seemed to consider possible. "But sufficient for the day is the evil thereof."

The case from 12 New Hampshire, cited by Judge Carmack counsel for appellants, is full to show the correctness of my position. The grantee failing to uphold the paper as a deed, sought to have it admitted to probate as a Will. The Court say there is no intrinsic difficulty in this; but then the party was met by the revocation of it—by his own consent and relinquishment of all rights under it, by his receipt of proprty under the last will and testament in lieu of this very grant.

In the case at bar, the party in interest does not seek to alter the face, nor to change the name of the paper. The paper is a deed of slaves—we do not seek to set it up as a will.

The appellants seek to set up this paper as a will, only that they may change its character—they would style it a testament, that it may become revocable—they would admit it a will, only to render it nugatory—they seek not to give it effect but to destroy. We rely upon the deed as it is, signed, sealed and delivered by the grantor in his life time. Recorded and declared to all the world as his act and deed, over which he no longer had power and domain—which was and is irrevocable in its very nature.

As authorities are desired by the Court upon the question whether the paper A, is testamentary in its character, I will adduce them, with an argument to show their application.

The counsel for appellants, declared, "this distinctive characteristic of a will to be its reference to the future;" this is not precise nor accurate.

The *ambulatory* character is its distinctive attribute—that is, the act itself is not fixed till death, *nothing attaches "in presenti."* Jarman on Wills in his 1st vol. p. 11, well explains the distinction. He says, "It is this ambulatory quality which forms the characteris-

81 tic of wills, *for though a disposition by deed* may postpone the possession or enjoyment, or EVEN THE VESTING *until the death* of the disposing party, yet *the postponement* is in such case *produced by the express terms,* and does not result from the nature of the instrument."

And the author then gives an example, closely analagous to the case at bar. "Thus, if a man by deed, limits lands to the use of "himself for life, with remainder to the use of A in fee, the effect "upon the usu-fructuary enjoyment is precisely the same as if he "should, by his will, make an immediate devise of such lands to A "in fee—for the former instance, A, immediately on the execution "of the deed, becomes entitled to a remainder in fee, though it is "not to take effect in possession, until the decease of the settler, "while in the latter—(the case of the will)—he would take no inter-"est whatever, until the decease of the testator should have called "the instrument into operation."

Now apply this reasoning to the case here.

Immediately on the execution of the deed, David Gartman becomes entitled to a remainder in fee, though it is not to *take effect in possession,* until the decease of the grantor—*for the postponement* is, in this case, produced *by the express terms,* and *not* from the nature of the instrument.

Again: "A will as to personal property is considered as having existence only from the death of the testator, not from the time of its execution."

Case of Elcock's Wills, 4 McCord, 39, cited in 1 Williams on Ex. ch. 2nd, note 3.

In Audley's case, in 4 Leon, 166, it was considered conclusive against the construing an instrument as testamentary, that by it an estate was to be taken by the maker, "who could not take by his own will." See 1 Jarman on Wills, p. 13, note e. Thompson vs. Browne, 2 Mylne & Keene, 32. 8 Cond. Eng. Chancery Rep. 262.

Now, it is very true, that papers most inartificially drawn, have been admitted to probate—but for what causes, and on what grounds? *If its purpose be testamentary*—if it is *only* to be *consummated by death*—if it is *not to operate during life*—if it comprises *no beneficial dispositions*—if no interest whatever is taken under it, *but such as are ulterior to the death of the donor*—in short, if death is the event which alone can infuse any life into the instrument, then it is considered as testamentary—then it is a will and testament. Lovelass on Wills, p. 317—8. 1 Jarman on Wills, p. 11. Thorold, vs.
82 Thorold, 1 Phillim 1. Roberts on Wills, p. 59. 1 Williams on Executors, p. 53—55. Shepard's Touchstone, 399.

And it is settled law, that the will could not be valid, unless there is present the *"animus testandi."* If there were no intention of making an operative will, the paper is no will. Shepard's Touchstone, 404. Nicholls vs. Nicholls, 2 Phil. 180. Taylor vs. D'Egville, 3 Hagg, 206.

☞ He must do some act, declaring the instrument to be his will. Powell on Devises, 54. And it is clear that where the party intends to make, and does not make a deed, he does not design a will.

This paper writing, then while it is perfectly sufficient as a deed, would be entirely inoperative, were it propounded as will—for it never could be admitted to probate.

Carmack. in reply:

I. It is no answer to the argument that this instrument is testamentary, to prove, from an elaborate examination of the books, that it is, in some respects, like a deed. Like a deed, it is under seal: but so occasionally are wills. The terms "positively deeds," are used, which is by no means very common in deeds, and can, therefore, have but little, if any tendency, to prove that it was even *designed* to be a deed. Indeed this extraordinary expression is, I will venture to assert, as unusual in deeds as it is in wills. But it proves nothing in regard to the *legal effect* of the instrument, which is the question to be discussed—and but little in regard to the *design*—especially when it is connected with the word "covenant," which is now used as a term of conveyance, and with the words "bequeath," "distribution of my property," which are very common in wills, and were probably never used in a deed, unless this should be decided to be a deed.

II. The certificate of Probate proves only what the witness and Justice of the Peace *thought* of this instrument. It had a seal, and they *thought* it a deed. But their *opinions* are not authority to prove any thing to the present purpose.

III. It is mistaking the question again, to apply the doctrine, that in construing an instrument of writing, the intention of the parties, if that can be ascertained, must govern; and when it cannot be ascertained, the writings shall be construed more strongly against the party making it. These are rules to ascertain the *meaning* of the instrument—to ascertain what the parties *have said, by the instrument,* that *they would do,* or *had done.* But what the parties *designed the* 83
instrument to be; is another and very different question, which it is not at all useful to decide, nor need it be investigated, except as a matter of curiosity. For once the *meaning* of the instrument is ascertained, the law affixes its *character,* which the design of the party making it can no more control, than it can control any other stubborn rule of law.

It is not that the party thought he was making a deed, that makes it a deed. In every case, and we have shown them to be numerous, both in this country and in England, where a deed-pole or indenture, has been declared to be a will, the party who made it thought that he was making a deed; and if the rule contended for on the other side, could control the character of the instrument, they would have been deeds.

IV. A disposition of property, "to take effect after death," *unless it be a present conveyance to a trustees, to save such limitation,* has generally been held revocable, and therefore a will.

The only cases cited, which form exceptions to this rule, are those from Maryland and Tennessee. In one case in Maryland, the administrator was sued, and if the instrument was good, either as a will or a deed, it in either character conveyed title, and the question might not have been deemed material. In the other, the question whether it was a will or deed, was not made, and it probably escaped the attention of the Court. In the first case decided in Tennessee, although the Court relies partly upon the common law, to sustain the instrument as a deed, yet that decision mainly rested upon the authority of one case in North Carolina, decided shortly after the revolutionary war and a *dictum* of Judge Haywood, that that decision had become a rule of property, in both North Carolina and Tennessee. The decisions, standing alone, against the other American authorities and all the English, can be no authority here.

Numerous cases from North Carolina have been cited, almost in point, showing that this writing is a will, and void as a deed. The case in New Hampshire is in point. The party there did not offer it as a deed—perhaps he was too modest—and it was decided not to be a will, only because it had been revoked. The case in Mississippi is in point also.

V. It is not necessary that this instrument, or any other, should first be decided by the Court not to be a deed, as is contended on the other side, before it could be offered for probate as a will. This did not happen in any of the numerous cases already cited, and n 84
objection appears to have been taken to their probate as wills, on that account.

VI. It may be true, as a general rule, that instruments of this kind have been regarded as wills, because they could not operate as deeds, from a benevolent desire to give effect to them in some form or other; but I am not aware that it has ever before been argued, that such an instrument must, and ought to be a deed, lest, perchance, it might be ineffectual as a will. I cannot, therefore, see the supposed inconsistency of our argument, by which we prove this to be a will, because it happens to be our intention to have it destroyed by the subsequent will. This inconsistency which is contended for, can only be proved, by first showing that this little instrument is a more worthy object of the benevolent attention of the Court than the last will and testament of Joab Horn.

VII. This deed had no present operation, at the time it was made. Its declaration that the property mentioned in it was Joab Horn's, and that it was to remain his, and undivided, until his death, was the mere statement of a truism, which was just as true before it was stated in the deed, as it was afterwards. This cannot be called a present operation of the deed. If it may, every will has the same present operation. "And then," (after the death of Joab,) "to be bona fide the property of David Gartman!"—the only part of the whole instrument which conveys the property to David. It was to remain Joab's property during his life, and to be David's at his death—precisely such an interest as a will would have created—with only this difference, that perhaps no paper, which was a will in form, ever so explicitly described just such an interest as the law allows to be given by will.

VIII. It has not been shown that a delivery of the thing given, is not as necessary when the gift is by deed, as when by parol. A parol gift is as good as a gift by deed, if it can be as effectually proved. The deed may, in cases *of a present gift,* prove a delivery of the property, *by way of estoppel*—the donor being estopped, by his deed, from denying that every thing has been done necessary to make a present effectual gift, By this means the deed proves a delivery of the property. But there is nothing on the face of this instrument to estop the donor from denying the delivery; on the contrary, the deed itself proves that there was none, and that there

85 was to be none until the death of the donor. It was then only a promise to give it at a future time, and on that account void.

IX. All the cases read, to prove that a remainder may be created in personal property, are cases of wills or deeds of trust, except the cases from Maryland and Tennessee, if they may be regarded as exceptions. This we never denied. We merely deny that a remainder can be created in personal property, by deed, unless it be a *deed of trust*, and we have Story & Kent, to sustain us in this denial, besides the reason of the thing. By a conveyance in trust, the trustee becomes presently the legal owner; he can sue for, and recover the property, even from the *cestui que trust*. The relation of trustee and *cestui que trust*, is not known in a Court of law; it is only in a Court of Equity where it is recognized, and where contingent and future interests in personal property can be maintained and enforced.

BALTZELL, Justice.

The right of recovery of Gartman, the plaintiff, in the Court below, depends upon the legal effect and construction of an instrument of writing, in these words:

TERRITORY OF FLORIDA, *Walton County.* } Know all men by these presents, that I, Joab Horn, of the Territory and county aforesaid, being in sound mind and perfect memory, are mindful this day to make a distribution of my property to my different children, to wit: David Gartman; that for the natural love and affection which I bear towards him, and my deceased daughter, Drucilla, and the heirs of her body. In the presence of witnesses, do this day bequeath, covenant, and positively deed, a certain portion of my property, to wit: a negro man, named Will, and wife, Milly, and seven cows and calves; to which species of property, I, the said Joab Horn, have at this time in possession, and owner of, clear of any enthrallment; and is to remain undivided, and in my possession, so long as I live—and after my death, immediately the stipulated property in this deed composed, to be bona fide the property of David Gartman, with its increase, to have and to hold forever and forever.

In witness whereunto I have set my hand and seal, this 29th of June, 1829.

his
JACOB × HORN, [SEAL.]
mark.

86 And in the presents of,
JEREMIAH SAVELL,
REUBEN N. BARROW,
RICHARD J. COMPTON.

Appellants, the executors of Horn, contend that this instrument confers no right:

1st. Because there was no delivery of the property, nor a sufficient delivery in law, of the deed.

2d. Because a remainder is created after a life estate, which is not permitted by law, except in cases of trust, and by will.

3d. Because the instrument is testamentary, and was revoked by the will of Joab Horn, made afterwards.

A delivery of the property was not made—indeed, was inconsistent with the terms of the instrument. Then inquiry then arises, does a deed dispense with delivery, and is it sufficient to convey the property, with a transfer of the possession. The law, in this respect, seems to be well settled—it being held, "that in order to transfer property by gift, there must be either a deed, or instrument of gift, or there must be an actual delivery of the thing to be done." 2 Barn. & Ald. 552. Adams vs. Hays, 2 Iredell, R. 366. 2 Kent Com. 438. 2 John, 52. 2 Leigh, 340. 2 Black, 441.

If valid as a deed, a second objection is, that there was no delivery of it. The instructions asked by defendant, shew that the deed was "presented by the plaintiff, to the recording officer, for registration," and was recorded. Consequently, it must have been in plaintiff's possession. This is sufficient evidence of delivery. Gilbert vs. Dunns lessee, 14 Peters, 322.

Nor does the fact of its being produced at the trial, by the defendants, under notice, alter the case. Brown vs. Winthrop, 1 John. Chy. 329—256. Ingraham vs. Porter, 4 McCord, 198. Dawson vs. Dawson, Rice's Eq. R. 257.

The next point is, that a remainder in personal property cannot be created after a life estate, according to law.

"By the ancient common law, personal estate was little regarded, "and thought to be subject to no modifications or limitations what-"ever. A gift or grant of a personal thing, for a day, or even for "an hour, was supposed to be equivalent to a gift, or grant of it "forever." Shep. Touch. 116. "But in succeeding ages, when "commerce and civilization had given additional importance to per-"sonal estate, new rules were introduced, to make it answer better "the exigencies of society; and it was at length placed, with respect 87
"to the limitations of which it was susceptible, more upon an equality "with real estate. In England, the only difference is, that real es-"tate may be entailed, and personal cannot; and in this country, "where estates tail are abolished, the rule is exactly the same with "respect to real and personal estate." This was the case of a gift of slaves, to take effect after the death of grantor and wife, reserving a life estate—presenting the very point at issue in this case. Boyle Ch. Just. in Banks vs. Marksbury, 3 Littell R. 275.

In Smith vs. Bell, although it was the case of a will, yet the remarks of Chief Justice Marshall are pertinent to the present case. "The rule that a remainder may be limited, after a life estate in "personal property, is as well settled as any other principle of our "law. The attempt to create such limitation is not opposed by the "policy of the law, or any of its rules." 6 Peters R. 78.

In North Carolina, the modern rule was first adopted. 1 Haywood, 234. 1 Murphy, 466. Afterwards the old common law rule was declared to be in force, the Judges expressing their regret in the cases decided by them, "that a disposition of property, so just and simple in itself, could not be sustained." Foscue vs. Foscue, 3 Hawks R. 544.

"I think it a hard case," says Judge Hall, "that this species of property cannot be conveyed, in a mode apparently so simple, when *the reason* upon which the rule was originally founded, is no *more;* and cannot but regret, that decisions upon the subject had not been more comfortable to the nature of this kind of property, and the convenience of those who possessed it. Graham vs. Graham, 2 Hawks, 322.

In 1823, the Legislature altered the law as thus declared.

In S. Carolina, the Chancellor, in a case affirmed by the Court of Appeals, in 1839, says: "I shall not, after the decisions which have been made in this State, trouble myself by inquiring, whether a personal vested interest, to be enjoyed in future, can be directly conveyed by deed, either as to realty or personalty; that is a settled question." Dawson vs. Dawson, Rice's Eq. R. 261.

In Carnes and wife vs. Marley, the deed was: "I give to H. Jones, to hold to him, and his executors forever; provided, that I resume the possession, use and labor of said slaves, for and during my natural life." The cause was before the Court of Appeals of Tennessee, in 1827, when the Court decided the gift invalid. The opinion, however, was not satisfactory, and a re-argument was 88
granted. The case was again argued in 1830, and held under advisement until August, 1831. The Court then say: "Nothing is better settled than that, an interest in remainder, after an interest for life expires, may be limited in a deed for slaves. 2 Yerger, 584.

But it is needless to multiply cases, when authority is so abundant, and the question has been so ably decided. 2 Kent Com. 352 Johnson vs. Mitchell, 1 Humphrey, 173. 2 Black, 398. 7 Harris & Johnson, 257—272. 1 Henry Black, 535. 1 Murphy, 466.

The case of Thompson vs. Thompson, &c., has been cited as asserting a contrary doctrine. That was the case of an instrument *not under seal*, so that the point was not before the Court for decision. 2 How. Miss. R. 737.

The case in 12 New Hamp. R. is also relied on by appellants. It was the case of a deed not delivered to grantees, and in which the party claiming the benfit of it, conceded that it could not avail him as a deed. The question before the Court seemed to be rather as to the effect of subsequent arrangements between the parties, in revoking the deed. 12 New Hamp. 372.

We are of opinion then, that a remainder may be created in personal property, after a life estate, by deed.

The third question is, that the instrument is testamentary in its character—a question of some novelty in our courts, and of no little difficulty.

If Mr. Horn intended the instrument of 29th June, 1829, to operate as a deed, and it is not legally impossible that it shall so operate, his intention should prevail. "It is a benign principle, well established," says Chancellor Johnson, in a case confirmed by the Court of Errors and Appeals of South Carolina, "that if a paper, wearing the "form of a deed, cannot operate as a deed, it shall, (if that will not "prevent its provisions,) be allowed as a testament." Dawson vs. Dawson, Rice's Eq. R. 260. 4 Dessausure, 617.

So in Williams on Executors: "It is settled law, that if the paper contains a disposition of property, to be made after death, though meant as a deed of gift or bond, and not intended as a will, yet, if it cannot operate in the latter, it may nevertheless, in the former character." 1 Williams ex'rs, 55. 2 Haggard, 247.

"If the instrument is to be consummated only by death, and not operate during life; especially if it is not upon a stamp—contains no valuable consideration—is not delivered out of the custody of the

89 maker, and comprises no beneficial dispositions, but such as are ulterior to the death of the donor; in short, if death is the event which is to give life and operation to the instrument, the Court will grant probate of it as a will." Lovelass on Wills, 317.

"In respect to personal property, where there is a final intention proved and execution prevented by the act of God, the mere want of execution does not invalidate the instrument. The disposition intended to be made, has the same legal effect in regard to personal property as if the instruments had been actually signed and attested. It is also settled law, and several cases have been decided, that if the paper contains the disposition of the property to be made after death, though it were meant to operate as a settlement or a deed of gift, or a bond, though such paper were not intended to be a will, nor other testamentary instruments, but an instrument of a different shape, yet, if it cannot operate in the latter, it may nevertheless operate in the former character." 2 Haggard, 108—235.

These authorities are quoted without reference to the effect of our statute on the subject of Wills, which it is not necessary here to notice.

The question then is, can this paper be sustained, and operate as a good and valid deed? The rules for the transfer of real estate have long since been established, and their meaning, force and effect declared and well understood. We are not aware that any such exist, or have been prescribed as to personal property. Undoubtedly less form is required to transfer personalty; such property ordinarily is passed by mere delivery. The most that the authorities seem to require is, that there be an actual gift—a design consummated—not the mere intention to give. In the case in 2 Yerger above cited, the words used were "I give," and the deed was held sufficient. In the case of Dawson vs. Dawson, the deed was in these terms, "this day I Richard Dawson, do give to my named children in my will, all my real estate, and all my personal property, and goods and chattels to my named children in my will, and I do acknowledge this day, to be theirn, and no others than those named in my will, and the use therein menshened." This, also, was established as a valid deed, coupled with the will so as to make the instrument take effect in futuro.

In Grangive vs. Arden, the holder of a lottery ticket wrote the name of his daughter on it and put it in his desk, afterwards said "the ticket was hers;" it did not belong to him, he had given it to his daughter, &c.

90 "These declarations, say the Court, recognize a gift as having been made. They afforded reasonable grounds for a jury to infer that all the formality necessary to a valid gift had been complied with." 10 John, 296.

In the case of Johnson vs. Mitchell, the words were, *"I agree to throw into* the hands of my sons-in-law." The Court say, "that these words however unusual and inartificial, want the force and efficacy of the words, give or transfer, &c., it would be difficult to maintain," &c. I Hump. 173.

"In the construction of deeds the Court will lean towards giving validity to a deed. If it will not have an operation one way, it may operate in some other way." Chase, Justice, 1 Harris & John, 527.

"There is one general principle that runs through the construction of deeds, that they are to be construed most beneficially for the party to whom they are made; and 2ndly, that a deed shall never be void, when the words may be applied to any intent to make it good." 1 Plow. 159.

It is true, that the instrument under consideration has some of the terms peculiar to wills, "being in sound mind and body, are mindful this day to make distribution, do bequeath;" yet the remainder of it has terms and provisions not contained in a will, but peculiar to a deed, showing an evident purpose to convey, a design executed, some thing done, in fact a deed. It does not commence as a will, but in the form of a bill of sale, "know all men by these presents;" it contains a consideration. The words, "do this day covenant," import agreement, bargain and obligation; "positively deed," a certainty of transfer, a determination and purpose evidenced by use of a word in common acceptation, the most solemn and effectual, that is known among men. The reservation of a life estate especially would be absurd in a Will. It is entitled as a "deed of gift to David Gartman" by the person who drew it, and the probate by Compton, one of the witnesses, before Jeremiah Savell, a Justice of the Peace, who is also a witness and a defendant in the case, states, "that the within deed was fairly assigned and delivered in his presents."

It is a striking feature of this case, that the object in construing this instrument a testament, is to effect its destruction, whereas the benign principle of construing, deeds, &c., as wills, was designed for their preservation. If the instrument were defective as a deed, the argument might be more effectual under the authorities to sustain it as a will.

It has been insisted in this Court, that the deed was invalid, for 91 want of a consideration, Gartman being only the son-in-law of Horn. This point was not presented in the Court below, from any thing appearing in the record; and after a verdict we should be inclined to regard the case of plaintiff as made out except as to the objections raised by the bill of exceptions. The position however is not sustained by the authorities. Voluntary agreements in favor of strangers are sustained, and "with respect to chattel interests, an agreement under seal imports a consideration at law." 3 Burrow, 670. 7 T. R. 350. Beard vs. Mitchell, I Vern. 42. 3 P. Wms. 222. Brown vs. Winthrop, 1 John ch. 336. 4 Com. Dig. 266, Fait B. 4 b.

Delivery of this slave to Gartman would have been good by way of gift, and if a deed supplies the place of, and is a substitute for delivery, there would seem to be no objection to the want of a consideration.

One of the errors assigned is that the deposition of Jeremiah Savell one of the defendants and executor of the will of Joab Horn, was offered in evidence, but rejected by the Court. The deposition is not a part of the record, nor does the bill of exceptions state what was designed to be proved by it, or the ground on which it was rejected. Under these circumstances, we cannot say whether the decision was right or wrong. We cannot take it for granted that the objection was because he was executor. It may have been that his testimony was not material, and this is in accordance with the ground invariably acted upon by Appellate Courts, that every fair intendment is to be made in support of the judgment below. The office of a bill of exceptions is to give the facts on which the Courts decided, and it should give all the facts bearing upon the decision, so that the Appellate Court, may know fully and clearly every thing which influenced the decision of the Court. After a statement of these facts it may then be stated, that the Court instructed the jury or decided in such manner upon the facts so stated.

Upon the whole case, we are of opinion that there is no error in the instruction given in the Court below, and that the judgment be affirmed.

The original deed produced in this Court will be delivered to appellee's attorney, to be filed in the Court below.

THE STATE *vs.* RICHARD K. CALL. 92

IN a criminal case, a certificate of the Judge who presided at the trial, which neither states nor intimates a doubt upon any legal question, but merely expresses a desire to have the cause heard before the Court of Appeals, is not sufficient, under the statute, to give this Court jurisdiction.

THE defendant was indicted at the Spring Term, 1844, of the late Superior Court of the Territory of Florida for Wakulla county, for unlawfully erecting in the river St. Marks, a navigable watercourse, a certain pier and obstruction, composed of wood and rock, and permitting the same to continue there; whereby the navigation and free passage of the said river, it was alleged, was greatly obstructed and straightened.

At the trial, a bill of exceptions was prepared and tendered by the counsel for defendant, which was signed and sealed by the presiding Judge; he attaching thereto the following certificate:

"The Court being desirous that the same might be heard before the Court of Appeals of this Territory, has signed and sealed this bill of exceptions."

The defendant, by his counsel, at the same term, filed his motion for a new trial.

At the Fall Term, 1845, the Circuit Court, the motion for a new trial being renewed, the then presiding Judge made a full statement of the facts and evidence, and transmitted it to this Court, with the following certificate:

"The motion to set aside the verdict, and for a new trial, was renewed before me during the late Circuit; and concurring in the wish of my predecessor, that this case might be heard in an appellate Court; and "entertaining doubts upon the legal questions" arising in it, I have made this statement, and transmit the same to the Supreme Court, for its consideration and decision.

"AT CHAMBERS, Tallahassee, Dec. 26th, 1845."

Attorney General, for the State.

Long & Walker, for the defendant.

HAWKINS, Justice:

This case comes before the Court on bill of exceptions, signed by Samuel J. Douglas, late Judge of the Superior Court of the Ter-

93 ritory, stating the instructions he had given to the jury on the trial before him and concluding as follows, "to which instructions given by the Court, the defendant's counsel excepted, and the *Court* being *desirous that the same might be heard* before the Court of Appeals of this Territory, has signed and sealed this bill of exceptions."

The first question presented by the record for the consideration of the Court is, have they jurisdiction of the case.

The act of the Territorial Legislature passed in 1833, gave the benefit of an appeal or writ of error to the Court of Appeals of the Territory, from all final judgment and sentences of the Courts of the Territory. Acts 1833, page 113.

This law was expressly repealed by an act passed in 1841, declaring, that from and after the passage of this act, *no appeal or writ of error, or bill of exceptions* to evidence, should be entertained or allowed, or granted to a defendant, or defendants, in criminal prosecutions in any of the Courts of this Territory; but if in the trial of any criminal prosecution, the Judge before whom the same is tried, *shall entertain a doubt upon any legal question* arising in the case, then and in that case, the said Judge may continue the same, and shall as soon as convenient make a statement in writing of the question of law, and carry up or transmit the same to the Court of Appeals for its consideration and decision. Acts 1841, page 7.

The design of the Legislature is too clearly expressed in the act, to occasion a doubt as to their intention.

The certificate of the Judge neither states nor intimates a doubt, but expresses merely a desire to have the cause heard before the Court of Appeals. If the Legislature designed an appeal in such a case, they have not so declared it.

A question of this kind arose before the Court of Appeals of the State of Mississippi, in which the following view was taken: "It is a general rule, that the Appellate Court can act only on the record from the Inferior Court, which must contain a case sufficiently certain in its character to enable this Court to act upon it. Admitting that the powers of this Court are co-extensive with those possessed by the former Supreme Court, the *doubts* of the Judge below, if any existed, being all that could give jurisdiction are not properly certified to this Court. It should clearly appear by the record that the Judge entertained *doubts* as to the rule of decision, and for this reason that he had adjourned the question on which he *doubted*, to this
94 Court for its decision." Caraway vs. Board, Police, Yazoo County, 1 Howard, 22.

The case ought rightly to have been presented to the Court of Appeals of the Territory at its last session, and the Judge of the Circuit Court finding it in the Court below, with the certificate of the Judge, did rightly in having the papers transmitted to this Court for its action. The Court having no jurisdiction of it, will have it remanded to the Circuit Court of the County, where it was tried.

It is therefore considered by the Court, that this case be dismissed from the docket, and the papers remitted to the Circuit Court for the County of Wakulla, for further proceedings to be had therein, agreeably to law.

THOMAS U. WHITE *vs.* JOHN G. CAMP.

A PLEA, filed under oath, alleging the failure or want of consideration of a bond, note or other instrument of writing, throws the onus of proving the consideration of the instrument sued on, upon the plaintiff; but the consideration can be inquired into only between such parties as it might have been at Common Law.

In an action by the endorsee against the maker, a plea, under oath, denying the consideration of the instrument sued on, does not throw the onus of proving the consideration on the plaintiff.

When a bill or note is endorsed in blank, the presumption of law is, that it was endorsed on the day of its date, or at least before it was due; and if the defendant alleges that it was endorsed after it was due, the burthen of proof is on him to show it.

The affidavit of a want or failure of consideration, should be drawn in issuable terms, and confined to a single allegation, and should not be in the alternative or double; it should be so constructed as to apprise the plaintiff what facts he would be required to prove on trial.

ERROR to Leon Circuit Court.

The facts are contained in the opinion of the Court, delivered by Justice Hawkins.

J. T. Archer, for plaintiff in error:

1. The Court below erred, in determining upon the 2d plea, affidavit, and notice of special matter, that it was necessary for the plaintiff to prove a consideration from Reese, the payee, to defen- 95
dant, the maker.

First. The 24th section of the act to amend an act regulating Judicial proceedings, approved November 23d, 1829, was intended to add to the force and effect of promissory notes; but the effect of this section has been to *impair* their force and effect, under the construction that, a denial under oath, of the consideration of a note by the maker thereof, overcomes the evidence of consideration contained in the note itself, and renders it necessary for the holder to produce *other* evidence of a consideration, before he can recover. Whether this construction be the correct one, is not necessary to be discussed or decided in this case. The effect of it is, to permit the maker of a note, on issues touching the consideration or execution of the same, to become a witness in his own case, while the same privilege is denied to the holder; but it does not allow any defences to be set up, which were not defences before the statute was passed; it affects the *proof* only.

The plaintiff claims as bona fide holder, under an endorsement in blank, by Reese, the payee; and it is clear and unquestionable, (if the statute affects only the rules of evidence,) that a want of consideration from Reese to Camp, cannot affect the plaintiff's right to recover.

The fraud alleged in the second plea, which prevented a demurrer, is not sustained by proof—the affidavit of defendant to the truth of the plea not being evidence, either at common law or under the statute, to support the allegation of fraud.

Second. The facts detailed in the notice of special matter, and sworn to by the defendant, shew that there was a consideration given him for the note, and disprove the allegations of the 2d plea. The Court should, therefore, having given judgment for the plaintiff, in the issue upon the second plea, affidavit and notice of special matter.

II. The Court erred, in determining upon the third plea, affidavit and notice, that it was incumbent on the plaintiff to prove the consideration of the endorsement to plaintiff.

The 34th section of the same act, provides, that it shall not be necessary for the assignee or endorsee of any instrument, assignable by law, to set forth in the declaration, the consideration upon which such assignment or endorsement was made, nor prove such consideration, unless the same shall be impeached by the defendant under oath. This section does not provide for an inquiry into the consideration of an endorsement or assignment of any negotiable or assign- 96
able instrument, where, by the old law, such inquiry would not be permitted. The most that can be claimed for the defendant, under this section, is the right, upon such inquiries into the consideration of the said endorsement as are authorized by the common law, to give in evidence his own affidavit, so as to put the *onus probandi* upon the plaintiff.

If this section, in like manner as the 24th, cannot be construed to create any new grounds of defence, and at furtherest, can only be considered to amount to an alteration of the rules of evidence, then the consideration from plaintiff to Reese cannot be inquired into by defendant. There is no privity of contract between the plaintiff and defendant; and it is immaterial to defendant whether the plaintiff got the note from Reese, with or without consideration.

The allegation of fraud, (which prevented a demurrer to the 3d plea,) was not proved; and it is perfectly clear that, in the issue upon the 3d plea, judgment should have been given for the plaintiff.

III. On the pleadings and evidence, the plaintiff was entitled to recover.

The affidavit made by the defendant, contains various statements; is drawn in the alternative; is unintelligible, double, uncertain, and not in conformity to the statute. It should not have been received, and is, in its present shape, no evidence. The only legal evidence in the case, is the note and proof of the endorsement by Reese; and this evidence is sufficient to determine all the issues in favor of the plaintiff.

No counsel for defendant.

HAWKINS, Justice:

The action in the Court below is of assumpsit, by Thomas U. White, the plaintiff in error, endorsee, against John G. Camp, maker of the following promissory note:

"127 97-100. SANDUSKY CITY, Sept. 6, 1839.

"Due on demand to William T. Reese, or order, for value received, one hundred and twenty-seven 97-100 dollars.

"JOHN G. CAMP.

(Endorsed)—"W. T. REESE."

The declaration contains a count upon the note, money counts, and account stated.

The defendant, Camp, put in three pleas: 1st, Non assumpsit.

97 2d, That the promissory note sued upon was given and made without any lawful or valuable consideration, and was obtained by the payee, Reese, by fraud, misrepresentation, concealment, covin, and deceit, and that the said note was, and is void, &c. 3d, That the endorsement or assignment of the note was made without any lawful or valuable consideration, and in fraud of the rights and interest of the defendant, to deceive and defraud him in the premises.

Accompanying the plea, there was a notice to plaintiff that, under the general issue pleaded, the defendant would prove that said William T. Reese, one Thomas Neill, Isaac A. Mills, and defendant, owned as tenants in common, a certain tract of land in Sandusky, Erie county, in the State of Ohio, and attempted to make division of said lands; and said note was given for the supposed difference due said Reese in said division; that since then, one Owen Follet, of whom said Reese purchased, has instituted proceedings to get said Reese's share of land, said Reese never having paid him the purchase money; and that the attempted division of said land, on which said note was predicated, is nullified and void, in consequence thereof; and that the same was, therefore, given without any consideration; or if there was any consideration, it has totally failed. That said Reese had since been declared a bankrupt; that the endorsement of the note to plaintiff was fraudulently made, by collusion, with knowledge and notice by plaintiff of the facts as before stated; that Reese was largely indebted to him, the defendant, at the time of the transfer of the note, and before, for defendant's blank endorsements, given to him for specified purposes, which Reese did not comply with, but made use of the same, by getting them discounted, and misapplied the proceeds, not as he engaged appropriating it, to pay for said land to Follet, and so release it, so as to effectuate said division; all of which the defendant alleges plaintiff had notice of, and that defendant would rely on said facts, in bar of the action.

Appended to this notice was an affidavit, in which the defendant denies, on oath, the consideration of said note declared on; and also saith, that if the consideration was legal and valid, the same has totally failed. He further denies, on oath, the consideration of said assignment or endorsement of the note, and that he believed the facts, as set forth in the notice, are true.

The plaintiff replied by similiter to the plea, and take issue on the second and third.

The parties waived a trial by jury, and put themselves upon the
98 judgment o fthe Court. By the bill of exceptions, it is shown, that the plaintiff ordered in evidence in support of his declaration the note sued upon, and satisfactorily proved the signature of the endorser, Reese; and thereupon Camp, the defendant, after exhibiting his affidavit, made under the statute, asked the Court, to determine upon the pleadings, that the plaintiff to recover must prove the consideration for which the note was given by Camp to Reese, under the second plea, and notice of special matter; and under the third plea and notice as aforesaid, must prove the consideration of the assignment or endorsement by Reese to plaintiff; and the Court so determined, and gave judgment accordingly for defendant.

To that opinion the plaintiff excepted; and thereupon a writ of error issued.

The counsel for the plaintiff in error assigns the following errors:

First. The Court erred in determining that, upon the second plea. and affidavit, and notice, it was necessary for the plaintiff to prove the consideration of the note, before he could recover.

Second. The Court erred in determining, that upon third plea, affidavit and notice, it was incumbent upon plaintiff to prove consideration of the endorsement or assignment, from Reese to him.

Third. That upon the pleadings and evidence in the cause, plaintiff was entitled to judgment.

The defendant, in the Court below, has attempted to avail himself of the provisions of the statutes of Florida, as to the proof of the execution and consideration of bonds, bills, notes, *et cetera*, contained in the twenty-fourth and thirty-fourth sections of the act, in relation to judicial proceedings, passed November 23d, 1829. Duval's Compilation, 95 and 96.

Section 24, after stating that all promissory notes, and other writings, not under seal, shall have the same force and effect as bonds and instruments under seal, says that: It "shall not be necessary "for the plaintiff to prove the execution of any bond, note, or other "instrument of writing, purporting to have been signed by the de- "fendant, nor the consideration for which the same was given, un- "less the same shall be denied by plea, put in and filed as aforesaid, "(i. e. on oath,) and filed before the cause is called upon the ap- "pearance docket."

Section 34th declares: "That the assignee or endorsee may bring "suit in his own name; nor shall it be necessary for the assignee or "endorsee of any instrument, assignable by law, to set forth in the "declaration the consideration upon which such assignment or en- 99 "dorsement was made; nor to prove such consideration, unless the "same shall be impeached, by the defendant, under oath."

The instruments "assignable by law," referred to in this, and the thirty-third section of the same act, are bonds, notes, covenants, deeds, bills of exchange, or other writings, whereby money is promised or secured to be paid; and the assignment of these instruments vests in the assignee or endorsee, the same rights, powers and capacities, as are possessed by the assignor or endorser.

The subjects arising for the consideration of the Court in the cause before us, involve the discussion of the inquiry, whether the statutes cited can be legally applied to the present case; and *between what parties* to suits in promissory notes, their aid is be invoked in the defence of those actions.

Statutes of the character of those under review, while in some degree they bear the impress of a remedial character, are entitled to a fair construction as to those in whose favor they are enacted, so far as is requisite to carry out the intention of the Legislature, when that intention, by legal rules of construction, can be ascertained.

Ordinarily, remedial statutes seem intended to supply any defects or imperfections in common law, where the remedy is deemed imperfect, or too narrow, to subvert the ends of justice, when they become what are termed enlarging statutes; but those under consideration cannot be embraced in that class, as they do not amplify or add to the remedy, as known at the common law; but being in derogation of it, should be construed strictly, for it is laid down that a statute, which takes away a common law remedy, ought never to have an equitable construction.

The statutes before us certainly affect the remedy hitherto possessed by the plaintiffs, in suits on promissory notes, by throwing the *onus probandi* upon him, by the defendant's taking the oath, as prescribed by the statutes. They are in direct derogation of the old rules of the common law, as to the defence of actions, and the principles of evidence, as to suits brought upon the above instruments. Chancellor Kent says, that statutes are to be construed "in refe- "rence to the principles of the common law, for it is not to be sup- "posed, that the Legislature intended any innovation of the common "law, further than the case absolutely required." 1 Kent Com. 464. And Lord Tenderden remarks that, "there is always danger "in giving effect to what is called the equity of a statute; it is much "better and safer to rely on, and abide by the plain words, al- 100 "though the Legislature might have provided for other cases, had "their attention been directed towards them." 6 B & C. 475.

From a review of the statutes cited, and being in *pari materia*, they should be construed together: the effect is clearly this—that upon the oath being taken, in compliance with the requisitions of the statute, and by *proper parties*, the onus of proof is thrown upon the plaintiff, and he is bound to prove the consideration of the instrument, upon which suit is brought. The 24th section of the act cited is silent, as to the parties between whom the consideration can be gone into; and in accordance with the views herein before expressed, we are of opinion that it can only be applied between such parties as the consideration could have been entered into at common law. It is possible that this section may have been intended to have had a more extended operation—if so, there is a *casus omissus*, and this cannot be supplied by a Court of law, for that would be the assumption of legislative powers by the Judiciary, and we are bound to take the laws, as the Legislature have enacted them.

The 34th section of the act is sufficiently explicit, and clearly relates to suit brought by the assignee or endorsee of the instruments therein set forth, against the assignor or endorser, and seems to have an eye to the privity existing between parties, at least, to notes and bills of exchange.

To give any other construction to these statutes, would produce results, which the Legislature could never have intended or anticipated—if otherwise, there would be no safety in the receiving or purchasing any of the instruments set out in the statute, particularly bills of exchange and promissory notes. These being assignable by endorsement or delivery, circulating from hand to hand, in accordance with the liberal and comprehensive notions of commercial policy, and entering into every day transactions of life, every consideration demands, that no restraint should be placed upon their free circulation, by the enforcement of a principle of defence, not set forth in the plain words of the act, and in restraint of the remedy at common law.

The question now arises, can the consideration of the note in suit be gone into between White, the endorsee, and Camp, the maker of the note, by the common law.

The total, or partial want, or failure of consideration, of the illegality of consideration, may be insisted upon as a defence or a bar between any of the intermediate or original parties to the contract.

101 It may be insisted upon by the maker against the payee, and by the payee and his endorser, and cannot be inquired into between the endorsee and the maker. 208 Story on Prom. Notes. Braman vs. Hess, 13 John. R. 52.

The holder of a negotiable instrument, taken before due, is *prima facia* rightful owner of it, and he ned not prove consideration, except circumstances of suspicion appear; and to render it void in the hands of an innocent endorsee, there must be a knowledge of the want, failure, or illegality of consideration. 4 Hill, 442. 6 Wendell, 615.

The defendant in the Court below, though he pleaded illegality, want and failure of consideration, et cetera, adduced no proof that the plaintiff took the instrument sued upon, under suspicious circumstances, or with knowledge of the defects alleged; and the rule now is, that the endorsee, when plaintiff, need not prove a *bona fide* consideration paid by himself; until some suspicion is cast upon his title. 1 Moody & Robinson, 366.

So far as the evidence in the Court below is concerned, White is clearly a *bona fide* holder, for a valuable consideration, without notice—and in accordance with the law, as to notes payable *on demand*, a holder before the note was due.

The presumption of law is, that when a bill or note is endorsed in blank, that it was endorsed on the day of its date, or at least before it was due. If the defendant alleges, that it was endorsed after it was due, the burthen of proof is on him to shew it. 137 Bailey on Bills. Pinkerton vs. Bailey, 8 Wendell R. 600. When a promissory note, payable on demand, is endorsed within a reasonable time after its date, the endorsee has all the rights of an endorsee receiving a negotiable instrument before it comes due. If not endorsed in a reasonable time, it is considered as overdue, and dishonored, and the endorsee will be subject to any defence, which would have been available against his endorser. 135 Bailey on Bills. 4 Mass. 370. What is considered reasonable time, is not precisely settled, but depends upon the circumstances of each particular case; but the presumption is, that it was transferred within a reasonable time, unless the contrary is proved. 137 Bailey on Bills.

The Court, upon a view of the case, is of opinion, that the affidavit of Camp should have been treated as a nullity; that the Court erred in receiving it; and that the cause should have been tried solely upon common law principles. But even if the affidavit should have
102 been received, it is not such a one as the statutes required. It should have been drawn in issuable terms, and confined to a single allegation—not in the alternative or double—but should have been so constructed, rendering it analagous to the old English rule of notice, as to have apprized the party plaintiff, which facts he would be required to prove upon the trial. It first denies the consideration of the note; and if it was valid and legal, it has totally failed, while the facts as set forth in the notice, would seem to make out a case of original consideration of the note.

In conclusion, we think the errors well taken. The judgment in the Court below must be reversed—the cause remanded to the Court below—and *venire de novo* awarded.

Douglas, Chief Justice:

At common law, promissory notes and bills of exchange were negotiable; they imported a consideration; if endorsed before they fell due, the consideration could not be gone into, except between the original parties, unless there were some suspicious circumstances attending the transaction; and if there was nothing to shew the time when the endorsement was made, it was presumed to have been made before they fell due. If endorsed after they became due, the endorsee took them, subject to all the equities that existed between the original parties thereto.

The first clause of the 34th sec. of our judicial act, Duval's Comp. 96. makes, any bond, note, covenant, deed, bill of exchange, or other writing, whereby money is promised, or secured to be paid, transferable by assignment or endorsement.

It is proper to remark here, that this act was passed in the year 1828, and that the Legislature, at the same session, repealed the act which had before introduced into the Territory of Florida the common law of England. This judicial act, therefore, was the only law in force in Florida, touching these several classes of instruments, until the common law was again introduced in the year 1829. Hence, the reason why notes and bills of exchange are found in this category.

Many of these instruments, although made negotiable by assignment or endorsement, did not, at common law, import a considera tion; and without that law, a doubt might well have been entertained, even in regard to those which *did*. To remedy this inconvenience, and carry out the views of the Legislature as to all, which it is presumed, was to increase the quantity of negotiable paper, in a new country, where there were few mercantile transactions, and 103
the circulating medium was scarce, the 24th sec. of the same act declared, that all promissory notes, and other instruments of writing, not under seal, should have the same force and effect, as bonds and instruments under seal.

The full effect of this provision upon these instruments, has never, (so far as I am aware,) been judicially determined. It certainly has not been supposed, by the legal profession, to give them such an effect, that an action of covenant could be maintained upon any one of them.

But they import a consideration, and without some further provision, the plaintiff could not, in any case, have been required to prove such consideration, unless it has been impeached by *proof* on the part of the defendant.

The last clause of the 34th sec. above cited, therefore declared, that the assignee or endorsee of any such instrument, might bring suit in his own name; and that it should not be necessary for the assignee or endorsee of any instrument, assignable by law, to set forth in the declaration, the consideration upon which such assignment or endorsement was made; nor to prove such consideration, unless the same should be impeached by the defendant under oath. And the 2d clause of the 24th section also declared, that it should not be necessary for the plaintiff to prove the execution of any bond, note, or other instrument of writing, purporting to have been signed by the defendant, or the consideration for which the same was given, unless the same shall be denied by plea, put in on oath.

What is the converse of these propositions? Why, that if such plea is put in on oath, in the one case, or the consideration in the other is impeached under oath, the plaintiff must prove the execution and consideration in the one case, and the assignment, or endorsement, and consideration thereof in the other—in all cases where the rule would apply to such instruments, so endorsed, at common law—for notwithstanding the Legislature had repealed that law, it cannot be supposed that they legislated, without any regard to its wise and equitable provisions.

The object of the Legislature was, as before remarked, to increase the quantity of negotiable paper; but these provisions of the statute would in a great measure, have defeated their own object, if such plea or impeachment required this proof from the plaintiff in any case, except between the immediate parties to the instrument, or where the plaintiff has taken it after it had become due, or under such 104
other suspicious circumstances, as should have put him on inquiry.

We are warranted, therefore, I think, in the conclusion, that these provisions of this statute only apply, as between the immediate parties to the transaction, or such others as have taken these instruments after due, or have not acted in good faith, or with due circumspection in cases attended with suspicion; and this, as I understand it, is all that the opinion, delivered yesterday by Judge Hawkins, in this case intended to assert on the subject.

Baltzell Justice, dissenting:

In the decision made in this case I fully concur, but do not agree to those parts of the opinions delivered which declare, "from a re-"view of the statutes cited and being in pari materia, they should be "construed together; the effect is clearly this—that upon the oath be-"ing taken in compliance with the requisites of the statute and *by "proper parties* the onus of proof is thrown upon plaintiff, and he "is bound to prove the consideration of the instrument upon which "suit is brought." And in the opinion of the Chief Justice "We "are warranted therefore I think in the conclusion, that these provi-"sions of this statute only apply as between the immediate parties "to the transaction, or such others as have taken these instruments "after due, or have not acted in good faith or with due circumspection "in cases attended with suspicion." Whilst the decision of the Court exempts bills of exchange and promissory notes in the hands of an innocent holder from the effect of the provision of the statute cited, this clause declares that all other instruments are subject to it, and that in case of suits brought upon them where an affidavit denying the consideration is filed, the burthen of proof is thrown upon plaintiff to establish it. I greatly regret that an expression of opinion upon this point was deemed necessary, as it did not occur in the case, had not been argued and was not presented by the record. It has been made however, and imposes upon me the duty of expressing my own views upon the subject, though reluctant to declare a dissent from the opinion of a majority of the Court. This is rendered the more necessary from the fact that the construction given, if persevered in, will lead in my opinion to very great embarrassment in practice, if not to serious injury and injustice to parties.

The position is that the plea of no consideration, verified by affidavit, throws the burthen of proof on plaintiff. That the plea of it-

105 self has not this effect is evident, being "a mere statement of defendant's ground of defence." 3 Blacks. Com. 225.

Has the plea with the affidavit this effect? The question may in some degree be answered by inquiring into the purpose and objects for which affidavits are used when attached to pleas and other proceedings.

"Affidavits are usually for certifying the service of process or other matter touching the proceedings in a cause." 1 Jacob's Law Dict. 64.

Also, by adverting to cases of pleas, to which affidavits are required by law.

Dilatory pleas are required to be under oath by statute, so also, pleas, puis darrien continuance. 1 Chitty, 452-3—638.

An oath is required "to prove the truth thereof, or show some probable matter *to the Court*, to induce them to believe that the fact of such dilatory plea is true." Ibid, 452.

It is no where held or even intimated, that in any of these pleas so supported by affidavit, the burthen of proof of the matter pleaded is thrown on the plaintiff.

To give the plea and affidavit the effect asserted would be to make them more than proof; by throwing the proof on the other side they are in this respect *conclusive* until rebutted by stronger testimony. Now I cannot find that the voluntary affidavit of a defendant is any where, in any of the books regarded as evidence, much less as conclusive.

"The plaintiff or defendant may take affidavit, yet it will not be "admitted in *evidence at the trial* but only on motion." 1 Lilly, 44. 1 Jacob's Law Dic. 64.

"It is undoubtedly a *sound rule* which ought *never to be violated*, "that no man can be a *witness in his own cause*. The affidavit of a "party is received on many incidental questions addressed *to the Court*, "and *do not effect the issue to be tried by the jury*. The testimony "which establishes the loss of a paper is addressed *to the Court*, and "does not relate to the contents of the paper. It is a fact which may "be important, as letting in the party to prove the justice of the "cause, but does not itself *prove any thing in the cause.*" Ch. Just. Marshal, in Taylor, vs Riggs, 1 Peters, 597.

"The general rule is that a party to the record in a civil suit can-"not be a witness either for himself or for a co-suitor in the cause." Greenleaf, 378.

106 "But though in criminal cases the exceptions are few indeed, in "which a party interested may not be a witness, in civil cases there "is hardly at common law an instance where the case is so circum-"stanced that he may, and this upon clear reasons operating such ex-"clusion. An universal exclusion, where no line short of this could "have been drawn, preserves infirmity from a snare, and integrity "from suspicion and keeps the current of evidence thus far at least, "clear and uninfected." 1 Gilb. Ev. by Loft. 223—224.

If the defendant is permitted to make evidence in his own cause, let the privilege be mutual, and extended to plaintiff, and let both be examined as witnesses.

Whilst no authority can be found for making the affidavit of the party, evidence for him on a trial before a jury, the law is well settled, that the affidavit of defendant is evidence against him. 2 Starkie's Ev. 21.

It may be regarded as established, I think, that an affidavit attached to a plea is not evidence, and cannot be read to the jury. Its only effect then, according to the authorities, would seem to be that "of certifying or proving the truth thereof *to the Court*, to induce them to believe the fact of the plea to be true."

I have thus far considered the question on general principles and the authorities bearing upon the point. It is now proper to advert to the statute itself, to ascertain the design of the Legislature in passing the law which is the subject of consideration.

"Three points are to be considered in the construction of all reme-"dial statutes, the old law, the mischief and the remedy; that is how "the common law stood at the making of the act, what the mischief "was for which the Common Law did not provide, and what remedy "the Legislature provided to cure the mischief; and it is the busi-"ness of the judges so to construe the act as to suppress the mischief "and advance the remedy." 1 Blacks. Com. 87. 1 Kent. 464.

First let us see what the common law was previous to the passage of this statute. "Inadequacy of consideration in sealed instruments "could not be impeached or inquired into at Law, for every bond "from the solemnity of the instrument carries internal evidence of a "good consideration." 2 Blacks. 445 and notes.

"Bills of exchange and promissory notes, partake also of this priv-"ilege; hence it was unnecessary to establish that a promissory note "was given for a consideration, and the burthen of proof rested on "the other party to establish the contrary, and to rebut the presump-"tion of validity and value raised by the law for the protection and 107
"support of negotiable paper." 2 Blacks. 446. Story on prom. notes. 197, 207-8, Sec. 181.

Contracts in writing not under seal had not this privilege, and in reference to them, consideration was required to be proved by plaintiff. 2 Black, 446, n. 7 T. R. 350.

The mischief then was, first the difference prevailing between writings with and without seals, which by the advance of civilization had become more in name than reality. Secondly, the frequent contesting of the consideration of written instruments on insufficient grounds. Thirdly, that the consideration of sealed writings could not be inquired into.

The remedy was 1st, to put all written instruments on the same footing, by giving to all the force and effect of bonds and instruments under seal; and secondly, to allow them to be contested, only by affidavit; hence it was declared not necessary for the plaintiff to prove "the consideration for which any bond, note or other instrument of writing was given, unless the same shall be denied by plea put in and filed under oath." Now of this it may be premised that the statute does not say that plaintiff shall prove the consideration, if it is denied by defendant; which would have left no room for construction, being a clear and decided expression of the legislative will; but the expression is "it shall not be necessary unless denied," which is tantamount to an expression merely, that if the defendant do not deny the consideration on oath, it shall not be necessary for plaintiff to prove it, but shall be taken as proved; and if denied by affidavit, it shall be considered as put in issue, to be tried according to the rules of law governing in such cases.

The issue is to be proved by the party raising it; nor is it an answer to say that defendant is not required to prove a negative, and that this plea is of this character. It is not every negative a party is relieved from proving, and I apprehend this issue is of that character. 4 Mass. 349. 4 Pick. 174.

By this construction according to my view, the mischief, in the mind of the Legislature, is fully avoided and the remedy advanced. By it uniformity in these instruments is effected, the verity attached from time immemorial to sealed instruments as the deliberate and solemn act of the parties is preserved, and they at the same time are not relieved from a wholesome and proper enquiry on a proper showing by defendant of the want of consideration. By it a wise and beneficial operation is given to the Statute, and every reasonable de- 108
sign of the Legislature is accomplished. But suppose the other construction to prevail, and the consideration is taken as disproved, so as to throw the burthen upon plaintiff; is it not perceived that the whole force and character of the instrument is at the mercy of one of the parties, and that party by his own solemn act, and every rule of right and propriety, estopped from making such a defence. If this rule is to prevail, there can be no further use for a bond, note or other obligation, hitherto adopted as the means of terminating a difficulty or dispute by some solemn act, having an admitted legal sanction. Is it not seen too that this rule will be highly injurious in case of notes, bills of exchange, bonds and other sealed instruments, which by the consent of almost the whole civilized world, from their very structure import a verity, and are regarded as made on consideration; and with what propriety can it be supposed that the Legislature in an act affirming the force and effect of these instruments, could have designed a provision by implication aimed at their vitality, and calculated more than all others to destroy their efficacy.

If it be true, as asserted by the Court in a rule of construction appealed to by them, "that it is not to be supposed that the Legislature "intended any innovation of the common law, further than the case absolutely required;" then I think we may safely conclude, that the construction asserted is not the correct one.

There would be "an innovation not absolutely required," in my opinion, by allowing the defendant to make evidence for himself, though an exparte affidavit, in violation of all principle, by throwing the proof from the shoulders of defendant on those of plaintiff, of an issue raised and presented by himself, and a further most injurious innovation by destroying the verity of sealed instruments and other writings. Such a rule, in my opinion, would create a greater mischief than that which the statute was designed to remedy. And its consequences are not to be confined to this Statute. Complainants file an affidavit to their bills in chancery, defendants to their plea to an application to foreclose mortgages at law; under the law for the trial of the right of property, plaintiff files his affidavit, and other instances not on our statute books. Are these also, to be embraced by the same construction?

It will not do to say that an answer in Chancery bears an analogy to the present case, since defendant is called on by plaintiff to give his testimony, and thus makes the answer evidence against him. Greenleaf's Ev. 397.

109 I shall conclude my views of this subject by referring to other rules of construction pertinent to it, and which ought to have their bearing in its consideration.

"Thus the real intention when accurately ascertained, will al-"ways prevail over the literal sense of terms, and the reason and in-"tention of the law gives will control the strict letter of the law, "when the latter would lead to palpable injustice, contradiction and "absurdity." "When the words are not explicit, the intention is to "be collected from the context, from the occasion and necessity of "the law, from the mischief felt and the remedy in view; and the in-"tention is to be taken according to what is *consonant to* reason and "good discretion." Plowden, 205. 1 Kent's Com. 462.

"Where fundamental principles are overthrown, when the gener-"al system of the laws is departed from, the legislative intention must "be expressed with irrestible clearness, to induce a Court of Jus-"tice to suppose a design to effect such objects." 2 Cranch, 358. 1 Cond. R. 421.

It will be no answer to say that a similar provision, and the same words are used as to the denial of the execution of a bond. To this it may be replied that a different rule prevailing as to it, a different construction of the statute is necessary. A plea of *non est factum* at common law, always put the proof of the signature on plaintiff, whereas the consideration of bonds and notes was never required to be proved by plaintiff, nor allowed to be questioned from the fact, that the party having made a solemn act of such character, was estopped to deny its validity.

"It is by no means a correct rule of interpretation, to construe the "same word in the same sense, wherever it occurs in the same in-"strument. It was very justly observed by Ch. Jus. Marshall in "the Cherokee Nation vs. State of Georgia, that it has been said, "that the same words have not necessarily the same meaning attach-"ed to them, when found in different parts of the same instrument. "Their meaning is controlled by the contract." 1 Story's Com. Const. 440. 5 Peters, 119.

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110 MARTHA ANN MANLY, ADMINISTRATRIX, AND HIRAM MANLY, ADMINISTOR IN RIGHT OF HIS WIFE, OF SAMUEL PARKHILL DECEASED, *vs.* THE UNION BANK OF FLORIDA.

AT common law, a plea *puis darrein continuance*, waived all former pleas, but a Statute of this State, has altered the rule, and such a consequence does not follow the filing of that plea, here:

A Administratrix of B, was sued in that capacity; pending the suit, she was removed from the Administration on the petition of the plaintiff in the suit. Afterwards A, C and D, were appointed administratrix and administrators *de bonis non;* The suit still pending, and no steps having been taken to make her a party as administratrix *de bonis non*, A pleaded in bar, that since the last continuance she had been removed from the administration by competent and proper authority, and that all the assets which came to her hands as administratrix of B, had been taken out of her possession, and that she did not and could not retain sufficient to pay plaintiff's claim; held, that it was well pleaded, and that the fact might have been pleaded either in abatement or in bar.

The fact of A's removal from the administration, constituted a complete bar to the action, and the fact that she was afterwards appointed administratrix *de bonis non*, does not alter the case; A as administratrix, and A as administratrix *de bonis non*, being in the eye of the law, separate and distinct characters.

A replication to the plea *puis darrein continuance* setting out that A had been dismissed from the administration, and that she had, under an order of Court, turned over to a receiver, who took charge of the same all the property which came to her hands as administratrix, and remained unadministered at the time of her removal; but that she had afterwards, and before the filing of the plea, been appointed an administratrix *de bonis non*, and the property recommitted to her, renders the allegation, in the plea *puis darrein continuance* of having fully administered, superfluous. Such a replication was a *departure* from the declaration and therefore defective.

On demurrer, the Court will give judgement for the party who on the whole case appears entitled to it, and against the party who committed the first error.

THIS case came up by Writ of Error to Leon Circuit Court.

This is an action of debt commenced April 10, 1843, against Martha Ann Parkhill Administratrix, &c.; and which was tried and determined, March 1845, in the late Superior Court of the Territory of Florida. The following is the cause of action on which the suit was instituted:

TALLAHASSEE, December 9th, 1840. 111

Dolls. 94,182 22-100.

Six months after date I promise to pay to the Union Bank of Florida, at their Banking House in the City of Tallahassee, ninety four thousand one hundred and eighty-two 22-100 dollars, for value received; for securing payment whereof, I do hereby pledge my shares in the Capital Stock of said Bank. Witness my hand and seal.

(Signed) SAMUEL PARKHILL, (SEAL.)

The declaration contains two counts; one on the Bond and the other on account stated—pleas, *non est factum* and *plene administravit*. There was a similiter to the first plea, and general replication to the latter.

Afterwards on the 22nd April, 1844, Martha Ann Parkhill administratrix, by her counsel, filed her plea *puis darrien continuance*, alledged "that since the last continuance to wit, on 22nd March, 1844, she was dismissed from the administration of the estate of said Samuel Parkhill, deceased, by competent authority, to wit: by the Judge of the Superior Court for said county, sitting as an Appeal Court to the County Court of Leon."

To this plea, *"puis darrien continuance,"* there was demurrer, 1st. Because the matters therein contained, should have been pleaded in *abatement*. 2nd, Because it should have been a plea in bar of *the further maintainance* of the action, and not *in bar of the action*. 3rd, Because the plea did not allege that the said Martha had fully administered, and had not in her hands, at the time of her said dismissal, lands and tenements, goods and chattels, &c., sufficient to pay plaintiff its debt and damages; and because it did not appear from said plea that she had delivered over to the administrator or administratrix, appointed in her stead, all, or any part of the goods, chattels, &c., in her hands not administered at the date of her said dismissal. 4th, Because the plea did not set forth the names of the persons to whom letters of administration were granted after her dismissal.

On the 24th February, 1845, plaintiffs in error by leave of the Court, filed an *amended* plea, *puis darrien continuance*, as follows:

And the said Martha Ann, sued as administratrix of Samuel Parkhill deceased, for further plea in this behalf, by leave of the Court, first had and obtained by Brockenbrough and Archer, her attorneys, comes and defends the wrong and injury, when, &c.; and protesting that at the time of the commencement of this suit, she had no goods, effects, or credits, lands or tenements of the said Samuel Parkhill, 111
deceased, in her hands to be administered, subject to the plaintiff's action, for plea, prays judgment if the said plaintiff, its action aforesaid thereof against her, ought further to have and maintain; because she says that since the commencement of plaintiff's action, to wit, at the county aforesaid, on the 19th day of December, 1843, the Honorable William M. Gibson, at that time Judge of the County Court of said County, and as such having and exercising jurisdiction as a Court of Probate, and being competent thereto, and having jurisdiction in that behalf, at the request and motion, and upon the petition of the said Union Bank of Florida, and against the will of this defendant for cause shown, revoked and annulled, the letters of administration before that time granted to this defendant, from which decision and order, this defendant appealed to the Superior Court of Leon County, exercising and having jurisdiction in that behalf; and the said Superior Court afterwards, and since the last continuance, and before the commencement of this term, to wit, on the 18th day of March, 1844, in the county aforesaid, confirmed the said order of the said William M. Gibson Judge of the County Court, as aforesaid, and then and there revoked, and annulled the said letters of administration before that time, granted to defendant, and had and held by her at the time of the institution of this suit, and this defendant, was then and there divested, and put out of possession of all the estate, rights, credits and effects, or assets of said Samuel deceased, then in her hands, to be administered, and this defendant was not allowed to retain, and did not retain in her hands enough thereof, to satisfy said plaintiff's action, or any part thereof; but the whole of said assets, rights, credits, and effects so remaining in her hands unadministered, were then and there, by order of said Superior Court, taken away from the possession of said defendant, and against the will of said defendant, and committed to the care, custody and control of the Marshal of the said Superior Court, who then and there took possession of the same, and the said letters of administration, so had and held by this defendant at commencement of this action, were revoked and annulled, and said defendant did not and could not retain in her hands, as administratrix, as aforesaid, effects sufficient to pay the plaintiff's claim, or any part thereof; and this she is ready to verify; wherefore she prays judgment if the said plaintiff, its action aforesaid, thereof, against her, ought further to have and maintain, &c.

This plea was sworn to by Mary Ann Manly, late Martha Ann Parkhill and Hiram Manly, her husband.

To this plea defendant in error, on 26th February, 1845, filed its replication, replying the revocation, and annullment of the letters of administration, for want of sufficient securities on the official bond of the said Martha, and her dismissal, in substance, as set forth in the plea; and that upon such dismissal, the Court ordered the property of the estate of the said Samuel Parkhill deceased, to be taken charge of by the Marshal of the Middle District, until the further order of the Court; and that the Court at another day, to wit, on 21st March, 1844, appointed a receiver of the said estate, until an administrator *de bonis non* should be appointed.

The replication continued, "and the said plaintiff, in fact saith that afterwards, and on the 22nd day of April, 1844, and before the filing of the said plea of the said defendants, Martha Ann and Hiram, in this behalf, the County Court of Leon County, having and exercising jurisdiction as a Court of Ordinary, and being competent thereto, did constitute and appoint the said defendant Martha Ann, upon the petition of the said Hiram and Martha Ann, an administratrix, *de bonis non*, of the estate of the said Samuel Parkhill deceased, and thereupon administration of the said estate, was duly recommitted in due form of law to the said defendant, Martha Ann, in her own right as such administratrix, before the filing of the said plea of the said defendants in this behalf, as in and by the record and proceedings thereof, remaining in said County Court, fully appears; and the said plaintiff further in fact saith, that all and singular, the goods and chattels, lands and tenements, rights, credits and effects, which were of the said Samuel Parkhill deceased, at the time of his death, and which came to the hands of the said Martha Ann, to be administred, and which remained in her hands unadministered, when the same were by order of said Superior Court, taken away from said Martha Ann, as in defendants said plea alleged, have again come to her hands, and to the hands of the said Hiram, in right of the said Martha Ann, administrators as aforesaid, and the same were, before and at the time of the filing of the said defendants plea in this behalf, and now are in their hands to be administered, &c."

On the 28th February, plaintiffs in error filed their rejoinder, which, after protesting, thatt neither at the commencement of this suit, nor since, the said Martha Ann, nor the said Hiram, had or possessed in their hands, to be administered, any goods and chattels,
114 lands, &c., which were of the said Samuel, deceased, at the time of his death subject to this action, rejoins: "That at the time and place in said replication mentioned, and by the authority there mentioned, the letters of administration *de bonis non*, therein mentioned upon the estate of the said Samuel, were not granted to the said Martha only, or to the said Martha and said Hiram in right of his wife only, but to said Martha in her own right, (by consent of said Hiram,) jointly with one William D. Moseley, now living, who then, and there, and thereby became, was, and still is, jointly with the said Martha, in her own right, and said Hiram in right of his wife, a joint administrator *de bonis non* of said Samuel Parkhill, deceased; and all and singular, the goods and chattels, lands and tenements, rights, credits or effects, left unadministered, which were of the said Samuel, deceased, at the time of his death, which ever came to the hands of these defendants, or either of them, to be administered as administratrix or administrator, *de bonis non*, as aforesaid, at the times and places, and in the manner stated in said replication, or at any other time or manner howsoever or whatsoever, came to the hands of the said Martha Ann as administratrix *de bonis non*, and said Hiram as administrator *de bonis non* in right of his wife, jointly with said William D. Mosely, the co-administrator *de bonis non*, and were, and are, so far the same remain unadministered, had and held jointly with him, and not otherwise." The rejoinder then enumerates certain liabilities of Samuel Parkhill, deceased, to the Union Bank of Florida, and states, that indentures of mortgage on certain land and negroes, were executed by the said Samuel to the Union Bank, to secure the payment; that these sums of money, being unpaid at the time of the death of the said Samuel, the Union Bank, before the revocation and annullment of the letters of administration granted the said Martha, filed its petition, under the statute, against the said Martha Ann, as administratrix in her own right, and the said Hiram, as administrator in right of his wife, to obtain judgment of foreclosure of the said mortgage; that after the affirmance by the Superior Court of the order of revocation of the original leiters of administration to said Martha Ann, and after the granting of letters of administration *de bonis non*, to the said Martha Ann and William D. Moseley, "the said Union Bank of Florida, by its counsel, moved for judgment and decree by default, no objections having been filed under the statute and the plea of Hiram Manly and Martha Ann, administrators, filed 3d May, 1844, not being verified by affidavit. But the Court overruled the motion, and the petitioner then filed its 115
demurrer special to said plea; and therefor administrators, Manly and wife, asked leave to file additional pleas, and the Court so allowed and continued the cause. Petitioner then suggested the appointment, by the County Court of Leon county, of William D. Moseley, together with Martha Ann Manly, administrators *de bonis non* of said estate; and moved the Court that the said William D. Moseley, administrator *de bonis non* of said estate, be made a party to said suit, and the suit continued, as well against the defendants as against the said William D. Moseley; and the same was done accordingly. And such further proceedings were thereupon had in the same Court, that afterwards, to wit: at the Fall Term, 1844, of said Superior Court, to wit: on the 4th day of January, 1845, it was considered by the Court, that said petitioner do recover of said defendants, Martha Ann Manly, in her own right, Hiram Manly, in right of his wife the said Martha Ann, and William D. Moseley, administrators *de bonis non* of said Samuel Parkhill, deceased, the sum of seventy-one thousand and twenty-three dollars and forty-eight cents, due said petitioner, for principal and interest of its mortgage debt," &c. That judgment was accordingly entered against the said parties, and foreclosure granted; and that said judgment still remains in full force, not annulled, satisfied or discharged. The rejoinder further alleged, that defendants had fully administered, all and singular, the goods and chattels, lands, &c., which were of the said Samuel, deceased, left unadministered, which came to their hands, or the hands of either of them, as administrators *de bonis non*.

To this rejoinder there was a demurrer, and the following causes of demurrer assigned:

For that the rejoinder does not fortify and support the matter by the said defendants, above pleaded in bar since the last continuance, but alledges new matter contrary to the plea, and was a departure therefrom; that the defendant's said plea, since the last continuance pleaded, set forth the fact of the discharge of said Martha Ann from the administration of said estate of Samuel Parkhill, deceased, as a substantive bar of itself to the further maintenance of the plaintiff's action in this behalf; and the said rejoinder now sets up the recovery of a judgment and decree rendered against said defendant and another, since such discharge, as and for a bar to the further maintenance of this action; and the said rejoinder doth not sustain the said plea of said defendants by them, since the last continuance above 116
pleaded.

For that the said defendants have, in and by their said rejoinder, attempted to plead matter in abatement, after having pleaded their aforesaid bar, in this, the nonjoinder of one William D. Moseley, with said defendants, as a defendant to this action.

For that the said defendants, in and by their said rejoinder, have attempted to put in issue another and different matter, since the last continuance happened and occurred, to wit: the judgment and decree of foreclosure in said rejoinder, set forth as rendered the fourth day of January, eighteen hundred and forty-five, which said decree so declared to have been rendered, was so rendered, as shown by said rejoinder, long prior to the filing by said defendants of their said plea, since the last continuance above pleaded, and for that the said defendants cannot thus set up and plead two several and distinct matters, since the last contiuance happened and occurred.

For that the said rejoinder is double and multifarious in this, that it sets up the non-joinder of William D. Moseley as a defendant with the said Martha Ann and Hiram; the recovery and rendition of said judgment and decree, and that the said defendants, Martha Ann and Hiram, have no assets, except the sum of five dollars.

For that the said rejoinder is argumentative; is no answer to the said replication; and is uncertain, informal, and insufficient.

The Court sustained the demurrer, and thereupon judgment was entered against plaintiff in error for one hundred and twenty-two thousand one hundred and sixty-four dollars and eighty-seven cents, ($122,164 87-100,) being amount due on bond, and for costs.

J. T. Archer, for plaintiffs in error:

I. There is error in this, that the issues on the pleas of *non est factum*, and *plene administravit*, were not disposed of.

These issues, it will be contended, were disposed of by the introduction of the plea, *puis darrein continuance*. It cannot be questioned that, at common law, a plea *puis darrien continuance*, "is a waiver of the first plea, and no advantage can afterwards be taken of it, nor can even the plaintiff afterwards proceed thereon."

This rule is the necessary consequence of another rule of common law, which allows but one plea to the whole declaration, or one plea to each count. The introduction of a plea to the whole action, *puis darrein continuance*, must, therefore, at common law, operate as a waiver of the former plea to the whole action, or former pleas to

Parkhill's Administrators vs. The Union Bank of Florida.

117 each count, for otherwise there would be more than one plea to the whole action.

Besides, a plea *puis darrien continuance, admits* a right of action at the commencement of the suit, while the former pleas *deny* a right of action at the commencement of the suit. The admission of the plea *puis* is contradictory to the allegations of the former pleas. To allow a defendant, therefore, to avail himself of a plea *puis darrien continuance*, and at the same time of former pleas in bar, would not only permit more than one plea to the whole action, but would allow such pleas to be contradictory, which is forbidden by the common law rules of pleading.

It is true, the statute of Anne makes it lawful for a defendant, *with the leave of the Court*, to plead as many several matters, as he shall think necessary for his defence. But even under this statute, a defendant has no positive *right* to plead more than one plea to the whole action, for the Court may, or may not grant the leave, at its discretion. Besides, the permission to plead *several* matters, does not include *contradictory* matters. In England, a plea denying, and another admitting the plaintiff's right of action, at the commencement of the suit, could not before, and cannot since, the statute of Anne, be pleaded together. 1 Chitty's Pl. 593. It is therefore easily accounted for, that in the English books, the rule is universally laid down, that a plea *puis darrien continuance*, is a waiver of former pleas.

But under our statute, every defendant sued in this State, has the positive right, independent of the leave of the Court, to plead as many matters as he deems necessary for his defence; and it is "no objection to *any* plea, that it is contradictory to any other plea filed by the same party, in the same cause." Duval's Comp. 95.

The reasoning which established and retains the English rule, cannot prevail against our statute; and the rule itself cannot prevail here.

Our statute, under the construction I claim for it, promotes the ends of justice. What hardship is there in requiring a plaintiff to answer all objections which a defendant may set up against his demand? On the other hand, what hardship does not exist in allowing a plaintiff to recover, because he has successfully answered one of several objections, while one or more of the others may contain good and valid grounds of defence, which might be established by the defendant?

118 II. There is error in sustaining the plaintiff's demurrer to the rejoinder.

The judgment should have been given against the party, who committed the first error in the pleadings. The declaration is substantially a good one. The plea *puis* contains a good defence to the action. Its subject matter, is 1st: The involuntary dismissal of defendant Martha, from the office of administratrix. And 2d: The taking possession by the marshal, under the order of the Court, of all the assets in her hands, up to the time of dismissal.

The involuntary dismissal is of itself a good defence. It separates the administratrix from the estate, as fully as if she were actually dead. Taylor vs. Savage, 17 Peters, 224. Jewett vs. Jewett, 5 Mass. 275. Alsop vs. Mather, 8 Conn. 584.

The taking possession of the assets by the Marshal, is of itself a good defence. The plea, in this regard, has all the properties of a plea of plene administravit. It is an accounting for the assets, the legal possession of which by the administratrix is necessary to entitle the plaintiff to recover.

But if each of the parts of this plea, taken separately, does not constitute a good defence, there can be no doubt that both taken together, make up a complete defence. 1 Williams on Executors, 373, citing Garter vs. Freem. 13.

It was argued and adjudged in the Court below, that the defendants should have retained assets sufficient to satisfy actions pending. This cannot be correct. The administratrix was dismissed for want of a sufficient bond, under the 31st sec. of the act of 1828 concerning wills, letters testamentary, and letters of administration, &c. Duval's Comp. 176. Under this section, the Court is authorized, upon the dismissal of an administrator, to appoint a receiver or other administrator, doubtless for the purpose of taking immediate possession of the assets, and in contemplation of an immediate surrender of the assets by the dismissed administrator. If a dismissed administrator could retain for actions pending, the very object of the statute, to take the estate out of irresponsible hands, would be defeated.

But to retain in a case like this, against the ministerial officer, acting under the express order of the Court, is physically impossible, if the officer performs his duty. To have attempted it in this case, would have been a contempt, and punishable as such. It is altogether unreasonable to hold these defendants responsible in damages to the amount of $122,164 87-100, for having permitted the assets to be 119 taken from them by a Court of competent jurisdiction.

The plea puis is properly pleaded in *bar*, for if the facts set up in it are true, the plaintiff can never maintain an action against the defendants as administrators on the cause of action in the declaration mentioned. 1 Chitty, 481. Jenks vs. Edwards, 6 Alabama, (new series) 143. Jewitt vs. Jewitt, 5 Mass. 275.

The first error committed is in the replication—it does not maintain, explain or fortify the declaration, but abandons it, and departs from it. The declaration seeks a recovery on the faith of assets in the hands of the defendant Martha, as administratrix under the original grant of administration, while the replication seeks a recovery on the faith of assets received by her as *"an"* administratrix *de bonis non*, under a new grant of administration, without joining the co-administrator or co-administrators *de bonis non*, shown to be in existence by the use of the indefinite article *"an."* If a judgment could be rendered against the defendants as administrators, on the ground of assets in their hands as administrators *de bonis non*, jointly with another, then the securities of the first administration would continue liable for the administration of the assets by the administrators *de bonis non*—"which never could be right." 2 Call, 41-56.

But if the replication be good, the rejoinder is good. The latter answers the replication by setting up a judgment in the same Court, against the administrators *de bonis non*, in favor of the same plaintiff, upon a petition under the statute to foreclose a mortgage; which judgment, it is alleged, is more than sufficient to cover the assets in the hands of the administrators *de bonis non*. The substance of the rejoinder, it cannot be questioned, would be a good bar to an action against the administrators *de bonis non;* what is the replication *in effect*, but a declaration against one of several administrators *de bonis non?*

If the rejoinder does not support the plea and is therefore bad, the fault lies with the plaintiff. We have followed the plaintiff and it cannot complain.

The objections raised by the plaintiff to the *form* of the defendants pleadings, if well founded do not warrant a judgment on the demurrer against the defendants, even for costs. Duval's Comp. 95.

III. On the whole pleadings, judgment should have been given in favor of the defendants.

The replication confesses the matters contained in the plea, and the demurrer admits the matters contained in the rejoinder. The 120 pleadings therefore show that Mrs. Manley had no assets whatever as administratrix, and none liable to this action as "an" administratrix *de bonis non*. Yet by the judgment of the Court on these pleadings, Mrs. Manley, *as administratrix* is made to have assets to the amount of $122,164 87-100! How can the plaintiff's judgment be sustained when the plaintiff itself, on the face of the record, gives testimony against its verity?

Long & Walker for defendant.

T. H. Hagner, (on same side,) for defendant:

Contended as to the 1st error assigned, that the plea of *non est factum*, and plene administravit, were disposed of; that they were waived by the defendants below pleading their plea, *puis dar. cont.* That the filing of that plea was a waiver of all other issues. He cited: Buller's N. P. 309. 2 Tidd's Prac. 847—849, last edition. 7 Bacon's Abrid. 685, Pleas and Plead. last edit. Croke Eliz. 49. 1 Salkeld, 79. 1 Lord Raymond, 693. Mansel on Dem. lxxxix. Hobart's Rep. 81. 1 Arch. Prac. by Chitty, 300—2. 1 Wheaton's Rep. 215. 13 Peter's S. C. Rep. 136.

10 Wendell R. 679, where the Court say: "The cause of action stands confessed to the same extent, as if no other defence than that in the plea *puis dar. cont.* had been urged." And this ruling is sustained by the Supreme Court of the United States.

As to the character of the plea, *puis dar. cont.* he cited, 1 Chitty Pl. 698: "It is not a departure from, but a waiver of the first plea; and no advantage can afterwards be taken of it, nor can even the plaintiff afterwards proceed thereon. He also cited, 2 Wilson's Rep. 137.

In rebutting the position of the counsel of plaintiffs in error, he argued, that the effect, the legal nature and operation of this plea, was not altered by the statute of Florida allowing to defendants to plead, "as many matters of law or fact, as he, she, or they, may deem ne-"cessary to his, her or their defence;" and that it should be "no "objection to any plea, that it is contradictory to any other plea "filed by the same party in the same cause." This was to be understood, with some reference at least to the rules of law, and the practice of the Courts. Here the defendants had pleaded as many and as contradictory pleas as they saw fit, and the case was at issue. They then apply for and obtain leave to file a plea *puis dar. cont*

Now, the statutes of Florida have no where altered or changed that plea, nor does the statute cited at all vary its legal effect. The character of the plea is destructive, and whether those pleas which have gone before be few or many, they are alike waived. This results from the nature of the plea. In the case cited from 10 Wendell, several pleas had been filed, and yet the law was declared as we here insist it is. He insisted that the replication was legally sufficient in all respects, and maintained that the judgment on demurrer was correct; for that the rejoinder was bad, and that, going back to the first error, the plea was bad also.

He explained the principles on which resort is had against the assets in the hands of administrators, even after the revocation of their letters; that it was the right of the creditor to follow the decedent's estate. He cited 2 Williams on Executors, 1196. "If adminstrator plead, that before the date of the writ, his letters were revoked, he ought to allege that he has fully administered, or that he delivered over the goods to the new administrator." He may be sued, then, having the property in hand, after his letters are revoked. Again: "If he plead the administration committed to another, plaintiff may reply, that before the second administration, he had wasted the goods." Wentworth on Executors, 472. Packman's case, 6 Coke Rep. 18. 11 Viner's Abridg. 119. Hobart's Rep. 49.

The plea here set up, is the personal discharge of adminstrators. We reply, that though the letters were revoked, yet the estate was recommitted before the filing of their plea, and that they have the assets of the estate in hand applicable to this debt. If we have the right to follow the decedent's estate, we have a right to follow it in this suit, for they have the property in hand, and in the eye of the law, they retain assets to pay. Toller on Executors, 129.

But their plea is fatally defective—they do not make good their exemption—they must allege that they have fully administered—a *protestation* of full administration is not available. He cited 1 Chitty's Pl. 650—*"The allegation protested against is in effect admitted in that suit,* (in which made,) so that no evidence need be adduced in support of it."

The plea *puis dar. cont.* is defective then, by reason of omitting averment of plene administravit—they protest they had no assets—they admit then *in this suit* that they had. He cited also 1 Tidd's Prac. 687. If, then, the replication be had, the plea itself is bad also, and judgment on demurrer must be for the plaintiff, against him
122 who has committed the first error. That the rejoinder of defendants is a departure from the plea, is very apparent. The plea is in *abatement* of the *writ,* for personal disability—the rejoinder is *in bar* of the *action* itself. For the rule of law upon departure in pleading, he referred the Court to, 1 Chitty's Plead. 681—697. Coke Litt. 304, a. 2 Saunder's Rep. 84. Lord Raymond, 233. 5 Dowling & Ry. 295. 16 Mass. Rep. 2. 2 New Hamp. 306.

But it is objected that the replication is bad. The plea had set up their personal discharge from the administration. We reply, (that though removed,) you are again administrators, and have the assets in hand, applicable to our debt. Where is the departure? We have the right to follow the decendent's estate—and make it answerable to our debt.

That the judgment on demurrer to plea *puis dar. cont.* is peremptory and final. 1 Wheaton's Rep. 215. Mansel on Demur. lxxxix

As to the alleged want of privity between administrators and administrators *de bonis non,* he considered that the question was upon the judgment on demurrer to the plea of the personal discharge of the administrators themselves. They have been sued—they could only discharge themselves by proper proceedings, set forth in proper plea. This they had not done. Yet, he said, if privity were wanting, it did exist. These defendants, adminstrators and administrators *de bonis non* were the same parties—the new and the old were in the same right. There is a privity of estate in law. Jones, Chancellor, in Dale vs. Rosevelt, 8 Cowan Rep. 339, clearly declares such a privity to exist—so that "where a judgment "is against the previous representative, he coming in place of the "testator, and the recovery being for the debt of the testator, he, "(the administrator *de bonis non,*) is liable." Chancellor Jones shows, that the statute 17 Charles 2nd, was passed to enable administrator's *plaintiffs* to execute judgments in favor of prior executors, upon the ground that there was a want of privity. But "in relation to judgments *against* the executors or administrators, *the rule as to privity has always been otherwise."* See also Ashurst, J., opinion in 7 Term Reports, 178. He also cited, 2 Saunders, 217. 2 Tidd's Prac. 1113. 6 Term Rep. 1.

Upon the 3d error assigned, he insisted that judgment must be for plaintiff below, if the plea of defendant be reached by demurrer—for the plea is fatally defective. He cited, 2 Tidd's Prac. 847. 3 Saunder's Rep. 217. And he compared this plea, with the requi-123
sites of such a plea there laid down.

HAWKINS, Justice:

The Court, in the case before it, have examined the record with care, and will endeavor so to adjudicate upon it, as that the legal rights of parties, as they appear, may be adjusted in accordance with the rules of law, pointing out those errors which may appear, and sustaining the legal rights of the respective parties, when they are correctly and substantially set out and embodied in the pleadings. The case has been so ably and elaborately argued—the arguments of counsel so elucidated by authorities—that the Court feels itself much relieved from the embarrassments which might otherwise exist, as to the arrival at proper conclusions, and a correct decision of the cause.

To rebut the first error, it is contended by the appellee, that the defendant in the Court below, by putting in a plea of *puis darrien continuance,* waived and abandoned all former pleas.

There can be no doubt that, by the common law of England, and adhered to in this country, a plea of *puis darrein continuance,* is always pleaded by way of substitution for the former plea; and though not a departure from, is a waiver of it; and when it is pleaded, the case stands in the same state, as if the plea had been one originally put in. Stephen on Pl. 66. Chitty on Pl. 697. 1 Archbold's Practice, 200.

The only cases by the counsel for the appellant, which seems to have at all a conflicting bearing, are Rayner & Hope, vs. Dyett, 2 Wendell R. 301; and Calver vs. Burney, 14 Wendell R. 162. Nor have the Court, in its researches been able to find authorities at variance with the doctrines just laid down.

The first case was, where the defendant obtained a discharge of his person from imprisonment, under the act to abolish imprisonment for debt in certain cases—and this discharge he pleaded *puis darrein continuance,* after having pleaded in bar to the action. The plaintiff confessed the plea *puis darrein continuance,* proceeded and entered a rule of interlocutory judgment. On motion to set aside the rule, Judge Sutherland, while admitting the general rule of waiver, said: "This was not an admission of the plaintiff's right of action, nor did it set up any new matter of defence to the action; it *only affected the remedy,* not the *rights of the plaintiff:"* and that the pleas were not waived. In Calver vs. Burney, 14 Wendell, 162, the same 124
Judge sustains the general doctrine, and while affirming the decision of Rayner & Hope vs. Dyett, remarks: "That the rule does not apply, where the matter of the plea affects the plaintiff's *remedy only,* and not his *right of action;"* that the above case "sought to modify the *remedy,* and *not to defeat the action."*

In the case before us, the plea is intended to go directly to the *action itself;* it is pleaded in bar, and partakes of a peremptory, and not a dilatory character; and the Court cannot view these two cases in the light of authorities, having a direct bearing upon, and application to the cause at bar.

The appellant's counsel contend, that the statute of Florida destroys the old common law rule, as to the doctrine of waiver of the pleas originally pleaded, by the plea *puis darrein continuance,* and cites the 26th section of "An act to amend an act regulating judicial proceedings" approved Nov. 23, 1828, which is in these words: "Sec. 26. Be it further enacted, That in all cases the defendant or defendants may plead as many matters of law or fact as he, she or they, may deem necessary to his, her or their defence; and it shall be no objection to any plea, that it is contradictory to any other plea filed by the same party in the same cause. Duval's Com. 95.

If this question rested solely upon the common law doctrine, the Court would have no difficulty in deciding that the first error was not well assigned; but the statute above cited interposes, and overturns, as we think, the entire structure of the common law doctrine, as to the waiver of former pleas, by a plea *puis darrein continuance.* The statute in its face, by its purview and spirit, seems evidently intended to abolish, to a certain extent, some of the rigid rules and technicalities incident to pleading at common law, to enable the defendant to avail himself of all and every possible defence, however contradictorily pleaded, which, by the old rules of pleading, he was unable to do; and in fine, by the liberality and comprehensiveness of its term, to effect the furtherance of justice.

A statute of this nature, however much in some instances we may deplore an innovation upon the common law, commends itself to the liberal construction of a Court, whose aim should be, at all times, the *substantial justice* of the case.

We look around us, and see the attempts of different States of the Union to simplify the science of pleading, so as to enable the parties litigant to set forth their respective claims and defences, irrespective

of the rigid rules of that science, and to infuse into it a spirit of liberality; and while unquestionably they admire the beauty and force of the fundamental reasons on which the science of pleading is founded, and the ingenuity with which its rules are carried out, yet possibly, they may conceive, that greater simplicity may not be incompatible with the grave deductions of logic.

The doctrine, as contended for by the appellee, took its rise in the early stages of the law, and we find it in the oldest books. It has stood the test of time in all its vigor, and has been carried out in the Courts of England and this country; and but that we think it contravenes the true intent and spirit of our statute, we would feel loath to impugn its authority, or deny its application.

Orignally, at common law, there could regularly be only one plea, on which, if there were issue or demurrer, the cause was to be determined, because there could be only one verdict in a cause; and though the statute of Anne permitted several pleas, still they were to be in unison, sustaining and not contradictory to each other. Multiplicity of pleading was to be avoided, and the use of pleading was, to reduce the matters in pleading to a single point.

In framing them, there is required great care and nicety; and it is said: "It seems dangerous to plead any matter *puis darrein continuance,* unless you be *well advised;* because, if the matter be determined against you, it is a confession of the matter at issue, and no *nisi prius* shall be awarded." 6 Bacon Ab. 479. And should the plea *puis* be defective, and be quashed, the judgment is at once *quod recuperet,* and not *respondeas ouster.*

If the object of the statute was to simplify the rules of pleading and soften down the rigid, (and in this instance) the arbitrary dicta of the common law, where so proper an occasion for the attainment of the object, or the fulfilment of its intention, as in a case where even at common law, more than usual severity is to be observed?

Why should the statute operate unequally by the extension of its liberalizing policy to other cases, and this, in which most required, be exempt from its genial influence, because not described in *totidem verbis?* Although a doctrine relying for its support upon the hardships, which might arise under it, is at all times dangerous as tending to destroy established precedents, yet construing the statute before us by an appropriate rule of construction, a desire to suppress the mischief and advance the remedy, we can perceive many cases, where great hardships would inevitably arise. Persons at all times
126 may not be "well advised" as to the pleading, and great injustice might be done by depriving a party of his legal defence pleaded in the first instance, because his plea of *puis darrein continuance* happened to be defective; and why, if that plea is annulled, should not the party be remitted to his original defence? To all this it may be answered that the law is different, and the maxim *fiat justica* should be followed, and that arguments *ab inconvenienti* should be avoided. We contend that the statute has altered the law; we point to its spirit, its context, and we must look at the true meaning of words.

The statute says, that *"in all cases,"* the defendant may plead, &c. Is this phrase to be circumscribed by the meaning attached to it, by strict legal parlance, or is its true import to be gathered from the purview of the statute, and the true definition of its terms? The dictionaries tell us, that *"case"* means or signifies, *a contingence,* a *state of things,* and if either of the synonyma was used in the statute, any and all doubt, would be dissipated.

The ample scope and free license to plead any number and contrariety of pleas granted by the Statute, have destroyed the reasons upon which the common law rule rests; and we can perceive no good cause when the reason of a law has ceased to exist, why the law itself should have a being, in direct conflict, as we think, with our statute, against the policy of our laws, and if persisted in, calculated to produce no good results, but rather consequences replete with hardship and extreme injustice; and with the views expressed, we clearly are of opinion, that this rule of the common law, as to pleas *puis darrein continuance,* should cease to be regarded by the judicial tribunals of the State.

The first error is therefore well assigned.

As to the plea *puis darrein continuance,* we think it well pleaded. It is contended that this plea should have been in abatement and not in bar. We think that the defendant could have pleaded in either; she could have pleaded in abatement, that she was not administratrix of Samuel Parkhill deceased, but was administratrix *de bonis non* of said Parkhill, and there can be no doubt, but that she could plead *ne unques administratrix.* The authorities are full upon this subject.

To an action against an executor, he may plead in bar *ne unques executor.* That be renounced, and *nulla bona devenerunt ad manus;* so he may plead in bar, the same bar as his testator could have done, as *non assumpsit,* or *non est factum.* 6 Comyn's Digest, 2, D. 7, 8.

So an administrator may plead *in bar* ne unques administrator. 6 12
Comyn's dig. 2, D. 12. 1 Tidd. p. 644.

To an action against an administrator he may plead in abatement that he is not adminstrator, but executor, ib, 2, D. 12, page 315; thus by analogy establishing the principle before asserted, that Martha Ann Manley might have pleaded in abatement if she thought proper, that she was not administratrix, but administratrix *de bonis non,* and it is equally clear, that she could plead *in bar ne unques administratrix.* Pleas in bar are calculated to show either that the plaintiff never had any cause of action, or if he had, that it is discharged by subsequent matter. 1 Tidd, p. 643.

"Whenever the subject matter of the plea or defence is, that the plaintiff cannot maintain any action *at any time,* whether present or future, in respect of the supposed cause of action, it may and usually must be pleaded in bar." 1 Chitty on pleading, 481. A plea in abatement must not only show the error of the plaintiff, but enable him to correct it by giving him materials for avoiding the same mistake in another suit in regard to the same cause of action, and give the plaintiff a better writ: ib.

The plea in bar in this case we think good, because the Union Bank could not at any time after the defendant's dismissal from the first administratorship, have brought suit against her in the capacity of administratrix simply; that *e. o. instanti* the letters of administration were taken from her and annulled, she became as to the suit *ceviliter mortuus;* and all the rights, powers, duties and liabilities, which had previously attached to her in the character of administratrix ceased and no longer existed. In Toler on Executors, 131, it is laid down where letters of administration are revoked, if an action be brought by an administrator, and while it is pending, administration is committed to another, the suit is abated.

In the case of Taylor vs. Savage, 1 Howard U. S. R. 286, there was a decree in favor of Taylor against George M. Savage, the executor of Samuel Savage deceased. On the very day of the decree, George M. Savage was removed from his executorship, and one Benham appointed administrator *de bonis non*—the Court in that case said: "By his (George W. Savage,) removal from the office of executor, he was *as completely separated* from the business of the executor, as if he had been dead, and had no right to appear in or be a party in this or any other Court, to a suit, which the law confided to the representative of the deceased." No further proceedings could be therefore had in the decree of the District Court, until Ben- 12
ham the adminstrator *de bonis non* was made a party.

The defendant in this cause could no doubt have come in voluntarily and made herself a party as administratrix *de bonis non* to the suit, by due and proper application to the Court, but this she did not do. The case of Hunt vs. Wilkinson, 2 Call. 41, is cited by the appellant. It seems that a Mrs. Hunt had been appointed a general administratrix of Charles Hunt deceased; that an office judgment was obtained against her in that capacity; upon its being set aside, she was permitted to plead, that since the last continuance, the will of the said Charles Hunt had been committed to record, and that administration with the will annexed was committed to her, whereby she became bound to surrender her letters of administration granted to her before the appearance of the Will; that she ought to be sued as adminstratrix with *the will annexed* of Charles Hunt deceased, and *not* as administratrix; Judge Carrington remarked: "In this case, at the time of their office judgment, Mrs. Hunt was defendant in her character of general administratrix; but before the end of that term, that character had ceased, all her powers in that capacity were done away and destroyed by the production and proof of the will; so that she was no longer general administratrix, but was then acting in a character correspondent to that of executrix, charged with the execution of the will, instead of the statutory administraton."

The plea was sustained as a good plea, and it was after two arguments, decided that an administratrix *with the will annexed* must be sued in that character, and if sued as administratrix *only,* without the addition of the words *"with the will annexed,"* she may plead in abatement.

This case so clearly in point, where the facts bear so close an affinity to those in the present cause, its decisions emanating from so high a source, and supported too by other authorities, entitles it to the most respectful consideration of this Court. In this case a plea in *abatement* was pleaded and sustained, and the question as to plea in *bar* did not arise. That question arose for direct adjudication in the case of James Jewett vs. Betsey Jewett, administratrix of Caleb Jewett, 5 Mass. 276. This was an action against Betsey Jewett as administratrix; she pleaded in bar, with *a prostestando,* (as in this case) that she had no effects, &c., of the intestate in her hands to be administered; that since the commencement of the action, she

had been removed from the administration by the Judge of Probate, on the petition of James Jewett, *the plaintiff*.

It was contended on demurrer to this plea, that the plea would have been in abatement, being in the nature of a plea to the person. C. J. Parsons, said, "in the case at bar, if the matter of the plea be good, it shows that the plaintiff has no cause of action against the defendant, either in this or any other suit; it is therefore properly pleaded in bar."

It is contended by the appellee that the defendant should have pleaded plene administravit, or that she handed over the assets to the new administrator, and should have retained sufficient to satisfy the plaintiff's demand.

The first objection as to the plea *plene administravit* cannot now receive consideration, as by the decision of the Court in the former part of this opinion, the plea not being waived, is still in full force and being, and undisposed of.

The law as laid down in 11 Viner Ab. 119, is in these words: "the defendant being sued as administrator, pleaded, that before the day of the writ, his administration was removed and granted to another; per Wild, he ought to have set forth that he had fully administered the goods in his hands, or else that he had delivered them over to the new administrator, for otherwise the debtor might be at a loss, for those goods shall not be assets in the hands of the new administrator till they come into his possession."

It is true, that the defendant did not plead *plene administravit*, in the plea *puis darrein continuance*, or in a different plea, but she pleaded, that she was removed from the adminstration; that by the order of the Court she was divested and put out of possession of all the estate, rights, credits and effects of Sam'l Parkhill, deceased, in her hands to be administered; that she was not allowed to retain, and did not retain in her hands sufficient to satisfy the plaintiff's *action, or any part thereof*, but that the whole of them were placed by the order of the Court in the hands of its Marshal.

A plea *plene administravit* even if not in before, would perhaps have been considered superfluous, inasmuch as all the assets being taken out of her hands, there was nothing left to administer, and the replication admits, that all effects *et cetera* which were of Samuel Parkhill, deceased, at the time of his death, and which came to the hands of Martha Ann Parkhill to be administered, and which remained in her hands unadministered, when the same were by order of the
130 said Superior Court, taken away from said Martha Anne *is in the plea alleged.*

It was impossible for the defendant to have retained assets as at common law, for the order of the Court was imperative, and an attempt to retain would have been idle and futile. This argument, coming from a party upon whose petition the order was made, does not appear with very good grace. Nor could she have pleaded, that she handed over the assets to the new administrator, for the plea would have been *false;* nor can we discern an impropriety in the plea pleaded, drawn as we think with sufficient legal correctness and nicety, setting forth a good and substantial defence by way of bar to the action, based upon facts which are admitted by the party plaintiff.

Could an execution have correctly issued on the judgment obtained against the defendant? It could not have been issud against the estate in the hands of Martha Ann Parkhill, the general administratrix, because there was no such character in existence; nor against Martha Ann Parkhill, as administratrix *de bonis non*, because the execution should have pursued the judgment *strictly*, otherwise it would be void; and the judgment here is against the said Martha, as the general administratrix.

It is urgd that a privity existed betwen Martha Manley as general administratrix, and Martha Manly, administratrix *de bonis non*. That a certain privity at common law exists, it must be admitted—as between administrator and administrator *de bonis non*, or executor and administrator *de bonis non, with the will annexed*. There seems to be a distinction as to this privity, in suits *by* or *against* adminstrators—in the former none existed, which probably gave rise to the statute of 17 Charles 2, C. 8, which enabled an administrator *de bonis non* to take out execution on a judgment of an executor or administrator. 8 Cowen 340. It was laid down by C. J. Parsons "that an administrator *de bonis non* with the will annexed, could not sustain a writ of error to reverse a judgment recovered by the original executor, because there is in law no privity betwen an executor and administrator *de bonis non, with the will annexed;*" and a judgment recovered by the executor, cannot be executed by the succeeding administrator. Grant vs. Chamberlain, 4 Mass. 612. This was cited by the appellant.

But the same Judge remarks, that the statute of Charles 2d is not in force in his State, and indicates that his decision would have been the reverse, if it had.

Parkhill's Administrators vs. The Union Bank of Florida.

If judgment had been obtained against the defendant, and she 131
had died, no doubt but that *scire facias* would lie against the administrator *de bonis non*. 8 Cowen 339, citing Norgate vs. Snap. (W. Jon. 214.)

Admitting the doctrine of privity to the fullest extent, how does it avail in the present case? The suit against Martha Manley, administratrix, abated as completely by her removal, as if she had died; and the suit should have been brought *de novo*, against her, in her new capacity of administratrix *de bonis non*. The two characters were incompatible, and could not exist together. If the defendant had wasted the goods, she would have been liable in an action of debt, in case the administration had been granted to another. 472 Wentworth on Exrs.—and besides, would be responsible to the new administrator.

The fact that the property and assets again came to her hands at the time of the plea pleaded, does not vary the result; for though *identically* the same person, yet legally viewed, Martha Manley, administratrix, and Martha Manley, administratrix *de bonis non*, are separate and distinct characters—appointed by different grants of administration, giving different securities, and not similar in any respect, save the duties and powers incident to the administration.

The securities of the first administration were certainly discharged, after the dismissal of the defendant, as to all her acts posterior to that event; and the second sureties were not responsible for any of her acts previous to her second appointment. Another consideration is, that in case this suit should be sustained, the securities of the first administration would continue liable for the result of this suit, although the functions of the general administratrix had ceased, and who yet might be involved, if creditors were allowed to proceed upon the first administration. The blending of the two characters would be attended with many perplexities and embarrassments, and in all probability, with great injustice.

We will now confine our attention to the pleadings of the cause "It is a rule in pleading, that one demurrer, the Court will consider the *whole record*, and give judgment for the party who, on the whole, appears entitled to it." Stephens on Pleading, 144. And if the pleading be bad, judgment shall be had against him, who made the first default. 6 Comyn's Digest, 183. And it matters not, whether the issue be of law or fact, and whether the cause has proceded to issue or not, the Court is always bound to examine the whole record, and adjudge for the plaintiff or defendant, according 132
to the legal right, as it on the whole appears. Stephens 144.

The plea of *puis darrein continuance*, we have already decided, is good; and next follows the replication. We think this is clearly a departure from the declaration. That sets forth the cause of action, and declares against Martha Ann Parkhill; *administratrix of the estate*, real and personal, which was of Samuel Parkhill, deceased. The replication sets out the order of the County Court, revoking and annulling the letters of administration to the said Martha Ann; the appeal to Leon Superior Court by the said Martha Ann; the affirmance of the order of dismissal of the County Court by said Superior Court, and the delivery of the property of the estate of said Parkhill into the possession of the Marshal of the said Superior Court; that a receiver was duly appointed for said estate, till an administrator *de bonis non* was appointed by the County Court of Leon county; and that afterwards, on the twenty-second day of April, 1844, and before the filing of the said plea of the said defendants, Martha Ann and Hiram in this behalf, the County Court of Leon county did constitute and appoint the said Martha Ann, upon the petition of said Hiram and Martha Ann, an adminstratrix *de bonis non* of the estate of Samuel Parkhill, deceased.

The declaration is against her, in the capacity of administratrix simply; the replication, by setting forth the dismissal of the defendant as administratrix, and her appointment as administratrix *de bonis non*, is clearly a departure in pleading. It is inconsistent with the declaration, because the two capacities in which the defendant is charged, are, as has been already shown, inconsistent with each other—being in different rights, and distinct in every particular. It should fortify and maintain the matter in the declaration. It does not, and the allegation in that, and the replication, are in direct conflict. The plaintiff, by his replication, has shewn that he has no action against the defendant, (by admitting her dismissal as administratrix;) and when this is the case, there shall be judgment for the defendant, though the bar be defective, for the Court will judge on the whole record. 6 Comyn's Dig. (E 37,) page 137.

The *rejoinder* is not good—it is clearly a departure from the plea, and does not support it—it alleges new matter inconsistent with the plea, and is defective. It is intended to answer the replication—they are both bad. It is unnecessary to set forth the reasons or

133 grounds of this opinion—and the Court must go back to the first error or default.

There were several grounds assumed by the counsel on either side, involving the discussion of principles of great interest and importance; but the Court have deemed it proper to notice only those which semed to have a direct bearing upon, and tended to a direct decision of the cause.

The judgment must be reversed, with costs.

HOWSE & HOLLOMAN *vs.* MILLS JUDSON, *et al.*

No person can bring a writ of error to reverse a judgment who is not a party or privy to the record, or who is not injured by the judgment, and therefore to receive advantage by the reversal of it.

Although a judgment is by law a lien upon the land of the defendant, yet he may after the judgment convey good title, if he has at all times afterwards, a sufficient amount of property, subject to and within reach of an execution, to satisfy the judgment.

A party purchasing land after the judgment was rendered, and of which he was bound to take notice, does not stand in such a relation to the judgment as enables him to prosecute a writ of error; even if the land purchased is endangered by the lien which it creates.

THIS case was brought up, by writ of error, sued out by William Forbes, to Gadsden Circuit Court; defendants in error moved to dismiss the case upon the ground that plaintiffs in error have not authorized the institution of the suit, and that the writ of error was prayed for and is now prosecuted without their privity or consent.

The opinion of the Court contains the facts as agreed to by counsel.

T. H. Hagner, for Forbes, who sued out writ of error.

C. H. DuPont, for defendant.

DOUGLAS, Chief Justice:

This case comes before us, upon a motion made by the counsel for the defendants in error to dismiss it, upon the ground that the 134 plaintiffs in error have not authorized the institution of the suit; and that the writ of error was prayed for, and is now prosecuted, without their privity or consent.

The motion is based upon the following statement of facts, which has been agreed to by the counsel for the defendants in error, and the counsel of William Forbes, who prosecutes this writ of error, and which is on file with the papers of this cause, viz:

"Judson & Co. obtained in the Gadsden Superior Court a judgment upon *certiorari*, against Howse & Holloman, which judgment, it is represented, is a lien upon certain *real estate*, subsequently purchased by one William Forbes, under a junior judgment, against one George W. Smith, the grantee of Howse & Holloman.

"Forbes now sues out this writ of error, as a party injured by the judgment, and who is to be benefitted by a reversal of the same."

The question arising upon this state of facts is, "Can he, Forbes, of his own right, in the name of Howse & Holloman, prosecute this writ of error." We think he cannot. It is a well established principle of law, to which no exception can, (it is believed,) be found, that "no person can bring a writ of error to reverse a judgment, who was not a party, or privy to the record, or who was not injured by the judgment, and theefore to receive advantage by the reversal of it." 1 Rob. Ab. 747. Dyer 90. There is nothing in this statement of facts, to show that Forbes was injured by this judgment, or even that he is in danger of being so injured. For aught that appears, Howse & Holloman have ample means which may be reached by an execution, to satisfy the judgment, *without* resort being had to the *real estate* purchased by Forbes, as set forth in this statement of facts; and it would be the duty of the plaintiff in execution, to exhaust *all* the other property of the defendants that can be thus reached, before resorting to such as they may have bona fide conveyed away, and which the purchaser shall have taken in good faith, and for which he shall have paid a valuable consideration, after the rendition of the judgment; and were the plaintiffs to attempt to act otherwise, a Court of Equity would restrain them; for although a judgment is by law a lien upon the lands of the defendant, yet he may, after judgment, convey a good title to real estate, if he has at all times afterwards a sufficient amount of property, subject to, and within reach of an execution, to satisfy the judgment; otherwise a judgment for one thousand dollars, (or even a much less sum,) might lock up all the real estate which the defendant

might own, although it were worth a million of dollars. But the 135 law is not thus unreasonable. We do not perceive, therefore, how Forbes is prejudiced by this judgment; and a party cannot maintain error, when not prejudiced by the judgment. 5 Reports 38. Tomlin's Law Dicty. Title Error 1. Hume vs. Long's Representatives, 6 Monroe's Reps. 118. Blight vs. McIlvoy, 4 Monroe's Reps. 147. Nor can we see how he would be benefitted by its reversal; and surely he can have no right to interfere, to prevent the plaintiffs below from making their money out of other property of the defendants, which would be the direct effect of this proceeding, and especially of such reversal, if they have such other property out of which the money can be made.

But the more important objection to this proceeding on the part of Forbes is, that he was not a party or *privy* to this judgment. He acquired his interest after it was rendered, and when he was bound to take notice of it. He is therefore a mere volunteer and does not stand in such relation to the judgment, as enables him to prosecute this writ of error, even if the *real estate* which he purchased as stated, is endangered by the lien which it creates.

The general rule being, that 'none but parties to the record or privies can maintain a writ of error." By privies are meant heirs, executors, administrators, terre tenants, those having an interest in remainder or reversion, or one who is made a party by the law, as he who comes in as a vouchee. 1 Rol. Ab. 748, 755. 1 Leon, 261, Tomlin's Law Dict. title error 1, page 649. Dale vs. Rosevelt, 8 Cowen's Rep. 333. Vanhorn vs. Frick, 3 Sergt. & Rawle Rep. 278. Fatteral vs. Floyd, 6 Sergt. & Rawle Rep, 315. Barr & Yeaser vs. Stevens, &c., 1 Bibb Rep. 292, 293.

Forbes does not stand in either of the relations above mentioned, nor was he made a party by the law.

The motion is therefore sustained, and the case dismissed.

Per totam Curiam.

JOHN D. EDWARDS *vs.* UNION BANK OF FLORIDA. 136

AN action of trespass *vi et armis* will lie against a corporation.

In an action of trespass against a corporation, the trespass being alleged to have been committed in one county, and the action brought in another, and the one in which the corporation has its office and transacts its business, it is too late, after verdict, to object that the action was brought in the wrong county; or that it should have been brought in the county in which the trespass was committed. The defect is secured by Statute 16 and 17, Car. 2. which is in force in this State.

A corporation is included in the 10 Sec. of the "Act regulating judicial proceedings," and must be sued in the county in which the office of such corporation is kept.

APPEAL from Leon Superior Court to late Court of Appeals of the Territory of Florida, transferred to this Court.

This was an action of trespass *vi et armis*, tried February 1845, in the late Superior Court for Leon County, when there was a verdict for appellant. On motion of appellee, judgment was arrested: whereupon, appellant prayed an appeal. The opinion of the Court contains the reasons assigned for arrest of the judgment and the other facts of the case.

A. E. Maxwell, for appellant:

Corporations, in all their privileges and liabilities, are assimilated as nearly as possible, to individuals. C. J. Marshall, in Providence Bank vs. Hillings & Pittman, says: "That the great object of an incorporation is, to bestow the character and properties of individuality, on a collective and changing body of men." He says further, that they are not exempt from any burthens common to individuals, unless expressly exempted by charter. And this remark is more especially true, of all money and other corporations for private benefit and emolument. If they are not exempt from any burthens common to individuals, they cannot claim to be exempt from any legal action, which their own misconduct, by agents and servants, would, if they were individuals, render them liable to. They cannot do any act without responsibility—they can do nothing without incurring the same legal liabilities which an individual would incur for the same act. A different doctrine would but furnish the pretext to persons to become incorporated for some plausible purposes, in order to have the power to commit outrages upon property, which their

vindictive propensities might urge them to, and which, as mere individuals, they dare not do, for fear of the law.

The law is well established, that corporations are liable for torts; and the authorities relating to this subject, so far as I have observed, make no distinction as to the character or degree of torts. In Case and Trover, they are clearly liable; and in no case so deciding, has a distinction been drawn, which exempts them from liability in trespass. See Towle vs. Com. Coun. of Alex. 3 Peters 409. Yarborough vs. Bank of England, 16 East, 8. Riddle vs. Proprietors &c. on Merrimack river, 7 Mass. R. 169. Ang. & Ames on Corp. 328. No reason can be assigned why they should be liable in these actions, and not in trespass. The technical objection, which seems to be the only one mentioned in the books, that *capias* and *exigent* do not lie against a corporation, applies equally to all these actions: yet it is not now allowed to prevail as to the former.

For authorities to show that trespass will lie, see Ang. & Ames on Corp. 331—34. 1 Chitty's Pl. 87. Dater vs. Troy Turnp. & R. R. Co. 2 Hill's R. 631. 23 Pick. R. 139. 7 Mass. R. 169. And Whiteman's Ex. vs. Wil. & Susq. R. R. Co. 2 Harrington 514. This last is a case where the point was fully considered, and the Court is positive in holding that the action can be well maintained.

The other ground taken below, that trespass does not lie in this case, because the trespasses were committed under legal sanction, by an officer of the law, is not available upon motion in arrest of judgment; for, at that stage of the case, all the facts alleged in the declaration are supposed to be proven as charged. 16 East. 8. 7 Cowen 486. The declaration her alleges that the trespasses were committed by the agents and servants of the bank, and after verdict, that fact is considered as proved.

Upon the point, whether the declaration was defective in regard to the venue, and whether, if so defective it was cured after verdict, by statute of Jeofails, &c., it is contended—That, although by the old law, trespass quare clau. fre., was a local action, and could not be brought out of the county where the cause of action arose, yet there is no reason, but a technical one for this doctrine. This was held to be true by Chief Justice Marshall in the case of Livingston vs. Jefferson, 2 Brock. R. 203; and from the tenor of argument in his opinion, it is clear that he would gladly have taken hold of any statutory regulation, however remotely bearing upon this doctrine, which could, with an color, be construed to abolish the distinction between
138 local and transitory actions, where the redress sought is only in *damages*, and in this respect imparting to the causes the character of personal actions. In this State there is a statute which, without any distortion, may be considered as abolishing the distinction, See Duv. Comp. 7 sec. 106. In all cases where *summons ad respondendum* is the proper writ, it seems intended by this statute that the plaintiffs shall be entitled to his option, either to bring suit in county of defendant's residence, or where the cause of action accrued. This includes all cases where damages merely are sought; and such is the action now before the Court. This view seems entitled to greater weight in this case, because the corporation cannot be served with process out of the county of its location, except when its officers are absent, Duv. Comp. 2 sec. 194.

Besides, the want of jurisdiction in such cases as this, is not of that character which would render a judgment against defendant below void. The Court certainly has jurisdiction of the subject matter, and if the defendant submits to its exercise, even if in a wrong county, he must be considered as waiving the privilege (for it amounts to nothing more than a personal privilege.) See 4 Mass. R. 591. This was a transitory action, but it establishes that the privilege may be waived, and will be considered as waived, unless defendant claims it before the cause goes to the jury.

It is true, that objection to jurisdiction may be made at any time where the want of it appears upon the record; but this rule cannot apply to cases where the jurisdiction is perfect, if the party entitled to the objection waives his privilege. Else he might wait till the verdict upon the merits is given against him, and then defeat it at his will. If the jurisdiction be such as cannot be had even by consent, then this rule may be good, but not otherwise.

But, this defect, if it be one, is cured by the statutes Jeofails. If the venue is mislaid it is curable after verdict. It is not of substantial defect. The cause of action must be presumed to be good, or the jury would not have given a verdict for plaintiff. Our statute (Duv. Comp. Sec. 54, p. 100,) seems broad enough to cover the defect. But if this statute does not cure the defect, it is aided by 16 and 17 Car. 2, which is of force here, not being repealed or superceded; for that statute, see 1 Chitty's Pl. 712, and for its construction, see Craft vs. Boite, 1 Saund. R. 246, and note (3) 247: see also, 1 Comyn's Dig. 260.

T. H. Hagner, for Appellee: 139

Contended that there was no error in the decision of the Court below, arresting the judgment. He insisted that it was well established by authority, that trespass *quare clausum fregit* does not lie against a corporation. That the weight of ancient as well as of modern authority inclines to this view, and that reason and analogy support the same opinion. He contended that the action must be brought against each person who committed the tort, by name, and not against the artificial being—that sound principle as well as sound law established the propriety of such procedure; that security of the rights of the citizens was best maintained by holding the parties committing the trespass *individually* liable.

He cited in support of these positions. 6 Viner's Abridg. 300. 1 Kyd on Corp. 223-225. 4 Comyn's Dig. 486, Tit. Franchises, F. 8 East. Rep. 230. 1 Tuckers Com. 156. Brown on actions, 159. 160.

He examined and commented upon the authorities cited by counsel for appellant, and called the attention of the Court, to page 328, and 9. Ang. & Ames on Corp. where the general principles he contended for, are declared and sustained by authority. That on page 331, the authors have laid down the text far beyond what the cases cited by them justify. Yet taken at its full value, the text claims but to be an argument to show what might be said to sustain their views. The cases there cited, and to which appellant's counsel has referred, established no such principle. The case of Yarborough vs. Bank of England, 16 East. 8, decided merely that *Trover* would lie against a Corporation. Gray vs. Portland Bank, 3 Mass. 364, was also a special *action on the case*. 6 Mass. 333, relied on by Angell & Ames, does not establish the point for which cited. The defendants were not known to be incorporated, nor was any question like this raised. The case of Fowle vs. Common Council of Alex. 3 Peters 399, is full in our favor, for it denies the liability of a corporation, *as such*, for acts done beyond the scope of their charter. Although admitting they are liable for torts—yet it is clearly indicated that they are liable *consequentially*—and that very action was *in case*. And this decision, he contended, placed the matter upon right grounds. No one questions that a corporation is liable for torts. The question is, in what form of action?

The remaining case relied on by Angell & Ames, is Chesnut Hill Turnpike Co. vs. Rutten, 4 Serg. & Rawle 6. This citation is equally unfortunate—the case decided that *trespass on the case* lies 140
against a corporation aggregate for a tort.

He said that, in addition to these cases, the counsel for appellant had cited others, to which he would call the attention of the Court. Riddle vs. Proprietors of lands, &c., 7 Mass. 169, established that an action of *trespass on the case*, will lie against a corporation aggregate, for neglect of a corporate duty. The counsel for the corporation having taken the ground in that case, that no action of trespass, *even on the case*, lay against the corporation, the Court decided, that some actions of trespass might, at common law, lie against corporations; but the decision goes no further than to support the action brought. He insisted, that the citations did not support the text in 1 Chitty's Pl. 87. He examined 23 Pickering, 140, wherein occur these words, used by way of argument:—"So trover, or assumpsit, or trespass, will lie against a corporation, as against a natural person. Foster vs. Essex Bank, 17 Mass. R. 503." That by reference to that case, (it appears) there is no such decision therein made. The Court say: "We think there is no doubt that, on such a de-"posit, an action of *trover* would lie against the corporation, if they "should refuse to deliver the property on demand; and *assumpsit* "might also be maintained, it being settled, by the later authorities, "that either action may be maintained against an incorporated com-"pany, as well as against a natural person." The case itself from 23 Pickering, involved simply the point that, by 40 years adverse possession, a corporation could acquire title to land.

He commented on the other cases cited. He said that, 2 Hill 631, was a case where ejectment was brought against a corporation—and that the opinion of the Court there expressed, that trespass *qu. cl. freg.* will lie, is an *obiter dictum*—"not called for by the case, and which it was unnecessary to give." Besides, it is declared upon the authority of 18 Wendell 9, where the point was not made. In that case, against the Mohawk R. R. Company, for trespass *qu. cl. freg.* the company justified under the act of the General Assembly of New York, authorizing them *"to enter upon, and take possession, and use* all such lands," &c., for the erection of their road.

As to the weight to be attached to this case, from 18 Wendell, he cited Ram on Legal Judgment, 183—4—that the decision was made without argument on the point, and the point itself did not arise. He read 3 Law Magaz. 317, to show the constitution of the Court for the correction of Errors in New York: and he commented

141 on this decision, and the feelings and temper of the Court which decided it, as shown in page 43 of 18 Wendell—all tending, as he insisted, to diminish the value of that decision.

The case cited from the Court of Errors and Appeals of Delaware, 2 Harrington's Rep. 514, he argued, could have little weight. The Court declares itself unable to find a direct decision of the question, and it undertakes to declare the law. To three of the Judges of the Court, a legal exception existed, and two persons were commissioned as Judges *ad litem* to try the case. It is, in fact, the single adjudication produced in this Court, admittedly (see p. 518) against the settled law declared by the old books—and by a Court thus constituted. Against it also, is the decision of the Supreme Court of Ohio, (Wright's Rep. 603,) Hamilton county vs. Cincinnati Turnpike Co., deciding that, "where a Corporation has caused an illegal act to be done, then the *Company's agents* are *trespassers;* or the Company having caused the act, are liable *in case* for the injury." Such, (he regarded,) as the sound rule of law.

It is urged that Corporations are to be treated as natural persons. So they are, within their chartered powers. 2 Chanch, 167—8. 7 Cranch 299. Beyond their chartered powers, their franchise ceases —the persons composing it cannot screen themselves behind their chartered privileges—the agents are trespassers, individually bound for the trespass itself; while the Company is liable for the consequences of the act they commanded to be done. Thus a double security is provided; and this, he insisted, was the true conservative principle, to secure the citizen from unjust aggression.

Upon the second point, that this action was local, and being local, proper ground of arrest of judgment, he cited. 1 Brock. Rep. 203. 1 Robinson's Prac. 21. 2 Wheaton's Selwyn, (1342.) 1 Bacon's Abrid. 79 A. 4 Term Rep. 503. 3 Harrison's Rep. 3. That the verdict does not cure defect. 2 Humphrey's Rep. 425. Stephens on Plead. 146. And that the objection was good on writ of error, he cited, 2 Scammon's Rep. 275. Grant vs. Tams & Company, 7 Monroe's Rep.

He urged, that no where had our law done away the distinction between local and transitory actions; that trespass *qu. cl. fregit* was such local action; that the declaration set forth that the trespass was committed in *Jefferson county;* that the action was there laid; and he insisted that even consent could not give jurisdiction, where the Court has not, by law, cognizance of the subject. 1 J. J. Mar-
142 shal R. 476. He examined the English statute of Jeofails, 16 & 17 C. 2, c. 8, sec. 1—that after verdict, judgment shall not be stayed or reversed, &c. "for wrong *venue,* so as the cause were tried by a "jury of the proper county, or place where the action is laid."—Crabb's Digest, 651.

He argued, that the action is laid in the declaration in Jefferson county—not under a videlicet—with no fiction of law to sustain it, as within the venue; and he urged, that the case meant in the statute would be this:—if the defendant were sued in Jefferson county, and the action tried there, where it is laid in the declaration to have arisen, and the *venue* in the margin was, "Leon county, set." this *wrong venue* would not vitiate—because "the cause *was tried* by a jury of the *proper county* where the action is laid."

To admit the converse, is to say, that the mere naming a *venue,* makes it the right venue—and any county thus becomes the proper county—that, in truth, the case pointed at in the statute could never arise; for there never could be a *wrong* venue, unless the action was laid in the *right* county; and to sustain this case, is to overturn all distinctions between *local* and *transitory actions.*

He distinguished between the cases of *transitory* actions, where the *justification* was *local;* and between *local actions* themselves. Craft vs. Boite, 1st Saunders, 247, was of the first sort; and the Court held that, in that action which was transitory, though the issue was *local,* yet it was rightly tried in the county where the action was laid in the declaration. He relied on the decision in that case, distinguishing it from the case at bar. Here the action being local, there could only be a local issue; and the proper county would be Jefferson county, where the action is laid. That for this reason, the judgment ought to be arrested.

Maxwell, in reply:

It is true, the law is, that a corporation can do no act not authorized by its charter, but the meaning of this law is greatly misapprehended. It does not mean, that a corporation shall not be held responsible for its acts, when it exceeds the power given by the charter, but that a corporation can do no act which it would be legal for an individual to do, unless the charter confers the power to do it. And it is very evident, that the most effectual way of keeping a corporation within the limits of its charter, is to hold it liable to actions at law, whenever it exceeds those limits. A contrary doctrine would give it perfect impunity as a corporate body. Moreover, the law as contended 143
for by the counsel, would deny an action of trover, or other action of tort, for he will not contend that the Bank, by any provision of its charter, is authorized to convert a man's property to its own use, or to do any other tortious act. Yet, these actions will lie, as the counsel himself admits.

The cases before cited, to show that tort will lie against a corporation, must be considered good authority in this case, unless some reason be given for a distinction, which makes a corporation liable for one degree of tort, and not for all. No such distinction can be found in the books.

The authorities relied upon by the counsel of the defendant are all based upon the citation from Viner. They are ancient, and, without exception, opposed by all the modern decisions. The case from Ohio does not hold that this action will not lie; but simply, that an action on the case will lie. This is not denied, but it forms no objection or bar to an action of trespass *vi et armis.* It is doubtful whether Viner is an authority for the opposite side. The case from which he derived his view, was that of a commonality corporation. Judge Marshall, in the case from 3 Peters, 409, says, he knows of no instance where such a corporation has been held liable, even for a tort; although a money or other private corporation would be held liable. Taking this distinction, Viner himself fails as an authority against this action, and with him fails all the cases based upon his credit, so that no authority remains to oppose, not only the general tendency, but the express holding, of the modern decisions.

DOUGLAS, Chief Justice:

This is an action of trespass, instituted by John D. Edwards against the Union Bank of Florida, in the Superior Court of Leon county, in the Middle District of Florida.

The declaration contains two counts. The *first* charges: "That the said Union Bank of Florida, by its servants, officers and agents, on the sixteenth day of April, one thousand eight hundred and forty-two, and on divers other days and times between that day, and before the commencement of this suit, with force and arms, &c., broke and entered divers, to wit: four closes of the said plaintiff, situated in Jefferson county, to wit: in the county aforesaid, and then and there broke down," &c.—(setting out the other matters of the trespass in the usual form.)

The *second:* "And for that also, the said defendant, by its officers servants and agents aforesaid, on the days and years aforesaid, at 144
the county aforesaid, impressed, seized, took, and carried away, divers, to wit: forty-one *negro slaves,* then and there being the servants, and in the possession of said plaintiff, and unlawfully kept and detained the said slaves, so being the servants of said plaintiff, from and out of the service of said plaintiff, without the license or consent of said plaintiff, and against the will of said plaintiff, for a long space of time, to wit: until the commencement of this suit, whereby, &c. (the usual form in such cases), to the damage of said plaintiff of one hundred thousand dollars," &c.

To this declaration, the defendant put in the plea of not guilty; upon which issue was joined, and that issue was submitted to a jury, who returned a verdict for plaintiff, and assessed his damages upon the first count at two thousand dollars; and upon the second at seventeen thousand dollars; making the whole nineteen thousand dollars.

And thereupon the defendant, by its counsel, moved the Court for "a rule nisi," to arrest the judgment, for the reasons following, to wit:—

First: Because an action of "trespass vi et armis," doth not lie against a corporation.

Second: Because if such an action can be maintained at all, it doth not lie in this case, the entry being warranted by law.

Third: Because the plaintiff has not, by law, a right to a judgment in his favor.

Which rule was granted; and after argument had thereon, was by the consideration and judgment of said Court sustained; and the judgment upon said verdict was accordingly arrested.

Whereupon the said plaintiff, by his attorneys, prayed an appeal to the Court of Appeals of the Territory of Florida, which was granted accordingly, and the cause was carried up to the said Court of Appeals, whence it was transferred into this Court, under the provision contained in the last clause of the 17th article, (Schedule and Ordinance,) of the Constitution of the State, which declares that all actions at law, or suits in Chancery, or any other proceeding pending, or which may be pending in any Court of the Territory of Florida, may be commenced in, or transferred to such Court of the State, as may have jurisdiction of the subject matter thereof; and of the provision contained in the 14th section of the act of the General Assembly of this State, of the 25th July, 1845, which was passed to carry into effect the above mentioned provision of the

Constitution, so far as related to cases pending in the said Court of Appeals:

Upon the first day of the present term of this Court, a motion was made by the counsel for Appellee, to dismiss this case, for the following reasons, viz:—

First: Because it has no rightful place in this Court; and this Court has no jurisdiction of the same, no appeal or writ of error having been sued out, or taken to this Court; and this Court having no appellate jurisdiction of the case.

Second: Because the judgment of the Leon Superior Court is final, until reversed by the proper appellate tribunal, constituted by the acts of Congress of the United States.

Third: Because this Court has appellate jurisdiction only over those inferior Courts, which the Constitution of the State of Florida has established, and which compose, with this Court, the judiciary power of the State.

Which last motion was overruled, for the reasons given in the opinion of the Court, pronounced by Judge Baltzell, on a former day of this term, in the case of Charles D. Stewart vs. Thomas Preston, Jr., upon a similar motion, founded upon the same reasons as the motion to dismiss this case.

After which, the counsel for the appellant filed herein the following assignment of errors, to wit:—

First: The Court erred in sustaining the motion in arrest of judgment.

Second: The Court erred in giving judgment for defendant, and not for plaintiff.

Which errors we now proceed to examine. From this state of the case, we are first called upon to inquire, whether trespass vi et armis lies against a corporation?

It is said, in some of the old books, that trespass does not lie against a corporation, because a capias and exigent does not go against a corporation. But an exigent was never known in practice in Florida, and the capias has long since been virtually banished from it, in all civil cases, by the provision contained in the last clause of the fifth section of the act to amend an act regulating judicial proceedings, approved November 23d, 1828, which declares that no person shall be required to give bail for his or her appearance, to any original writ or summons, emanating from a Court of Law; and the fifty-third section of the same act, Duval's Comp. page 146 99, by which it is declared: "That in *no* case shall a capias ad satisfaciendum be issued by the Clerk, upon judgment of the Court — nor shall the body of any defendant be subject to arrest or confinement, for the payment of money, except it be for fines imposed by lawful authority;" so that, neither a capias or exigent ever issued in an action against a corporation in this State in any case. "Cessante ratione, cessat et ipsa lex." But it is believed, that the position thus stated, is laid down more broadly than was ever warranted by the principles of the common law. It was held, at an early period in England, that, "a corporation might be defendants in an action of quare impedit, and the hindrance is an act of tort." And the case of Butler vs. the Bishop of Hereford and the University of Cambridge, Barnes C. P. 350, is cited by Lord Ellenborough in the case of Yarbrough vs. the Bank of England, 8 East Rep. 9, to this point: "To which he says, a multitude of other instances may be added, as Rost. 497, 2 Mod. En. 291. Winch. 625—700—721. 2 Lut. 1100, and 3 Lev. 332. The statute of 9 Henry the 4th, chap. 5, recites the practice in assizes of novel "disseisin," and other pleas of land, of naming the mayor, and bailiffs, and commonalty of a franchise, as disseisors, in order to oust them of holding plea thereof; and directs the inquiry before the Judges of assize, whether they be disseisors or tenants, or be named by fraud;"— which most clearly proves, that they may be considered as disseisors. And there are instances of trespasses against corporations, in 44 Ed. 3d. 2 Pl. 5, which was after 22 Ass. Pl. 67, cited in the argument of the case of Yarborough vs. the Bank of England. Trespass, says Lord Ellenborough, was brought against the mayor and commonalty of *Hull*, and another person; and the objection was made, *not* that trespass would not lie against the corporation, but as a natural person was joined with them, there must be different processes. A distress against the former, and a capias against the latter. But the objection does not appear to have prevailed—and in 8 Hen. 6, 1—14, trespass was brought against the mayor, bailiffs and commonalty, and one of the commonalty; and the objection was, *not* that trespass would not lie against the corporation, but that it could not be supported against them, and an individual of *their body*. And Bro. on Corporations Pl. 24, says, the better opinion was, that the writ was good; and 14th Hen. 8th, 2, says it was so awarded, and that in that case, all the justices agreed. The case of Yarborough vs. the Bank of England, was decided on the principle, that actions of *tort*, 147 without distinction, would lie against corporations. Lord Ellenborough who delivered the opinion of the Court of King's Bench, cited several cases, (some of which we have already cited,) in which trespass had been maintaind, in very early times, against corporations, under circumstances which preclude the idea or inference that an objection to the form of the action was then considered maintainable. His own opinion was, that trespass had been, and might be maintained; and that the want of authority, under the corporate *seal*, to do the act complained of, was not material. Both Viner & Comyn, it is true, speak of the law as settled, that trespass lies not against a corporation aggregate. Both assign the same reason, viz: that capias and exigent do not lie: and cite Brown on Corporations. Thealal & Thorpe's Assizes.

In Riddle vs. the proprietors of the locks and canals on the Merrimack River, 7 Mass. Reps. 186—8, although an action for a nonfeasance, Parsons, Chief Justice, entered fully, and very ably, into this question, and shows, upon the authority of Thealal himself, the principal reference of Viner & Comyn, that Thorpe's opinion, which has been so much relied on, had been overruled in England, as to certain trespasses; and takes what we deem the true and correct distinction, between corporations of a public nature, called *quasi* corporations, such as towns, cities, &c., and proper corporations aggregate, by which is meant money, and business corporations, against which the action may, (and we think sound policy requires should,) be maintained.

In the case of Chestnut Hill, &c., Turnp. Co. vs. Rutter, 4 Serg. & Rawle, Rep. 6, which was an action of trespass on the case for stopping a water course, it was strongly objected, that a corporation could not be *guilty* of a *tort;* but Chief Justice Tillman said, that this doctrine was fallacious in principle, and mischievious in its consequences, as it tends to introduce actual wrongs, and ideal remedies; for a turnpike Company might do great injury, by means of laborers having no property to answer damages recovered against them; that it was much more reasonable to say, that where a corporation is authorized by law to make a road, if any injury is done in the course of making that road by the persons employed under its authority, it shall be responsible in the same manner as an individual is responsible for the acts of his servants touching his business, and "there is no solid ground for a distinction between contracts and *"torts."* Angell & Ames on corporations, 224, 226, is also authority to this point. And Chief Justice Marshall in the case of Towle vs. The Common 148 Council of Alexandria, 3d. Peters' Rep. 409, lays it down as well settled, "that money corporations, or those carrying on business for themselves, are liable for torts;" not of particular discription only, but torts generally committed by their agents. In the case of John Whitemongs Ex. vs. The Wilmington and Susquehanna Rail Road Company, 2 Harrington's Rep. 514, it was held, that "trespass will lie against a corporation," and in the case of Dater vs. Troy Turnpike and Rail Road Co. 2 Hills N. Y. Rep. 632, Cowen, Justice, said, "the old doctrine always admitted to be questionable, (1 Kyd on Corporations 223,) that trespass or ejectment will not lie against a corporation, is exploded by modern authorities," and in the case of the second Precinct, in Rebobath vs. The Cath. Cong. Church and Society in Rebobath, 23 Pickerings Rep. 140, the Court remarked, "it is said that an aggregate corporation cannot commit a disseisin unless the entry be authorized by their *deed;* and so, if a corporation be disseised, the entry to revest their estate must be by an authority *under seal.* This, says the Court, *was* undoubtedly the ancient doctrine as to corporations, but a more liberal doctrine has *long since* prevailed, and as the law now is, corporations may be bound by implication from corporate acts without a vote or *deed,* and the cases of the Canal Bridge vs. Gordon, 1 Pickering Rep. 297, and Episcopal Charitable Society vs. Episcopal Church in Dedham, 1 Pickerings Rep. 372, are cited.

So trover or assumpsit, or *trespass,* will lie against a corporation as against a natural person. Foster vs. Essex Bank, 17 Mass. Rep. 503. So a town or Parish may acquire a title by disseisin, by an exclusive adverse occupation, although the occupation was not authorized by any writing under *seal,* Milton vs. First Parish in Milton, 10 Pickering's Rep. 452, and it is not a little remarkable, that the case of Bloodgood vs. The Mohawk and Hudson Railroad Company, which was an action of trespass, Quare Clausum Fregit, and is first found in 14 Wendell's Rep. 51, and again in 18 Wendell's Rep. 9, should have passed through all the Courts of the State of New York, without objection as to the form of the action, if (as is contended,) such an action doth not lie against a corporation. Indeed it is strong evidence, that both the bar and the Courts of that great and enlightened State, consider, as did the late venerable Chief Justice Marshall, that it is *well settled,* "that money corporations, or those carrying on business for themselves, are liable for torts, committed by their ser-

149 vants or agents in the course of their business." And in view of all these high authorities, we feel ourselves constrained so to regard it. If however this point was left in doubt by the general current of authority, our statute, directing the mode of instituting suits against corporations, Duval's Comp. 104, the *first* section of which provides, "that in all cases actions or suits which may be instituted against any corporation, instead of the process heretofore used to compel the appearance of such corporation, it shall be sufficient to issue *'a summons'* to the Marshal or other proper officer, (now the Sheriff,) reciting the cause of action, and summoning the said corporation to appear and answer the same on the proper return day," &c., should be permitted to settle the question.

This brings us to the second reason assigned for arresting the judgment which was, "that if such an action could be maintained at all, it does not lie in this case, the entry being *warranted by law.*" It is a sufficient answer to this position to say, that there appears to be nothing in the record to sustain it, and after a verdict against the defendants upon the only issue in the case, upon the plea of not guilty, it comes too late. The *third* and last reason assigned was that the plaintiff, had not by law a right to a judgment in his favor. This is very general, as is also the last error assigned, viz: "that the Court erred in giving judgment for the defendant," but it is under this *third* reason, that the appellee urges the want of jurisdiction in the Superior Court of Leon County to try this case. The cause of action, it is alleged, (if any was committed,) was committed in Jefferson County; that the cause of action is local not transitory, and could not therefore be rightfully instituted or tried in Leon County. It is very curious and instructive, says a late writer upon this subject, (who seems to have examined it extensively and with considerable ability,) to trace the progress of the English law respecting the locality of actions During the earliest ages of our judicial history, juries were selected for the very reasons which would now argue their unfitness, videlicit their personal acquaintance with the parties, and the merits of the cause. And few rules of law were enforced with greater strictness than those which required the *venue, visne* or *vicenum,* or in other words the neighborhood whence the jurors were to be summoned, should be also that in which the *cause of action* had arisen, in order that the jury, who were to determine it, principally from their own private knowledge, and who were liable to be attained, if they delivered a wrong verdict, might be persons likely to be acquainted with the
150 nature of the transaction which they were called upon to try. In order to effect this end, the parties litigant, were required to state in their pleadings, with the utmost certainty, not merely the county, but the very venue, i. e. the very district *hundred* or *ville* within that county, where the facts that they allege had taken place, in order that the Sheriff might be directed to summon the Jury from the proper neighborhood, in case issue should be taken on any such allegations. It followed of course, that a new venue was designated, as often as the parties litigant shifted the scene of the transaction from one part of the county to another. This was however soon found to produce great inconvenience, for in mixed transactions, which may happen partly in one place and partly in another, it was extremely difficult to ascertain the right venue, and as the number of these transactions multiplied with increasing civilization, these difficulties about determining the place of trial became numerous and of constant occurrence, and soon induced the Courts to take a distinction between *transitory* matters, such as contracts which might happen any where, and *local* ones, such as trespass to the realty, which could only happen in one particular place, and regulations were adopted respecting transitory actions, and from time to time changed, and modified to suit the exigencies of the times, (which it is not necessary for us now to notice.) But where a matter alleged in pleading was of a *local* description, whether the allegation happened in a declaration or in any subsequent pleading, the venue for the trial of such matter could be no where but at the very place where it was alleged in pleading to have happened, and therefore even in cases the most transitory, if the cause of action was laid in London, and there was a *local* justification as at Oxford, the cause must have been tried in Oxford, *not* in London. Ford vs. Brook, Croke Eliz. 261. Bower's case Moor. 410. "And it was probably this strictness of the law with regard to venue, which rendered it necessary to confine the defendant so long to a single plea, since had he pleaded several please on which issues had been taken triable by different venues, there could have been no single trial of the action, and accordingly we find that it was not till after the effect of the statute of 16 and 17 Car. 2, on venues, had become well settled, that the very same year which put an end to the last remnant of the old severity, by abolishing the necessity of summoning hundredors, also endowed the defendant with a right which he ought in justice always to have possessed, of stating every thing in his defence, which can by law be made available to exonerate him;
151 the right corresponding to which, that namely of replying to the defence, every thing which has a direct tendency to rebut it, is even in our more advanced times denied the plaintiff." 1 Smith's leading cases 481, in note. Thus stood the law in England in regard to local actions, and defences at the time of the passage of the act of 16 and 17 Car. 2, Cap. 8, concerning venues, (one of the statutes of Jeofails,) which declared, "that after verdict judgment should not be stayed or reversed, for that there is no right venue, so as the cause were tried by a jury of the proper county, or place where the action is laid." 1 Chitty's Pl. 279-283. Considerable difficulty arose on the construction of this statute, many lawyers contending that the words, "the proper county or place where the action is laid," must be understood to mean the proper county or place, where the issue arises, so that if the issue arose at Dale in Oxfordshire, and the venue was Sale in the same county, here they said was a case within the same statute, there being a right county, but a wrong venue. But it was at length decided in the case of Craft vs. Boite, 1 Saund. 246, that the words, "where the action was laid," mean where it was *laid in the declaration, not in any subsequent pleading;* and accordingly it has ever since been held, that it is sufficient if the jury be summoned from the venue laid in the declaration. 1 Smith's Leading cases 482 in note. In local actions, the only modes of objecting to the venue are by demurrer. Thrale vs. Cornwall, 1 Wilson 165, or at the trial as a ground of nonsuit. The Mayor, &c., of London vs. Cole et al. 7 Term Rep. 588. Stevenson vs. Lambard, 2 East 580. Brackshaw vs. Hopkins, Cowp. 410. Soutler vs. Heard, 2 Bla. Rep. 1033. In *local* actions, if the venue be laid in the *wrong County,* and the objection appear upon the record, it is clear, that the defendant may demur. 1 Saunders 241. The Mayor, &c., of Berwick vs. Ewart, 2 Bla. Rep. 1070. Mellon vs. Barber, 3 Term Rep. 387; and if it do not appear on the record, he may under the general issue avail himself of the objection at the trial, as the ground of nonsuit. 1 Chitty's Pl. 284-285.

It is contended, on behalf of the appellee, that the case meant in the statute of 16 and 17 Car. 2, would be this: If the defendant were sued in this case in Jefferson county, and the action tried there, and the *venue* laid in the declaration was "Leon county, ss.," and a number of cases were cited by his counsel in support of this position. As this is a very material point in this case, we have bestowed upon it that anxious attention, which the important bearing that it has upon the issue in this case demands. But after the most careful 152
examination of the question, and the authorities presented upon it, we cannot assent to that proposition. To our minds, it seems to be at variance with the current of authorities on the subject. The case of Craft vs. Boite, 1 Saunders 387 to 389, first settled the true and proper construction of the statute of the 16 and 17 Car. 2. In the case of the Mayor, &c., of London vs. Cple, 7 Term Reps. 583—584, Lord Kennyon, Ch. J., delivering the opinion of the Court, and speaking of the statute of 16 and 17 Car. 2, said: "I cannot express myself in better terms than Kelynge, Chief Justice, and Rainesford and Moreton, Justices, did, in one of the cases cited, who said the words of the statute are plain, that the issue was tried by a jury of the proper *county where the action was brought,* which was within the express words of the statute, and, (as they conceived,) within the intent of the statute." The one of the cases cited, as mentioned by Lord Kenyon, was that of Craft vs. Boite, 1 Saunders, 337, 339, by which the true and correct construction of this statute was first settled. In note 3, at page 339 of this book, it is said: The judgment in this case was at first received with considerable disapprobation; and Lander vs. Elliott, Camb. p. 75, is cited to sustain the remark; the better opinion being, (says the *annotator,*) that the intent of the statute was, to aid a *wrong venue* in the *same county,* where the issue arose, and not a *wrong county,* according to the distinction made by Saunders. However, (he adds,) the subsequent decisions are conformable hereto; and 2 Lev. 164—165. Adderly vs. Wise, Vent. 263. Jennings vs. Henking, S. C. 2 Lev. 121. 3 Keble, 509. Sir T. Raymond, 292. Horton vs. Nausan, 3 Lev. 394, (Hunt's case, and Briggs vs. Chew, there cited.) 1 Lord Raym. 330. Sir Richard Leving vs. Lady Claverly, S. C. Cooth. 448. 2 Lord Raymond, 1212. Maitland vs. Taylor, and 7 Term Rep. 583. The Mayor of London vs. Cole, are cited as "the subsequent decisions conformable thereto." In Comyn's Digest, 260, it is said: "If a local action be brought and tried in a *wrong county,* the defect is *aided* after *verdict,* by statute 16 and 17 Car. 2, C. 8.

The general issue was pleaded in this case; the cause was tried in the Superior Court, and by a jury of Leon county, where the action *was brought.* As the land upon which the trespass was committed, is shown by the declaration to be situated in Jefferson county, the defendant might have demurred; had it not been thus shown, it might have availed him on a motion to rule out the testimony, as to

153 the count in "quare clausum fregit." This is in accordance with the principle upon which the case of McKenna vs. Fiske, 17 Peters Rep. 245 to 250, was decided. This was an action of trespass, brought by the plaintiff in error against the defendant, in the Circuit Court of the District of Columbia, for the recovery of damages, for a large amount of goods and chattels, rights and credits, and personal property, taken and detained, and destroyed by the defendant. The declaration contained two counts, one for trespass to personal chattels, the other was, for "quare clausum fregit" in the county of Washington. On the trial, the plaintiff offered to prove that the defendant, with a large force of armed men, came to the store house or shantee of the plaintiff, in *Alleghany county,* in the State of Maryland, entered into the same, and took and carried away the goods and chattels stated in the declaration, &c.; and other evidence was offered to show the value of the goods. The Court refused to permit the evidence to go to the jury. Upon an exception to this ruling, the case was carried up to the Supreme Court of the United States, which, although it held that the evidence offered, as to the *local* count, was not competent, yet sustained the exception taken by the plaintiff, to the ruling of the Court below, in regard to the evidence excluded, and remanded the cause for further proceedings. And see also, 1 Chitty's Pl. 284.

In the case before us, no objection was made to the reception of the evidence in the Court below, on either count. The jury found for the plaintiff. The defect is cured by the statute of 16 and 17 Car. 2, before cited. The Court, therefore, erred in arresting the judgment upon it.

It was intimated, (but not strongly urged,) by the counsel for the appellant, that our statute of Jeofail, which is found in the act above referred to, regulating judicial proceedings, of 23d November, 1828, is that of 32 Henry 8, chap. 30, sec. 1, and not that of 16 and 17 Car. 2; and a doubt was expressed, whether the last mentioned statute is in force in this State—but the act of November 6th, 1829, entitled, an "act providing for the adoption of the common and statute laws of England," &c., which was passed one year after the judicial act, declared that the common and *statute* law of England, which are of a general, and not of a local nature, with certain exceptions, (none of which include the statute of 16 and 17 Car. 2,) should be of force in the Territory of Florida. Duv. Com. 357. This act is
154 continued, and made of force in this State, by the 17th article, (Schedule and Ordinance.) of our Constitution.

Hitherto, we have been considering this question, without reference to the act directing the mode of instituting suits against Corporations, before referrd to upon another subject—the second section of which provides:—"That if any summons be issued against any banking, rail road, insurance or incorporated company, service on the president or other head, or in his absence, on the cashier or treasurer; or in the absence of both the president or chief officer, and the cashier or treasurer, then on any director of such company; such president or other chief officer, cashier, treasurer, or director, being, *at the time of service, within the county in which he usually resides,* shall be deemed sufficient service of the said process." This act was approved February 11th, 1834. See Duval's Comp. 104—105. The object of this latter provision, ("such president, &c., being at the time of such service, within the county in which he usually resides,") is certainly not very clear. But it is difficult to imagine any reason for it, unless it be, that the Legislature contemplated such residence to be in the county where the office of such company should be kept, and intended the trial to take place in that county, thereby bringing such corporations within, (if they were not already so,) the provisions of the 10th section of the judicial act above mentioned, by which it is declared: "That no suit shall be brought to any of the Superior Courts of the Territory, against any persons residing therein, unless the same be instituted in the judicial district *and county* in which the defendant resides."

By the first section of the "act to incorporate the subscribers to the Union Bank of Florida"—Duval's Comp. 442—it is provided: "That a bank shall be established in the city of Tallahassee, under the title of the 'Union Bank of Florida,'" &c. The Court may take judicial notice that Tallahassee is in Leon county, (where the venue in this case was laid, and where this cause was tried,) that being the place where, by law, the Courts for this county are required to be holden. This suit was instituted in that Court, and it may well be doubted whether, under the peculiar provisions of the statutes referred to, it could properly have been brought in any other. The distinction upon which the question under discussion is based, is purely *technical.* This was so held by Chief Justice Marshal, in the case of Livingston vs. Jefferson, 2 Brock. Rep. 203, (cited at the bar.) and from the terms in which he expressed himself in delivering his opinion in that case, it appears quite evident that he would 155
gladly have seized upon any statutory regulation, which could, with propriety, have been construed to abolish the distinction between local and transitory actions, especially that class of them in which possession of real estate is not the object of the suit, and where the redress sought is only in damages. In that case the objection was taken by demurrer.

It seems to have been the intention of the Legislature to abolish this distinction, by the statutes cited to this point. Whether that be the effect of these statutes or not, this Court is clearly of opinion, that they confer upon the defendant, in cases like the present, the privilege of having any cause tried in the county where he resides, which the plaintiff may bring against him there; and that, after verdict, it is too late for him to object that it was tried in the *wrong* county. No objection was taken to the locality of the action in the Court below, and for the causes stated, such objection cannot be taken now.

The judgment of the Court below must be reversed, with costs; and the cause remanded to the Circuit Court of Leon county, for further proceedings, in accordance with this opinion.

Per totam curiam.

WILLIAM D. MOSELY AND THE EXECUTOR OF JESSE H. WILLIS *vs.* JOHN S. SHEPHERD.

WHERE two separate and distinct rules are taken at the same time against the Marshal, which, after a joint trial, are dismissed by one order or judgment of the Court, the parties to the two rules cannot legally unite in one joint appeal bond; although the order or judgment allowed the parties an appeal upon their filling their appeal bond. In such a case separate appeals should be taken.

APPEAL from the judgment of late Superior Court for Leon County.

The following tabular statement will show the different executions, which came to the hands of the Marshal against the executors of A. M. Gatlin, and the endorsements on each of them: 156

In whose favor.	No. of execution.	When it came to hands of marshal.	"Stay" by order of plaintiff endorsed on execution.	Remarks.	Amount.
Union B'k Fla., vs.	2887	1 April, '44.	From May 9, 1844, to June 1, 1844.	May 16, 1844, same levy as endorsed on 2994. Credit, 6 Jan'y, '45, $17,040, by sale of lands, negroes & 8 mules.	$20,229 33
Union B'k Fla., vs.	2982	16 May, '44. 15 minutes after 2 o'k.		May 16, 1844, same levy as 2994.	4,285 06
Union B'k Fla., vs.	2983	16 May '44 15 minutes after 2 o'k.		May 16, 1844, same levy as on 2994.	1,532 24
Union B'k Fla., vs.	2994	16 May '44.		May 8, '44, levied on 77 negroes, on which pl'ff hel a mortgage. On May 16, on 14 mules and 22 negroes, levied on under 2891. Oct. 7, levied on 1200 bushels of corn, and 4½ stacks of fodder.	4,743 20
Jesse H. Willis, vs.	2981	16 May '44 10 minutes after 2 o'k.		May 16, 1844, levied on 22 negroes	4,850 50
W. D. Moseley, vs.	2985	16 May '44		May 16, 1844, same levy as endorsed on & attached to 2994 and 2981.	404 01

On 28th April, 1845, Willis, plaintiff in execution No. 2981, took a rule on the Marshal, to show cause why he should not pay over to him the moneys arising from sale of the mules, corn and fodder, sold on 1st Monday in January, under and by virtue of executions in his hand, as the property of the estate of Gatlin. On the same day Moseley, plaintiff in execution, No. 2985, took a similar rule.

Afterwards the following judgment was entered:

"This day came as well the plaintiffs in the above executions, as John S. Shepherd, assignee of the Union Bank of Florida, plaintiff in the several executions returned by the Marshal with his answer, by their respective Attorneys. And the Court having fully heard the evidence, and argument of counsel, doth order and adjudge,

157 that the moneys arising from the sales of the mules, and corn and fodder, sold on the first Monday in January last, by the Marshal, properly belong, and are applicable to the executions in favor of the Union Bank of Florida, against A. M. Gatlin's executors, Nos. 2887, 2982, 2983 and 2994, respectively; and therefore the Court discharges the said rules with costs, &c. From which order and judgment of the Court, the said Jesse H. Willis and W. D. Moseley, prayed an appeal, which is granted them upon their entering bond in the sum of one hundred dollars, conditioned for the payment of all costs and damages, on failure of prosecuting their said appeal with effect; and upon motion of the said Willis and Moseley, seventy days is allowed them, within which to execute their said appeal bond."

Willis & Moseley accordingly filed their joint appeal bond.

Appellee, by his counsel, moved to dismiss the appeal, because among other reasons assigned, it was taken jointly, and not separately.

Hagner & J. & L. Branch, for appellants, insisted:

The judgment of the Court being joint, the appeal was necessarily taken jointly, and a joint appeal bond filed. That, under the judgment, it would have been irregular to have taken the appeal in any other way. If the Court below erred in rendering a joint judgment, instead of a separate judgment on each of the rules, this of itself is sufficient ground for reversing this judgment; but not for a dismissal of the appeal.

A dismissal of the appeal, because taken in accordance with the judgment which appellants are seeking to reverse, among other reasons, because of the error in its being entered jointly, would be to deprive a party of all remedy for an injustice which is admitted; and the very error complained of, would preclude the judgment from being brought to this Court for reversal or correction.

Long & Walker, for Appellee.

BALTZELL, Justice:

Two rules were taken in the Court below, by different counsel, against John G. Camp, as follows:

Jesse H. Willis, vs. Lamb, Ex'r of Gatlin, dec'd. } And now, on this 28th day of April, 1845, on motion of Thompson & Hagner, of counsel for plaintiff, it is ordered, that John G. Camp, Esq., Marshal of the Middle Dis-
158 trict, do show cause on to-morrow morning, why he should not pay over to the plaintiff in this execution, the moneys arising from the sale of the mules, and corn and fodder, sold on the 1st Monday of January last, as the property of the estate of Gatlin, under and by executions in his hands, against the executors of said estate.

The other rule is entitled:

W. D. Moseley, vs. Ex'rs of Gatlin.

And was made by J. & L. O'B. Branch, counsel for plaintiff, and is in other respects a copy of the former.

The Marshal, in return to this writ, says: "He returns into Court the executions, No. 2887, &c., respectively issued at the suit of the Union Bank of Florida, against the executors of Gatlin, together with certain papers, and that he did, on the 16th May, 1844, levy upon said mules, corn and fodder, by virtue of said executions, and made sale thereof, to satisfy the same. That he holds the proceeds for the use and benefit of the assignee of the plaintiff in said suits respectively. All which he submits."

Afterwards, on a day which does not appear, the following order was made:

Jesse H. Willis, vs. L. G. Lamb, Ex'r of Gatlin.

Wm. D. Moseley, vs. The same. } In Re. The rule upon the Marshal, J. G. Camp.

This day came, as well the plaintiff in the above executions, as John S. Shepherd, assignee of the Union Bank of Florida, plaintiff in the several executions returned by the Marshal with his answer, by their respective attorneys; and the Court, having fully heard the evidence and argument of counsel, doth order and adjudge, that the moneys arising from the sales of the mules, and corn, and fodder, sold on the first Monday in January last, by the Marshal, properly belong, and are applicable to the executions in favor of the Union Bank of Florida, against A. M. Gatlin's Executors, respectively, and therefore the Court discharges the said rules, with costs. From

which order and judgment of the said Court, the said Jesse H. Willis and W. D. Moseley, prayed an appeal, which is granted them, upon their entering into bond, in the sum of one hundred dollars, conditioned for payment of costs and damages, on failure to prosecute 159
their appeal with effect.

An appeal bond was executed and given, to the effect as follows:

Know all men by these presents, that we, Jesse H. Willis, Wm. D. Moseley, are held and firmly bound unto John S. Shepherd, in the just and full sum of one hundred dollars, &c.

The condition is such that, whereas, on the 8th of May, 1845, in the matter of a rule on John G. Camp, Marshal, issued at the instance of said Jesse H. Willis and W. D. Moseley, the said Court considered, that the moneys arising from certain sales of personal property, belonged to sundry executions, wherein Union Bank of Florida, for the use of John S. Shepherd, assignee, is plaintiff, and the executors of A. M. Gatlin are defendants; and thereupon dismissed said rule, from whilch said Willis and Moseley appealed to the Court of Appeals. If, therefore, the said Willis and Moseley shall pay the costs and damages, &c., then the obligation was to be void.

A motion is made to dismiss this appeal, on the ground that it was irregularly taken.

Without adverting to the fact, that the bond is not made payable to Camp, the party to the suit, and against whom the rule was taken, it is sufficient, in the opinion of the Court, that the interests of these parties are separate, and that they cannot legally unite in a joint appeal bond. The rule is in the nature of a suit; and if these cases had been commenced by writ and declaration, they must have presented separate and distinct interests and rights. The dismissal of them by one order, in no sense makes them joint, or a joint judgment. Properly speaking, and in strictness, there should have been a separate order in each case; but for brevity, as the same order may apply to several cases, their incorporation together has been permitted in practice, where the object of the Court could be equally attained by it. If the decision of the Court had been different, and for plaintiffs below, a separate order would have been requisite and indispensable. If the parties had succeeded, the judgment of the Court would have been, to pay to each the sum to which he might be found entitled, and his costs; and such would be the judgment of this Court, if the parties succeeded here upon their rules. In this latter event there would be two separate judgments in a common law case, and in favor of different parties, having distinct and opposing interests, which cannot, in our opinion, be according to the rules 160
of law.

As the judgment of dismissol stands now in the Court below, we are of opinion that separate executions ought to issue against each of the parties, for the costs in that Court.

The appeal will therefore be dismissed, with costs.

MARTHA ANN MANLEY, AND HIRAM MANLEY, IN RIGHT OF HIS WIFE, AND WILLIAM D. MOSELEY, ADMINISTRATORS DE BONIS NON OF SAMUEL PARKHILL, DECEASED, *vs.* THE UNION BANK OF FLORIDA.

A PERSON who has been appointed an Administrator de bonis non, after the institution of a suit, cannot be made a party to it by *mere suggestion*, although a copy of the record of such suggestion, and of his having been so made a party, be served upon him.

The "act to regulate the foreclosure of mortgages by the Courts of Common Law, and for other purposes," is in derogation of the Common Law; and mortgagees, when they resort to it, should be held to a strict compliance with its provisions; but the mortgagor or defendant should be allowed more latitude in making his objections, which will be sufficient for him to set forth substantially and as specifically, as the defence in an answer in Chancery, or in notice of special matter, under the general issue in a suit at law.

Neither the ordinary rules of special pleading, nor the technical rules of practice at law, are applicable to proceedings under this statute.

When a mortgagee has elected to proceed at law, and has obtained a judgment there upon his debt, he cannot proceed under this statute; but he should go into Chancery to obtain a foreclosure of his mortgage.

After judgment at law, a former recovery is a good plea in bar of proceedings under this statute.

After demurrer to a plea, it is too late to object that it was not filed in time.

APPEAL from late Superior Court for Leon county.

The suit was instituted under the statute "to regulate the foreclosure of mortgages by the Courts of Common Law, and for other purposes," on certain indentures of mortgage, executed and delivered

Manley and Moseley, Administrators, vs. Union Bank.

161 by Samuel Parkhill, in his life time, to appellee. The facts and pleadings are embraced in the opinion of the Court.

J. T. Archer, for Appellants:

I. The prayer for judgment and foreclosure and the judgment and decree of the Court thereon, treat the mortgage of 1839, and that of 1840, as if they were both given to secure the same notes and obligations, and upon the same property. The mortgage of 1839 was given on a part of the slaves, contained in the mortgage of 1840, and to secure the Bill of Exchange for $25,000, and *nothing else*. The petition should have prayed, and the Court should have decreed that the proceeds of the sale of the slaves named in the first mortgage and their increase, be applied, first to the payment of the Bill of Exchange, and the remainder, if any, on the second mortgage. The endorser on this bill, is entitled to the benefit of the security contained in the mortgage of 1839, in preference to the lien created by the mortgage of 1840. If this view be correct, the first error is well assigned.

II. The demurrer to objection filed 3rd May, 1844, remains undisposed of as shown by the record. This is fatal to the judgment and decree. 6 Howard, 389.

III. The Court had no power to make William D. Moseley a party defendant by *suggestion* of the plaintiff, and without the consent of Moseley. It is believed that the order of the 4th May, to that effect, is entirely unprecedented. The right of every defendant to have notice of proceedings instituted against him before the Courts, has ever been recognized as too sacred to be disturbed by the Legislature, much less to be subjected to the discretion of a Court.

IV. The record shows no legal notice to the defendants, (appellants in this Court,) as administrators *de bonis non*, against whom the judgment and decree are entered. The notice to Manley and Wife, as adminstrator and administratrix under the first grant of administration, is good against them as such, but is not good against them as administrator and administratrix de bonis non. 2 Call, 41-26. As to the copy of the order of 4th May, 1844, served upon Moseley in November, it is no legal notice of any thing, except the misgivings of the plaintiff, as to the sufficiency of the order itself. It was not ordered by the Court to be served, there is no seal of the Court attached, it commands nothing to be done by him, does not require him to appear, and is altogether irregular and informal. Besides, if it was a writ or notice, as contemplated by the statute, it should have been
162 served at least two months before the first day of the term. Duval's Comp. 40. The record shows the service of the copy to have been made about seven days before the first day of the term. The defendants Hiram & Martha, in the Court below, pleaded throughout as administrator and administratrix under the judgment of adminstrator, and never made an appearance as administrators *de bonis non*. William D. Moseley did not make any appearance, and judgment by *default* was entered against him. The record must show a legal notice to all the defendants below, or the judgment and decree are not only erroneous but absolutely void.

V. The 1st, 2nd, 3rd and 16th objections were stricken out, because not sworn to. The act for the foreclosure of mortgages at common law was passed in 1824. By the act of 1828, regulating judicial proceedings, administrators may deny the execution or consideration of any bond, note or other instrument of writing, without verifying the objection by oath.

VI. The administrators *de bonis non*, were not impleaded in and by the petition. The objections or pleas should not therefore have been entitled, as in a cause where they were defendants, and the striking out the remaining objections or pleas because not thus entitled, was erroneous.

VII. The equity of redemption in the mortgaged slaves, was not in the defendants to the petition, to wit Manly and Wife representatives of Parkhill under the first grant of administration, at the time of filing the 6th objection; but was in the administrations *de bonis non*. This equity could not be barred, except by petition against the parties "having the equity of redemption." The 6th objection contained a substantial defence, and the general demurrer was erroneously sustained.

VIII. The 10th objection sets up in bar of the judgment prayed for in the petition, that judgments at law had already been rendered against the defendant Martha (dum sola,) as administratrix in favor of the plaintiff on the same notes, &c., secured by said mortgages. Our statute was evidently intended to give to holders of notes, &c., secured by mortgages in *one* proceeding, the remedy at law on the notes, &c., and the remedy in equity on the mortgage. If petitioner had in the first instance proceeded under this statute, it might have recovered judgment on the bills and notes, and obtained foreclosures of the mortgages in one decree. But the petitioner has already obtained judgments at law on the notes and bills, and by proceeding upon these judgments can reach the property of the intestate not includ- 163
ed in the mortgages which is subject to levy and sale; a judgment under the statute could do no more, and there is no principle upon which two judgments and two executions can be allowed on the same cause of action. All the petitioner lacks to complete its remedy, is foreclosures of the mortgages to subject the mortgaged property to sale. This cannot be decreed in this proceeding without giving a judgment also, for under the statute, the judgment and foreclosure are inseparable; a Court of Equity alone can give the foreclosures separate from a judgment. The petitioner by instituting proceedings at law on the notes and bills, has made its election of the older and better remedy, and must be considered, since these securities have come to the dignity of judgments, to have waived and rejected the remedies prescribed by the statute. If another judgment could be allowed, there is no reason why other foreclosures may not be allowed in equity, and then we should have three distinct classes of proceedings on the same mortgage of personal property.

IX. The judgments at law are rendered for assets *"quando acciderint,"* and petitioner is *estopped* by the record of its own judgments from extending an enquiry into the assets received by Mrs. Manley as administratrix, antecedent to the date of the judgments.

X. The 12th objection sets up by way of *estoppel*, the same facts set up in the 10th objection, and the same reasoning which supports the 10th objection, applies to the 12th.

XI. The bank being insolvent, is not entitled to any relief in Equity on the mortgages until the obligations of the bank, endorsed by Parkhill for accommodation of the bank, and now outstanding and dishonored are paid, or Parkhill's estate is indemnified. Ohio Cond. Rep. 225. The statute gives equitable relief, and must allow equitable defences.

XII. The 12th error assigned is abandoned.

XIII. Mrs. Manley was dismissed by the Superior Court, from the office of administratrix, upon the petition of the Bank, and the bank is estopped by the record, from proceeding against her as administratrix. Taylor vs. Savage, 17 Peters 224. Alsop vs. Mather, 8 Conn 584.

XIV. The 14th error assigned is abandoned.

XV. The *amended* objections 18th and 19th, should not have been stricken out. The only objection urged against them, was that they were pleas in abatement filed with pleas in bar. The statute requires all objections to be filed fifteen days before first term of the Court, next 164
after the service of notice is perfected; and allows the judgment and decree to be pronounced and entered at the first term. Now pleas in abatement in ordinary suits at law, are to be filed at or before the first term, and pleas in bar, at or before the second or trial term. But in this proceeding the *first* term is the *trial* term, and this necessarily forces the pleas in bar to be filed as early as the pleas in abatement, and destroys the order necessary to be observed in ordinary suits at law in filing pleas in abatement and pleas in bar.

XVI. The questions arising on the remurrer to the replication to 8th additional objection, are the same as those raised by the demurrer to the rejoinder in the case of *Manley and Wife, plaintiffs in error, vs. The Union Bank*, pending in this Court, and argued at a former day. The argument there made by the counsel for the plaintiffs in error, on the second error assigned, will apply here.

XVII. The mortgage on lands and slaves required of a purchaser of forfeited stock by the amendment of the charter of the Union Bank, passed in 1839, was doubtless required to keep up or add to the security of the Territory for its bonds issued and sold, to raise the Capital of the Bank. The Territory is entitled to have secured by the stockholders in stock mortgages payable to, and deposited in the bank, a sum of money at least equal to the amount which the Territory by its bonds is obliged to pay. If the bond and mortgage required of the purchaser of forfeited stock, was necessary to keep up the security of the Territory, and the amendment of 1839 is in force, then the first instruction to the jury is correct; but if the bonds and mortgages have all been taken up by the Bank, why may not the shares so purchased be paid for in money, or liabilities of the bank, or why may not the bank purchase the shares and sink them for the benefit of the other stockholders? Suppose the Bank to have taken up or reserved from sale a portion of the bonds of the Territory, more than equal to the stock subscribed for, and secured by Samuel Parkhill, may not the bank if it can find a purchaser, (the Territory being more than amply secured for the remaining outstanding bonds,) convert an amount of stock corresponding with the bonds taken up, or reserved from sale, into cash stock, which shall draw dividends under the 3rd section of the amendment of 1835? Or if the bank cannot find a purchaser, may it not in its corporate character, and as a plaintiff in execution, (the defaulting stockholder not objecting but insisting on the purchase,) bid off the shares for the benefit of the re-

maining stockholders, or in other words sink the stock in that way? Who could be injured by such a purchase? Not the Territory, for it is amply indemnified, and it is it's interest to have the bonds taken up; not the bank or remaining stockholders, for, by the operation, the shares are diminished, and the holders of the other shares will be entitled to greater dividends; and not the defaulting stockholder, for he gets the market value of his property credited on his obligations to the bank. If this view be correct, the law, as laid down by the Court below in the first and second instructions, is not universally correct.

The 3rd instruction to the jury, that the claim of the administratrix for $142,800, as an offset, cannot be allowed under the proof in the case, is not given in proper terms. The Court should instruct the jury as to the *law*. The facts, the jury are presumed by the law to be alone competent to decide. But in this instruction the court broadly assumes to determine both the law and the facts. It is mockery to call a jury if they are to be judges of nothing.

XVIII. The judgment and decree are given against the administrators *de bonis non*, and the suit, if it ever was commenced against them, must have been so commenced as early as May, 1844. Administration was granted to them in April. The costs are included in the judgment, and yet, "if any person shall bring any action against any executor or administrator within" six months from the taking out letters, "the plaintiff, although he may obtain judgment for the amount of his demand, shall not recover any costs in his suit," &c. Duval's Comp. p. 175.

XIX. The petition prays for judgment and foreclosure against Manley and Wife, as administrator and administratrix, under the first grant of administration, and the judgment and foreclosure run against William D. Moseley, Hiram Manley and Wife, adminstrators *de bonis non* of Samuel Parkhill. The prayer and the relief are irreconcilable.

T. H. Hagner, for Appellee:

Said—He would examine the errors assigned, not in the order in which they were assigned, but with reference to the subject matter to which they related. Their multiplicity was such as to prevent a very extended argument upon them.

On the 1st error alleged—the giving one judgment, and one decree of foreclosure on two mortgages—he said he would refer the Court to the petition, and to the mortgages also, to show that any other course would have been not only improper, but impossible.

166 The second mortgage was cumulative security, for the same debt named in the first, with others, and on same property, together with other—and the *whole debts* secured by both, were *"installed,"* and payment of the whole deferred. The petitioner had set forth and propounded the execution of both, and the forfeiture, by reason of non payment of instalments. He referred to the statute regulating foreclosure. Of the 2d error assigned, he explained to the Court the loss of the papers in the cause, by defendant's counsel, which had forced the parties to supply the omission, as far as they could. That the plea filed of 3d May, 1844, and demurrer thereto, were lost, and were, by mutual consent, disregarded. But he showed that, if the defendant's loss of these papers was to be visited upon the petitioner, yet that the Court ought not to have regarded the plea of 3d May, 1844; that it was not sworn to, as required by 5th sec. of the act. He cited 2 Chitty's Archbold's Prac. 655, to show that, "if the plea be filed without an affidavit, (where an affidavit is required,) or with an insufficient affidavit to verify it, the plaintiff may treat it as a nullity, and sign judgment. That no judgment of *non pros.* could be regularly signed for not replying to it, and the plea is such an absolute nullity, that the defect cannot be waived." 1 Dowling, 28 and 693. 1 Strang. 639. 3 M. & S. 154.

That the same rule of law required the Court below, to strike out the 1st, 2d, 3d and 16th additional objections, not being sworn to; and that the 5th error assigned would be thus disposed of. That the 6th error was wrongly assigned: the Court had not stricken out the pleas; the defendants conformed to the order of the Court. That the pleas mentioned in 15th error, assigned as stricken out, were so stricken out, because filed without leave. They were out of time and out of place—pleas in *abatement*, filed after pleas in *bar*. That the defendants, after having, on 3d May, set up their discharge in the defection plea, pleaded *non est factum*, and after that, it was too late to plead matter of *personal discharge* over again. He cited on this, Stephen on Plead. 430. Yeaton vs. Lynn, 5 Peters Rep. 231.

The same answer would have covered the 7th error assigned, for the plea to which the demurrer was held good, was the non-joinder of a co-defendant. He insisted that the judgment was correct on general principles of law. To 8th, 9th and 10th errors assigned, he argued, that the recovery by the bank of judgments for *assets quando*, upon the original notes secured by these mortgages, and whose payment was installed, was no bar to this petition—either for decree of

foreclosure and judgment, or for decree alone. He urged the gene- 167
ral principles of law, that a mortgagor has *three* remedies, all of which he may pursue at the same time:—ejectment—suit on the causes of action—or proceeding on the mortgage. 1 Powell on Mort. 204. 3 Powell on Mort. 966, note. 1 Sch. & Lef. 176.

To 18th error assigned, he argued, that the fact of Sam. Parkhill's being liable as accommodation endorser for the bank, would not prevent its proceeding against him. That if Parkhill had paid any thing, he could off-set it; and if not, he might, in a Court of Equity, compel the application of the debt due by him, to the discharge of his liability, on account of the bank. But to say the bank should not collect it's debts, was to take from it the means of payment of those liabilities.

That 12th error is wrongly assigned. There was an issue on 9th objection, and found for petitioner.

That the Court did not err in sustaining demurrer to defendant's 15th objection, because the plea was uncertain—no answer to the petition—sets up matter both before and since petition filed—and pleads matter of abatement as if matters in bar; and he urged that the 13th error was badly assigned for these reasons.

The 14th error attacks the judgment of the Court, upon what he said, seemed to him to be clear beyond doubt. The defendants set up a statute of limitation of five years, against a debt named in, and secured by the mortgage petitioned to be foreclosed. We demurred —thus admitting the five years had expired, but denying that this could bar a mortgage debt.

He said that, the errors assigned not yet disposed of, would be considered more particularly. That there remained the 3d, 4th, 16th, 17th, 18th, 19th and 20th—all of which he would present to the Court; and in order to do it the more succinctly, he would law down the principles for which he contended, and on which the case turned. Upon the questions presented before the jury, the verdict was for petitioner upon each issue, to wit: upon the 4th, 5th, 7th, 9th and 14th objections filed: and no great question seems to be made upon the law, as laid down by the Court below, in the matter of those issues, although the 17th error had been assigned thereon.

The questions particularly involved, grow out of the revocation of the letters of Manley and wife, subsequent to the commencement of the action, and of their re-appointment, together with the addition of Moseley, as administrator *de bonis non*. The effect of that revocation and re-appointment, are questions before the Court—but only so 168
far as that revocation, and alleged discharge, are well pleaded by the defendants, and the Court is made to know the facts in legal manner. He said that, the suit did not abate *ex necessitate rei*, by the dismissal of defendants from the administration. He adverted to the principles on which resort is had against the assets in hands of adminstrators, after revocation of letters—that it was the right of the creditor to follow decedent's estate—that the suit would continue against the administrators, unless they exempt themselves from the estate. This is done by one or two modes; either by showing that they have fully administered the estate at the time of their discharge, and before notice of the suit pending; or that, before suit brought, their letters are revoked, and that they turn over the estate to the new administrators. The plea is in *abatement*, and must give the party a *better writ*. Here, however, the new administrators are the same persons; the assets of the estate had, to be sure, left their hands; but they are again in hand, before plea pleaded. Were we to discontinue, we would begin again, against the *same defendants*, and another. 2 Williams on Ex'rs. 1195. 6 Comyn's Digest, p. 309. Our resort would be against the very property in their hands. There is no such case as this administration to be found in the books. The new grant of letters was irregular:—1st. In being to the same party removed. 2d. In associating with the widow another person. The law never contemplated, that where a party was dismissed for refusal to obey an order of the Court of Probate, that same Court of Probate should re-appoint the party. And 1 Williams on Executors, p. 267, declares, that administration must be committed to the wife alone—not even associating the husband, "because if he should survive her, he would be administrator, contrary to the meaning of the act," (the statute of adminstration.) Again, there is no instance of an executor answerable only *pro tanto*, as having administered only partially. Kelbey vs. Sueyd, 2 Molloy, 201. 1 Chitty's Equity Index, 531. And upon analogy, where adminstration is fully committed in the first instance, there can be no such exemption from administering the whole estate, as that set up here. The new grant of letters, then, is in truth, but a continuance of the administration which had been suspended—and at the time of plea pleaded, Manley and wife were, in the eye of the law, proper representatives of the estate, required to administer the assets. Independently, therefore, of the

169 party, Moseley, we were then entitled as now, to the judgment and decree against Manley and wife.

Upon the 16th error assigned, he insisted, that the judgment of the Court below was correct, in point of pleading, and also in point of principle. It is not enough for an administrator to be turned out of the administration, for his own default, to exempt him from accountability.

He cited, 2 Harris & Gill, 139. He asked, if the plea had gone on to show the new administration already then committed to defendants, and property in hand to satisfy the debt, would not the suit have remained good? If so, the replication exhibits the same facts.

Of the causes of demurrer to replication to 8th plea, it is alleged that matters of record are not verified by the record. He cited 2 Gill & Johnson, 430, to show that, where a plea contains matters of *fact* and *of record*, it must conclude with a verification—which he insisted was this case.

He further contended, that the cause was pending against Manley and wife, as representatives of the estate; and the Court being informed, by suggestion, that another representative had come in to the administration, service was perfected upon by the Marshal. That no *scire facias* was proper—the suit had not *abated*—no new process, as in the original institution of a suit, was necessary, for the old suit was pending—the new adjunct was to be notified that the suit was so pending—this was done. The case occurring was a new one, without parallel, and therefore without precedent. Upon the general errors assigned, he argued, that the judgment and decree was substantially correct; and that if error had been made, this Court could give the petitioner that relief which his case warranted—the application of the property mortgaged, to the mortgage debt.

DOUGLAS, Chief Justice:

This suit was instituted by the Union Bank of Florida, in the Superior Court of Leon county, in the Middle District of Florida, against Martha Ann Manley, administratrix, and Hiram Manley, administrator in right of his wife, of the lands and tenements, goods and chattels, rights and credits, and effects, which were of Samuel Parkhill, late of Leon county, deceased, by petitioner, under the act of the Legislative Council of the late Territory of Florida, approved Dec. 11th, 1824, entitled, "An act to regulate the foreclosure of mortgages by the Courts of Common Law of this Territory, and for other purposes," for the purpose of foreclosing two mortgages given by the
170 said Samuel Parkhill in his life time, to said Union Bank, the first bearing date the 6th day of November, 1839, on twenty slaves, with the future issue and increase of the female slaves, to secure the payment of a certain bill of exchange for twenty-five thousand dollars, dated August 29, 1839, drawn upon Hamilton & Co., of New York, at ninety days after date, payable to and endorsed by William H. Brodie;— the second bearing date the 19th day of October, 1840, made and executed by the said Samuel Parkhill, to the petitioner, on the same twenty slaves, set forth in the mortgage of 6th November, 1839, and on twenty-two other slaves, together with the future issue and increase of the females, which said last mentioned mortgage was intended to secure the payment of the following debts, viz:—1. A certain bill of exchange, dated 29th August, 1839, payable 90 days after the 4th of November, 1839, drawn on Hamilton & Co., of New York, in favor of William H. Brodie, for twenty-five thousand dollars, credited by endorsements, with the sum of $9,350. Feb. 22d, 1840, and which is, (stated in the notice given to said Martha Ann Manley and Hiram Manley, to be,) the same bill specified in the mortgage of the 6th Nov. 1839. 2. A note of said Samuel, payable to the order of John Parkhill, cashier, dated 28th August, 1839, at 90 days after 24th Oct. 1839, for twenty thousand dollars, credited by endorsements, July 18th, 1840, by the sum of $3923 58-100 dollars. 3. A bill of exchange, dated Feb. 8th, 1837, drawn by William H. Brodie, on Hamilton & Cole, New York, in favor of, and endorsed by said Samuel, for the sum of ten thousand five hundred dollars. 4. A certain note of said Samuel, dated 24th April, 1839, in favor of and endorsed by William P. Craig, for fifteen thousand dollars, payable eight months after its date, credited 21st January, 1840, with the sum of $10,000, and on 1st January, 1840, with the sum of $1099 35-100. 5. A bill of exchange, dated March 22d, 1837, drawn by William P. Craig, in favor of and endorsed by said Samuel, on Maitland, Kennedy & Co., New York, at 4 months date, for the sum of five thousand two hundred dollars. 6. A promissory note of the said Samuel, dated Jan. 4, 1840, payable to and endorsed by R. H. Berry, at ninety days after its date, for fourteen hundred and forty-three 58-100 dollars. 7. A note of the said Samuel, dated Jan. 10, 1840, payable to and endorsed by John Parkhill, at ninety days, for the sum of six thousand dollars. 8. A promissory note of the said Samuel, dated 18th March, 1840, payable sixty days after date, to and endorsed by William P. Craig, for ten thousand dollars. 9. A promissory note of the said Samuel, dated 171
Jan. 19th, 1840, payable 90 days after its date, to the order of, and endorsed by John Parkhill, for five thousand dollars. 10. A promissory note of the said Samuel, dated Feb. 1, 1840, payable ninety days after date, to and endorsed by John Parkhill, for five thousand dollars. 11. And a promissory note of the said Samuel, dated October 19, 1840, payable to the said Union Bank of Florida, or its assigns, on demand, for thirteen thousand two hundred dollars. Which said several sums were, by the terms of the last mentioned mortgage, to be paid in and by the following installments, viz:— Twenty-five thousand dollars on or before the first day of April, in the year 1841, and fifteen thousand dollars annually thereafter, on or before the first day of April, in each succeeding year, until the whole of said debts, with the interest threon, should have been duly paid and discharged. The petition sets forth the death of Samuel Parkhill; the grant of letters of administration, upon the goods and estate, which were of the said Samuel, at the time of his death, to his widow, Martha Ann Parkhill; her intermarriage with the said Hiram Manley; alleges that the first, second and third installments, mentioned and specified in the mortgage last set forth, were due and unpaid; and that the same, with the interest due thereon, amounted to the sum of $64,049 99-100; and prayed judgment for the said debt, and foreclosure of the equity of redemption, in the usual form, and for further relief, &c.

Personal service of notice was given, on the 20th of February, 1844, to Martha Ann Manley, administratrix, and Hiram Manley, administrator as aforesaid, of the intention of the Union Bank of Florida, to institute this suit, agreeable to the provisions of the act above referred to, and that it would, on the fourth Monday in April then next, move the Court for a decree of foreclosure, &c., according to the prayer of the petition. On the 3d day of the ensuing month of May, said Martha Ann and Hiram Manley filed a plea, alleging in substance that, after the commencement of this suit, to wit:—on the 22d day of March, 1844, in the county aforesaid, they were dismissed from the administration of the estate of the said Samuel Parkhill, by competent authority, to wit:—by the Judge of the Superior Court of said county, sitting as an appellate Court, &c. To this plea, there was a special demurrer filed by the counsel for the petitioner, and this plea and demurrer remain undisposed of upon the record. This plea and demurrer, it is alleged by the counsel for the petitioner, was missing at the time of the trial of this cause in 172
the Court below; and as that fact is understood to have been conceded by the counsel for the appellants, and there seems to be some difference of opinion between the counsel for the respective parties, as to the fact whether they were noticed and considered of record, during the argument of this cause in the Court below, and are not deemed material to a decision of the case, we pass them without further notice. On the 4th day of the same month of May, the administrators, Manley and wife, as appears by the record, asked leave to file additional pleas; and the Court so allowed, and continued the cause.

The petitioners then suggested the appointment, by the Court of Leon county, of William D. Moseley, together with the defendant, Martha Ann Manly, administrator de bonis non of said estate; and moved the Court that the said William D. Moseley, administrator de bonis non, be made a party to the said suit, and the suit continue, as well against the defendants, as against the said William D. Moseley, and the same was done accordingly. On the 18th day of July, 1844, the said defendants, Martha Ann Manley and Hiram Manley, sued as administratrix and administrator of Samuel Parkhill, deceased, filed certain additional and amended pleas, (nineteen in number,) to the said petition.

On the day of November, 1844, the copy of the order of the 4th May, 1844, with the Marshal's return thereon, was filed; which copy and return is in these words: "In Leon Superior Court." "The Union Bank of Florida vs. administrators of Sam'l Parkhill." "On Petition of Foreclosure of Mortgage."

The petitioner, by his counsel, moved for judgment and decree, by default, no objections having been filed under the statute, the plea of Hiram Manley and Martha Ann Parkhill, administrators, filed on the 3d day of May, 1844, not being verified by affidavit. But the Court overruled the motion; and the petitioner then filed his demurrer, (special,) to said plea. The administrators, Manley and wife, then asked leave to file additional pleas; and the Court so allowed and continued the case. The petitioner then suggested the appointment, by the County Court of Leon county, of William D. Moseley, together with the defendant, Martha Ann Manley, administrator de bonis non of said estate; and moved the Court that the said William D. Moseley, administrator de bonis non, be made a party to the said suit; and the suit continue, as well against the defendants, as

173 against the said William D. Moseley; and the same is done accordingly.

"A true copy. N. P. Bemis, D. C. "Served a copy of this copy of record, on Wm. D. Moseley, administrator de bonis non of Samuel Parkhill, deceased, Nov. 4th, 1844. "J. G. Camp, Marshal, by Deputy Wm. R. Taylor."

On the 4th day of November, 1844, the petitioner, by his counsel, gave notice that he would move the Court to strike out sundry pleas, eighteen in number, heretofore filed by Martha Ann Manley, late Parkhill, and Hiram Manley, sued as administratrix and administrator of Samuel Parkhill, deceased, filed in July last, for the reasons following:

1. Because said pleas are not properly entitled, in this—that they are entitled in a cause of Martha Ann Manley, (late Parkhill,) and Hiram Manley, sued as administratrix and administrator of Samuel Parkhill, deceased, at the suit of the Union Bank of Florida, upon petition for foreclosure of mortgage, and for judgment, &c. Whereas, the said pleas upon the said petition of the Union Bank of Florida, ought to have been entitled, in the cause upon said petition, wherein the Union Bank of Florida is petitioner, against Martha Ann Manley and William D. Moseley, administrators de bonis non, of Samuel Parkhill, deceased, as the same is now pending in Leon Superior Court.

2. And as to the said pleas, *firstly, secondly, thirdly,* and *sixteenthly*: Because the same are not sworn to, as directed by the statute in such case made and provided.

And on Monday, Dec. 30th, 1844, the Court having considered the motion theretofore made in this case, to strike out sundry pleas filed by Martha Ann Manley, (late Parkhill,) and Hiram Manley, on the 18th day of July (then) last: Ordered, that the said plea be stricken out, unless the said Manley and wife should rightly entitle said pleas, numbered 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17 and 18, in the case pending against the administrators de bonis non of Samuel Parkhill, deceased.

And it was further ordered, that the pleas No. 1, 2, 3 and 16, be absolutely stricken out, because the same are not sworn to; and thereupon the defendants, by their counsel, amended the title to their said several pleas, to read as follows, viz: "The Union Bank of Florida vs. Martha A. Manley, in her own right, and Hiram Manley, in right of his wife, Martha Ann, together with William D. Moseley, impleaded administrators de bonis non of Samuel Parkhill, deceased."

174 On the 31st day of December, 1844, the petitioner, by it's attorneys, filed general demurrers to the sixth, tenth, eleventh, twelfth and thirteenth pleas, as above pleaded; and special demurrers to the ninth, fifteenth and seventeenth of said pleas; to which the defendants joined; and the Court, after argument, sustained said demurrers, and rendered judgment for costs thereon, against the said defendants; and on motion of the petitioner, ordered that the eighteenth and nineteenth pleas should be stricken out; and the same was done accordingly. Whereupon the said defendants, Martha Ann and Hiram, asked leave of the Court to amend their ninth plea; which was granted, and the same was amended accordingly. And thereupon the petitioner, by it's counsel, filed its replications to the several pleas of the said Martha Ann and Hiram, 4, 5, 7, 8, 9 and 14, above pleaded; and issue was joined to all the said replications except the one filed to the said 8th plea, to which last replication the counsel for the defendant filed their demurrer; to which the petitioner, by it's counsel, joined, and after argument had thereon, the court overruled said last mentioned demurrer. The issues joined upon the 4, 5, 7, 9 and 14th pleas, were submitted to a jury, at the Fall Term of the Leon Superior Court—who returned a verdict upon all the issues joined, to wit:—upon the issues joined upon the 4, 5, 7, 9 and 14th pleas; but without stating any amount or sum in their verdict.

And thereupon the following decree and judgment of foreclosure, was entered in said cause, viz:—"Middle District of Florida. "In Leon Superior Court, at Fall Term, 1844. "The Union Bank of Florida, petitioner, vs. Martha Ann Manley, (late Parkhill,) in her own right, and Hiram Manley, in right of his wife Martha Ann, and William D. Moseley, administrators *de bonis non* of Samuel Parkhill, deceased, defendants."

"And now at this day came, as well the petitioner, by it's attorneys, as the said defendants, Martha Ann and Hiram, by their attorneys; and thereupon came a jury, to wit:—(naming the jurors)—who, being elected, tried and sworn, the truth to speak upon the issues joined, upon their oaths do say, that they do find for the petitioner upon all the issues joined, to wit:—upon the issues joined upon the fourth, fifth, seventh, ninth and fourteenth pleas respectively. And the defendant, William D. Moseley, not having shewn any objection or cause whatever, against the foreclosure of the equity of redemption of, in and to the said mortgaged property, in said deed mentioned, but being in default—and the said petitioner having exhibited to the Court here, the several original promissory notes, and bills of exchange, and other evidences of debt, to secure which the mortgages, in said petitioner's petition, set forth and filed with the same, were executed; and affidavit having also been made, and read to the Court here, of John G. Gamble, President of the said Union Bank of Florida, the petitioner for the foreclosure of the said mortgages, of the amount of principal and interest claimed, as due at the time of making such affidavit; and which said promissory notes, bills of exchange, and other *evidences* of debt, it appears to the Court here, were given by the said Samuel Parkhill, deceased, in his life time; and to secure the payment whereof, the said deeds of mortgage, exhibited to the Court, and filed with such petition, were made, executed and delivered, by said Samuel Parkhill, deceased, in his life time, to the said petitioner. It is therefore, this fourth day of January, 1845, no cause havig been shewn to the contrary, considered by the Court, that the said petitioner do recover of the said defendants, Martha Ann Manley, in her own right, Hiram Manley, in right of his wife, the said Martha Ann, and William D. Moseley, administrators *de bonis non* of said Samuel Parkhill, deceased, the sum of seventy-one thousand and twenty-three dollars and forty-eight cents, due to the said petitioner, for principal and interest of its mortgage debt aforesaid, up to the rendition of this decree, together with its costs and charges of these proceedings by the said petitioner, in this behalf expended, to be taxed by the Clerk of this Court, to be made and levied of the slaves in said mortgage specified and named, and of the increase of the female slaves, since the execution of the said mortgage; and if the same shall be insufficient to satisfy the petitioner's debt, and the costs and charges aforesaid, then the remainder of said debt to be made and levied of the goods and chattles, lands, slaves and tenements generally, of the said Samuel Parkhill, deceased, in the hands of the said defendants, administrators *de bonis non* aforesaid, to be administered. And it is further ordered, adjudged and decreed, that the said defendants, administrators *de bonis non* aforesaid, and all persons claiming, or to claim, by, through or under the said Samuel Parkhill, deecased, be and the same are hereby forever foreclosed and barred of and from all right and equity of redemption, in and to the said mortgaged property, to wit.—the slaves—(here naming them)—and the increase of the female slaves above named, and every part of said mortgaged property in said mortgages named, specified and described. And it is further ordered, that this judgment be entered up and filed; and that the petitioners have execu- 176
tion therein, according to law." 175

On the trial of this cause, the following bill of exceptions was filed, which was signed, sealed, and made a part of the record, and which is in these words:

Middle District of Florida, Leon Superior Court, Fall Term, December 30th, 1844. The Union Bank of Florida vs. Hiram Manley administrator in right of his Wife of Sam'l Parkhill, deceased, Martha Ann Manley, administratrix of Sam'l Parkhill, deceased, "memorandum." That the counsel for the petitioner on a former day, moved the Court to strike out the plea filed by the defendants, and appearing upon the records, upon the following grounds, to wit:

1st. Because said pleas are not properly entitled in this, that they are entitled in a cause of Martha Ann Manley, (late Parkhill,) and Hiram Manley, sued as administrator and administratrix of Samuel Parkhill, deceased, at the suit of the Union Bank of Florida, upon petition for foreclosure of mortgage and for judgment, &c. Whereas the said pleas upon said petition of the Union Bank of Florida, ought to have been entitled in the cause upon said petition, wherein the Union Bank of Florida, is petitioner against Martha Ann Manley and William D. Moseley, administrators *de bonis non* of Samuel Parkhill deceased, as the same is now pending in Leon Superior Court.

2nd. And as to the said pleas, *firstly, secondly, thirdly,* and *sixteenthly* above pleaded. Because the same are not sworn to as directed by the Statute in such case made and provided. And the same was argued by counsel, but the Court not being fully advised of its decision in this cause, took time to considered thereof, and now in this day the Court being fully advised, ordered the said pleas to be stricken out, to which opinion and decision the defendants by their counsel excepted and prayed, that this their bill of exceptions should be signed and sealed by the Court; which was done."

There was another bill of exceptions filed in the cause, but it does not embrace any of the points which the Court has found it necessary to decide upon this appeal, and will therefore be no farther noticed. The defendants to wit, Martha Ann Manley and Hiram Manley, her husband, and William D. Moseley, administratrix and administrators *de bonis non*, prayed an appeal to the Court of Appeals of the (late) Territory of Florida, which was granted. The case was carried up, and was transferred to this Court, pursuant to the provisions contain-

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ed in the last clause of the 4th section of the 7th article, schedule and ordinance of the constitution of this State, and the 14th section of the act to organize this Supreme Court. A motion was made on the first day of the Term to dismiss it, upon the same ground as that on which the motion was made to dismiss the case of Charles D. Stewart vs. Thomas Preston, Junior, in which Judge Baltzell, on a former day of this term, delivered the opinion of the Court, and was for the same reasons as given in that case dismissed. Whereupon the appellants by their counsel filed herein the following assignment of errors to wit:

1st. There is error in the petition in praying for, and in the final judgment and decree in giving one judgment, and one foreclosure on two alleged mortgages.

2nd. There is error in giving the judgment and decree in this case, before the demurrer to first objection filed, 3rd May, 1844, was disposed of.

3rd. There is error in the order of the Court of 4th May, 1844, making William D. Moseley a party by suggestion.

4th. There is no legal notice of such suit given to the administrators *de bonis non*, and there is no appearance by the administrators *de bonis non*.

5th. The Court erred in striking out the 1st, 2nd, 3rd and 16th additional objections.

6th. The Court erred in ordering the other additional objections to be stricken out because not properly *entitled*.

7th. The Court erred in sustaining general demurrer to 6th additional objection.

8th. The Court erred in sustaining general demurrer to 10th additional objection.

9th. The Court erred in sustaining general demurrer to 11th additional objection.

10th. The Court erred in sustaining general demurrer to 12th additional objection.

11th. The Court erred in sustaining general demurrer to 13th additional objection.

12th. The Court erred in sustaining special demurrer to 9th additional objection.

13th. The Court erred in sustaining special demurrer to 15th additional objection.

178 14th. The Court erred in sustaining special demurrer to 17th additional objection.

15th. The Court erred in striking out the amended pleas.

16th. The Court erred in overruling demurrer to replication to 8th additional objection.

17th. The Court erred in the first, second and third instructions to the Jury.

18th. The Court erred in giving judgments for costs against appellants.

19th. The judgment and decree are at variance with the prayer of the petition.

20th. Upon the record and pleadings, the judgment and decree should not have been given in favor of the petitioner.

Passing for the present, the first error assigned, and (for the reasons before stated,) the *second* also, we come to the third, which is that there is error in the order of the Court of 4th May, 1844, making W. D. Moseley, a party by suggestion. This suit was commenced on the 16th day of February, 1844. W. D. Moseley was not appointed administrator *"de bonis non,"* until the 22nd day of the succeeding month of April; until that time it does not appear, that he had any connection with the estate of said Samuel Parkhill, deceased, and if this suit was then pending, or was pending on the 4th day of May following, when the suggestion mentioned was made, we are not aware of any principle of the common law, and certainly we have no statute, by which he could have been made a party to it, by a *mere suggestion*. It is insisted on behalf of the petitioner, that he, together with the said Martha Ann Manley, administratrix *"de bonis non,"* came into Court, exhibited letters of administration to them *"de bonis non,"* upon said estate, and demanded the assets belonging thereto, which it seems were in the hands of a receiver, appointed by the Court to take charge of them, and that the fact of his being such administrator was therefore judicially known to the Court, and it could for that reason properly grant the order to make him a party defendant by suggestion. No authorities were cited to this point, and it is presumed that none exist. The statement of a single case we think must demonstrate the unsoundness of this proposition. Suppose A, against whom twenty suits are pending, dies; B obtains administration upon the goods and estate left by him at his death, and sued C, for a debt due to his intestate in his life time, makes profert of his letters of administration, and adduces them on the trial of his cause, which he must do to show his authority to sue. Here the 179
Court may, nay must take judicial notice, that B is administrator of the goods and estate which were of A, at the time of his death. But could any Court, under such circumstances, make B a party defendant to each of the twenty suits so pending against A, as aforesaid, by a mere suggestion? We think that no lawyer upon mature reflection will answer this question in the affirmative. Yet upon the principle assumed, a Court might do it, and enter up judgment against him in each case for thousands of dollars. But is is said that he had notice of the order and was therefore a party, and it appears by the record that on the 4th day of November, 1844, a copy of a certified copy of the record of that order, was served on Wm. D. Moseley, administrator, *"de bonis non,"* of Samuel Parkhill deceased, by the Marshal. But, if Wm. D. Moseley could have been made a party at all to this proceeding, was that such a notice as the case required? There was no order of the Court requiring such a copy to be served upon him. The copy was not a writ or process known to the law. It required nothing of, and commanded nothing to be done by him. It was not verified by the *seal* of the Court, and was not calculated to enlighten Mr. Moseley much, as to the nature of the proceeding. Upon the whole, we are compelled to say that it was no legal notice to him, and there is no pretence that he voluntarily made himself a party; on the contrary, the judgment and decree against him went by default. The third error assigned, is therefore well taken, as are also the fourth, nineteenth and twentieth, so far as they regard Wm. D. Moseley, who is *no* party to this suit.

The Court does not deem it necessary to enter upon an investigation of all the errors above set forth, but to examine a few of the most prominent ones, which are deemed to be decisive of the case; in doing which we pass to the 8th and 9th errors assigned, which are, that "the Court erred in sustaining a general demurrer to each of the 10th and 11th, additional objections." The 10th objection, and also the 11th is in substance and effect a plea of former judgment, recovered upon the same identical causes of action set up in this case. The plea commences, "and said defendants for further plea in this behalf by leave of the Court," &c.; averring and protesting, that since the institution of this suit, their letters of administration were revoked and annulled by competent authority, and that all of the estate of Samuel Parkhill deceased, in their hands unadministered, was taken away by like authority, to wit:—The order of Leon Superior Court, and at the instance of petitioner, showing objections and cause by 180
way of plea in conformity to the statute in such case made and provided, against a judgment and foreclosure of the equity of redemption in the said mortgaged property, in plaintiff's petition mentioned under the statute in conformity with complainant's petition, and answering said petition, and showing equity against the same, by Brockenbrough & Archer, their attorneys, come and defend the wrong and injury, when, &c., and say that said petitioner ought not to have the judgment and foreclosure by its petition sought, because they say, &c., (setting out fully and distinctly the several matters, which are set up as causes of action in this case from *one* to *eleven* inclusive,) and they say that said plaintiff heretofore to wit, in the adjourned Fall Term of 1842, continued and held into the year 1843, in the Superior Court of Leon County, held at Tallahassee, in the County of Leon, before Samuel J. Douglas, Judge, impleaded the defendant Martha Ann, then a *feme sole*, and widow, in certain pleas of trespass on the case, upon promises to the damage of said petitioner of divers amounts and sums of money in the said several cases specified, for the non payment and non performance of divers promises to pay the very same identical promissory notes, and the several sums of money and interest therein specified, in this plea herein before mentioned, and set forth in petitioner's petition, and mortgage aforesaid, and such proceedings were thereupon had in that Court upon the said pleas, that afterwards to wit, on the 24th day of February, 1843, at the County aforesaid, the said petitioner, then plaintiff, by the consideration and judgment of the said Court recovered, &c., (setting out the recovery in due form distinctly upon each, and every one of the several causes of action mentioned,) and there aver that the said Martha Ann Parkhill, in the said several pleas mentioned, is the same Martha Ann Manley and none other, she having since said judgments were obtained as aforesaid against her, intermarried with Hiram Manley, as in said petition alleged; and these defendants further aver, that the several causes of action on which the said judgments were obtained in the said pleas, are the same and all of the same and none other than the several notes, bills and liabilities in plaintiff's petition, and supposed mortgages mentioned as by the records and proceedings thereof, still remaining in the said Superior Court of Leon County at Tallahassee in Leon County aforesaid, more fully and at large appears, which said judgments still remain in full force and effect, not in the least reversed, satisfied or made void, and this the said defen-

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181 dants are ready to verify by the said records. Wherefore they pray judgment if the said petitioner ought to have and maintain its aforesaid action thereof against them.

The eleventh objection is very similar in its leading features to the tenth, except in the concluding part; after the usual averments of identity of the defendant and of the causes of action, &c., it proceeds as follows to wit: "And the said petitioner, The Union Bank of Florida, plaintiff in the several actions wherein the judgments were recovered against the defendant Martha Ann, as administratrix as aforesaid (*dum sola,*) in each of the said several actions in the last plea mentioned, admitted of record, in and by the said several judgments, that the said defendant Martha Ann, had no assets of the said Samuel deecased, in her hands unadministered, sufficient whereby to satisfy the said damages of the said Union Bank, so in each of said actions recovered as aforesaid, or *any part* of *them* or *either* of *them*, and then and there at the time and place of the rendition of the said judgments the said Union Bank, petitioner, being then plaintiff, took judgment in each of said several actions against the said defendant Martha Ann, then a feme sole, to take effect as to assets "Quando acciderint." and this, they the said defendants are ready to verify by the said several records of judgments remaining in said Leon Superior Court in this and last pleas before mentioned. Wherefore they pray judgment if the said petitioner ought to be admitted or received, to file his said petition, wherein he prays judgment generally of the said mortgage debt aforesaid; without saying that any assets or effects, wherewith and whereby to satisfy said judgments, have come to the hands of these defendants or either of them, since the rendition of the said several judgments, quando, &c., above pleaded." A general demurrer was put in by the petitioner to each of these pleas or objections, which after argument were sustained by the Court. Was there error in this? If either of those pleas contained a good and substantial defence to this suit, the Court erred in sustaining the demurrer thereto. Did they or either of them contain such defence?

It may not be improper here to remark, that a misapprehension, (to some extent,) seems to have prevailed in relation to the proceedings under this statute, for the foreclosure of the equity of redemption in mortgage, viz: that the defendant in stating his objections, should be required to comply with the strictest rules of technical special pleading, while the petitioner may be indulged in a more
182 latitudinous course of proceeding. But the converse of this proposition would be a more reasonable rule.

A statute which gives a new remedy by summary proceedings, or other deviations from our ancient constitutions, ought not to receive a liberal construction. Poal vs. Neal, 2d Sid. page 63. Dwarris on statutes 77. This is such a statute—all of its provisions are for the benefit of mortgagees. Nothing is conceded to him who holds the equity of redemption. In other cases at law the mere entry of an attorney's name to the suit, entitled the defendant to a continuance at the first term, and he may plead most of his defences without oath, and has seventy days after the close of the appearance term, within which to file his pleas. But when the mortgagee proceeds under this statute to foreclose the equity of redemption, the defendant must file his objections fifteen days *before* the first day of the term next following the expiration of the notice. They are required by this act to be *sworn* to, and the case must be tried at the first term if the plaintiff *shall require it*, unless good cause be shown by the opposite party for a continuance, and even the important right of a trial by jury is by a literal construction of the act, also left to the option of the petitioner. This statute is in derogation of the common law, an innovation upon old and well established principles, and mortgagees when they resort to it, may well be held to a strict compliance with its provisions; but the defendant in making his objections, should not be required to conform to all "the nice sharp quillets" of special pleading. If he sets them out substantially, so that the petitioner can readily see and understand the grounds of his objection, or in other words if he sets them out as specifically as he would be obliged to do, the matter of his defence in an answer in Chancery, or in a notice of special matter under the general issue in a suit at law, verified by oath agreeable to the requirement of the statute relating to the subject, it is sufficient.

Having premised thus much, we proceed to consider the effect of these pleas upon this cause, and for the purpose of this inquiry, the facts alleged in them are to be taken as true. The petitioner, then, has already obtained judgments at law upon these several causes of action. Are they entitled to another judgment at law? The object of the statute is two-fold. *First:* A foreclosure of the equity of redemption:—and *second*, a judgment for the debt secured by the mortgage. The 8th section of the act declares, that "the judgment of the Court in the foreclosure of a mortgage, shall, *in all cases*, be entered up and filed, and that execution shall issue thereon, as in 183 other cases." Duval's Comp. 41—42. It was urged, in support of this proceeding, that a mortgagee has, at common law, three remedies, all of which he may pursue at the same time, viz:—that he may bring suit at law, upon the bond or note secured by the mortgage; institute an action of ejectment, to put himself in possession of the rents and profits of the estate, and file a bill in Chancery, to foreclose the mortgage. All this is very true. But in the action of ejectment, the mortgagee would accomplish nothing more than to put himself in possession of the rents and profits. And in Equity he would obtain nothing but his foreclosure. In the case of Dunkley against Van Buren and others, 3 John Chy. Reps. 330—331—the Chancellor held, that "the party on a bill to foreclose a mortgage is confined in his remedy to the pledge. Such a suit is not intended to act in *Personam*. It seems to be generally admitted in the books, that the mortgagee may proceed at law on his covenant, at the same time that he is prosecuting on his mortgage in Chancery; and that, after foreclosure here, may sue at law on his bond for the deficiency. Lord Redesdale, in 1 Schoale & Lefroy, 166. 13 Vez. 205. Aylet vs. Hill, Dicken 551. 2 Bro. Ch. R. 125. Perry vs. Barker, 13 Vez. 198. Dashwood vs. Blythway, 1 Eq. Cases Abr. 317.

The natural, and certainly the most convenient and beneficial course for the mortgagor, (says Mr. Justice Story, in his 2 Comm. on Eq. 293,) would seem to be, to follow out the civil law rules on this subject; that is to say, primarily and ordinarily to direct a sale of the mortgaged property, giving the debtor any surplus, after discharging the mortgage debt. And secondarily: to apply the remedy of foreclosure only to special cases, where the former remedy would not apply, or might be inadequate or injurious to the interests of the parties. This course has, accordingly, been adopted in many of the American Courts of Equity, and is also the prevailing practice in Ireland. And this is done without any distinction, whether there be a power to sell given in the mortgage or not. 4 Kent's Comm Lect. 58, p. 181—182—2d. edition. Brickerhoff vs. Thallheiner, 2 John Chy. Rep. 486. Mills vs. Dennis, 3 John. Chy. Reps. 369—370. Perry vs. Barker, 13 Vez. 205. 3 Powell on Mort. 963. McDonough vs. Shewbridge, 2 Ball & Beatt. 555.

In England a practice widely different has prevailed. A bill for a foreclosure is deemed, in common cases, the exclusive and appropriate remedy; and the Courts of Equity there refuse, except in special cases, to decree a compulsory sale, against the will of the mort- 184
gagor. These Courts, however, have departed from this general rule in certain cases; as, where the estate is deficient to pay the incumbrance; or where the mortgagor is dead, and there is a deficiency of personal assets; or the mortgage is of a dry reversion; or where the mortgagor dies, and the estate descends to an infant. 2 Story's Eq. 294.

Our statute is cumulative. It provides a fourth remedy, and was intended to save the mortgagee the necessity of both a suit at law, and a suit in Chancery, to obtain his mortgage debt. But when the mortgagee has elected to proceed at law, and has obtained a judgement there upon his debt, he cannot then proceed under this statute, and obtain another judgment at law. The law abhors a multiplicity of actions, and where one remedy has been resorted to with success, it usually restrains resort to another, to accomplish the same purpose. Lessee of Allen vs. O'Parish, 1 Ohio Cond. Rep. 536. Here the effort is to obtain a second judgment at law for the same debt, and that too, without alledging that assets have come to the hands of the defendants, since the rendition of the first judgment, notwithstanding that judgment was taken *"quando acciderint,"* by which the plaintiff admitted that the defendant had fully administered to that time. 2 Saunders, 219, note, (2,) Parker vs. Dee. 3 Swanst. 532: Note to Drewery vs. Thacker. And accordingly, the terms of such judgment are, that the plaintiff do recover his debt, to be levied of the goods of the testator, which shall thereafter come to the hands of the executor, (or administrator, as the case may be.) 2 Saunders, 210, note, (2.) And in debt, on *scire facias* on this judgment, proof of the executor, (or administrator,) receiving assets, is always confined at the trial, to a period subsequent to the judgment. Taylor vs. Hallman, Buller's N. P. 169. 2 Saunders, 219—a—note, (2.) 2 Williams on Executors, 1221.

When a judgment is obtained, the original cause of action is merged in it; and if the plaintiff proceeds afterwards, he should proceed on his judgment. The appellee in this case, having obtained a judgment at law, before the commencement of this suit, upon all the causes of action set forth in this petition, should, when it proceeded to foreclose these mortgages, have proceeded in Chancery upon that judgment, and not again at law, upon these original causes of action. That course would have obviated all the difficulty resulting from this judgment, *"quando acciderint."* But it will be

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perceived that, if this suit could be sustained, the defendants must either be permitted to avail themselves of that judgment by plea, (as was attempted in this case,) or they would again be driven to their plea of *plene administravit;* and if the latter course were adopted, the jury must necessarily have extended their inquiry back to the date of the letters of administration; and their verdict in relation to assets, would, of course, have covered the whole period which had elapsed betwen that date, and the rendition of the judgment, and the trial of the cause in the Court below, which may have worked irreparable injury and injustice, not only to defendants but to their sureties. Pleading the judgment therefore, (or setting it up as an objection,) seems to have been their only safe and proper course. But it is contended by the counsel of the appellee, that these pleas are bad, because they are pleaded in bar, and not in abatement. But a former recovery is a good plea in bar. 1 Chitty's Pl. 475, old ed.; 7 Amer. from 6 Lond. ed. 513: and authorities there cited in note, (c.)

The objection, therefore, if it were a valid one in such a case as this, could only extend to the matter of foreclosure; and furnishes another reason, and a very cogent one, why this mixed proceeding, (for we cannot separate them,) should not be permitted, after a judgment at law, upon the same causes of action. But we do not consider the ordinary rules of special pleading, or the technical rules of practice in ordinary cases at law, applicable to a proceeding under our statute of foreclosure. The proceeding is an anomalous one, for which neither the Courts of Common Law, or Equity, furnish a precedent; and so the appellee has treated it; for its petition neither contains the essential requisites of a declaration at law, or of a bill in Chancery. It contains something of both; but not enough of either, to stand the test of scrutiny, by the rules of pleading which prevail in either of those tribunals; and were we to apply that strictness to it, which is demanded in relation to the pleas or objections, the appellee must fail on that ground alone, if on no other. But we are not inclined to apply a greater degree of strictness to either, than is necessary to subserve the principles of justice and equity. Indeed, a more liberal spirit than prevailed in times gone by, in regard to special pleading, one more consonant to the spirit of the age, seems every where to be gaining ground; and we feel warranted in departing from those strict technical and rigid rules, which were formerly applied to this science, whenever such departure may facilitate the attainment of
186 justice, without endangering any of its principles; and our Legislature has left us an open door for so doing.

But the eleventh objection is rather in the nature of a plea in abatement than in bar. It is, however, again insisted, that if this is in abatement, it was filed too late, having been put in after a plea in bar. But if the first plea filed in the case, is to be considered as out of the record, for the causes above mentioned, then this plea was amongst the first that were filed in the case; and if the first plea is to be considered as part of the record, for the purpose of this objection, then it must be so for all other purposes. To that plea the petitioner demurred, and the issue of law thereby made, remains undisposed of. This is the second error assigned, and we passed over it for the reasons before stated. Indeed, it may have been difficult to have gotten over it in any other way, unless, as contended by the counsel for the appellee, that not being sworn to, *it is no objection* under the statute, is such an absolute nullity, that the defect cannot be waived, and the Court may disregard it.

Without stopping to inquire whether these propositions are correct or not, or to examine the authorities, (a number of which were cited to sustain them,) let them for the present purpose, be so considered; and then this first plea is, (as we have before been disposed to regard it,) out of the record, and does not stand in the way of the plea under consideration. But if the first plea filed had been sworn to, and the issue upon it disposed of, still another difficulty lies in the way of the objection we are now considering. The petitioner, instead of taking the ordinary step to rid itself of the tenth and eleventh pleas, demurred to them. It is too late, therefore, to object that they were not filed in time. By the demurrers, the facts alleged in the pleas are admitted to be true, and issues of law were made for the Court to determine. Upon these issues the Court, after argument had thereon, gave judgment for the petitioner. In doing this we think it error. These pleas, (and especially the last,) were a sufficient objection to this proceeding:

The 16th error assigned, viz: "The Court erred in overruling the demurrer to the replication to the eighth additional objection," presents some very important questions; but as most, (if not all of them,) have been considered, and decided in another case, akin to this, at the present term, we forbear any remark upon the subject here.

The first error assigned, so far as it relates to the judgment or decree, is well taken. The decree should have directed a sale of the 187
negro slaves mentioned in the first mortgage, together with the issue and increase of the female slaves, the proceds thereof to be applied upon the payment of the debt thereby secured; and the residue or surplus, (if any,) to be applied to the second mortgage. But this error, as well as several other minor ones, which we have not deemed it necessary to discuss, might be very easily corrected, were it not for those of more importance, which we have maturely considered, and find insurmountable.

The judgment must be reversed, with costs, and the case remanded to the Circuit Court of Leon county, with directions to dismiss the petition.

Per totam curiam.

JOHN MILLER AND BRYAN CROOM, *vs.* FREDERICK HOC, SURVIVOR.

Where the record shows that a judgment by default, for want of a plea was entered, when in fact a plea has been filed and appeared upon the record, the Court will conclude that the plea was overlooked, and that judgment was entered through inadvertence.

When two distinct cases between the same parties, are by consent, submitted at the same time to the same jury, the jury should return a separate verdict in each case.

And in such a case the jury should assess the damages, not *pro rata*, but according to the evidence in each case, independent of the other.

Upon failure to rejoin to the replication to a plea of non damnificatus, there is no *issue* which can be submitted to a jury, and the defect is not cured by a verdict.

A jury, after having rendered their verdict on Saturday and been discharged, cannot be recalled on the ensuing Wednesday for the purpose of putting their verdict in form, and apportioning the damages in each of the two cases which had been by consent submitted to them.

Appeal from late Superior Court of the Territory of Florida for Leon county.

Debt on an Attachment Bond.—Plea, *non damnificatus* and *nil debit*, filed on the 13th December, 1841.—On the 15th February, 1842, a Judgment, by default, for want of a plea, was entered against appellants. Afterwards, however, on the —— day of —— 1842, appellees filed their replication to plea nom. dam. and demurred to second plea. No rejoinder to the replication was filed.

There being another case between the parties, in all respects
190 similar to this, on the 1st March, 1845, the two cases, by consent of parties, were submitted together to a jury, who returned a verdict in the following words:—"We, the jury, find for the plaintiff, and assess the damages at fifteen hundred dollars, which includes both cases."

On the 5th of March, 1845, on motion of appellees, the jury who had been empanelled in the case, was recalled into Court for the purpose of apportioning the damages returned by them in their verdict, between the two cases—Whereupon, appellants filed the following Bill of Exceptions:

"1st. The defendants' counsel asked the Court to instruct the jury that in each case, assessing damages in these cases, they cannot find for more than plaintiffs have actually proved was incurred in consequence of improperly suing out of the attachment; and that the jury cannot consider in their verdict, any damages plaintiffs may have sustained by reason of defendant, J. Miller, taking away his negroes, in violation of his contract with the plaintiffs.

"2d. That in the absence of any evidence, except levy of the marshal, they are not bound to presume that the property attached was taken from the possession of plaintiffs or sold; and that the same on the dissolving of the attachment, goes back to them, the jury should only find damages merely for the deterioration of the value of said property, the loss of the benefit thereof the meantime and the damages consequent thereon and their expenses.

"3d. That jury should not assess the damages in each case *pro rata*, according to amount, but upon the evidence as to each case independent of all considerations.

"These instructions were refused, because the jury were only called together to render in form, their verdict found at a former day.

S. J. DOUGLAS, Judge."

The jury therefore assessed the damages in this case at $1295, and judgment entered accordingly.

On the 7th March, 1845, appellants filed the following Bill of Exceptions, which is inserted at large, because of the discrepancy between some of the facts as set forth therein and in other parts of the record:

"Be it remembered, that these two cases were tried together by consent; and the jury, on the 1st March, 1845, in the absence of defendants' counsel, absent on leave, rendered a verdict for $1500
191 damages in both cases, without stating in which case, or separating the damages in the two cases.—'We, the jury, find for the plaintiffs, and assess the damages at fifteen hundred dollars, which includes both cases.'"

Defendants' counsel moved for a new trial—the verdict was recorded, and the jury discharged, and the Court adjourned to March 4, 1845.

March 4: Plaintiffs' counsel, on the opening of the Court, moved the Court, to recall the jury, to amend the verdict, by apportioning the damages in each case separately; but the motion was refused by the Court, on account of the absence of defendants' counsel March 5, 1845, defendants' counsel filed their reasons for a new trial, as follows:

LEON SUPERIOR COURT.

JOHN MILLER, et al defend'ts. }
ats. }
The HOCS, plaintiffs.

Defendants move for a new trial on the following grounds:

1. Because in the writ and declaration, the damages claimed are but $1,000, whereas the verdict is for $1295 damages.

2. Because the declaration and assignment of breaches, upon which said verdict is rendered, was and is defective, irregular and insufficient.

3. Because the verdict is irregular and illegal, inasmuch as the jury in this case, and which tried it and No. 358, between the same parties, by consent, at the same time, on the 1st of March, 1845, rendered a verdict in open court for $1500 damages in both cases, without assessing damages in each case separately, and were on said 1st of March, 1845, discharged by the court in said cause, and the said verdict duly recorded, and after a motion for a new trial, &c. and reasons filed, the jury were against consent of the defendants, collected and called together again by the 5th of March, 1845, on motion of plaintiffs, and by order of the Court, and instructed to separate their verdict and find the damages in each case, when they found $205 in this case and $1295 in the other, which proceeding was irregular and illegal, and said verdict void.

4. Because the said damages were and are unreasonable and excessive.

5. Because the defendant was surprised on the trial, as his counsel in the original cases of attachment, and who brought the same, 19
Mr. Baltzell, was absent, and his defence was conducted by other counsel who were not as well acquainted with the facts of his case as Mr. Baltzell.

6. Because said defendant hath newly discovered evidence, to wit, that the plaintiff, after the levy of the Attachment in the original case, retained possession of the property levied on, and used the same, and with the burned brick, built a house or a part thereof, and used or sold the others.

7. Because the verdict is otherwise against law and evidence.

THOMAS BALTZELL,
Defendants' Attorney.

Plaintiffs' counsel moved the Court, that the jury might be collected and recalled, and instructed by the Court to amend their verdict by apportioning the damages separately in each case. Defendants' counsel objected thereto, and the Court overruled the objection, and the jury were recalled and so directed, and thereupon retired, divided the damages, and apportioned the damages in one case at $1295 and in the other at $205. The defendant excepted to the said decision and proceedings in both cases, and this Bill of Exceptions is therefore signed and sealed, and ordered to be made a part of the record in both cases.

S. J. DOUGLAS, Judge [SEAL.]

Appellants assigned the following for errors:

1. The Court below erred in rendering judgment against defendants, as for want of a plea, on the 15th February, 1842, when, as the record shows, there was on file two pleas, one of non damnificatus, and the other of nil debit.

2. The Court erred in permitting plaintiff to reply to defendants' plea of non damnificatus and to demur to his plea of nil debit, at the Fall Term, 1842, while the aforesaid judgment which the court had rendered against defendants, at the same term, remained in full force, and unreversed or set aside.

3. The Court erred in having the jury sworn, when there was no issue to try—the defendants not having rejoined to the plaintiffs' replication to his plea of non damnificatus.

4. The Court erred in rendering final judgment against defendants while plaintiffs' demurrer to defendants' plea of nil debit remained open and undisposed of.

193 5. The court erred in rendering judgment upon the verdict of the jury—it appearing from the record that they were sworn to try but *one* issue, and it not appearing whether that issue was in this case, or in the other submitted to them at the same time.

6. The court erred in rendering final judgment in this case at a time when there was a motion for a new trial and in arrest of judgment still open and undisposed of.

7. The Court erred in recalling the persons who had composed the jury after they had rendered their verdict and been discharged —— days, against the consent of defendants, and then requiring them to change the verdict they had rendered while acting as a jury.

8. The Court erred in refusing the instructions to the jury prayed for by defendants.

9. The Court erred in rendering judgment for a greater amount of damages than that claimed in the writ and declaration, to wit: the sum of $1295, when the writ and declaration claim only one thousand.

Long & Walker, for Appellants.

L. A. Thompson and *T. H. Hagner*, for Appellee.

HAWKINS, Justice:

The record in this case certainly presents a series of anomalies, and the questions for the consideration of the Court are embraced in the enquiries, how far consent of parties can remedy error; what defects in pleading are cured by verdict, and whether the verdict and judgment of the Court below have been rendered in compliance with the well settled rules of law. Although a Court of error will go far to sustain a judgment of a Court which tried the cause, when upon a view of the whole case it comes to the conclusion that substantial justice has been done between the parties; yet still, there are certain fundamental rules governing legal proceedings, which cannot be departed from, without producing great confusion and evil results. There can be no doubt but that the Court below erred, as alleged in the assignment of errors, in pronouncing a judgment by default, whilst the record shows that pleas were in and filed by the defendant.

The record states that no plea was filed by defendant, upon which the judgment by default was entered. As a general rule, the record is to be taken as true, and nothing is to be averred against the allega-
194 tions contained in it, but we must examine the *whole* record; and it would be carrying the above axioms to an absurd extent, if after its inspection, we should say, the judgment by default was correctly tendered, because the record said there were no pleas filed, when in fact two pleas stand in bold relief, and undisposed of. It would seem far more consonant with reason to conclude, that they were overlooked, and the judgment pronounced through inadvertance, then to take for granted, even a record averment so utterly at variance with the strongest evidence of our perceptions.

There is nothing in the record to show, that a motion was made by the defendant in the Court below, to set aside the judgment by default thus irregularly granted, as might have been done; nor does it appear that the plaintiffs availed themselves of any legal rights growing out of it; so that it is to be inferred from the further proceeding of the cause, that this judgment was waived by both parties, perhaps considered as struck out and a nullity—by the defendants, by not moving as above—by the plaintiffs, by pleading in disregard of it. Without moving to have the judgment set aside, the latter reply to the plea of *non damnificatus* filed by defendants and demur to that of *nil debit*. The defendants do not rejoin to the replication, nor join in the demurrer; but "by consent *of parties it is agreed* that the two cases shall be submitted to the same jury." The cases referred to are the one at bar and another between the same parties, as shown by the record

The consent alluded to, seems not to have extended further than that the same jury were to bring in separate verdicts in each case, and not as contended for by counsel, that the cases should be consolidated, and one verdict be rendered for the two cases.

The Court can only be guided by the record as to the version to be given to this submission, and as there is nothing contained in it that conveys the idea of consolidation, we must take the words as we find them. If the consent went to the extent contended by the counsel for appellee, a different decision as to the verdict first rendered, might be arrived at, as consents may take away error; and guided by this rule, the court is constrained to overlook the irregularity of the judgment by default.

With the views of the submission, as above expressed, the Court is of opinion, that separate and independent verdicts should have been rendered in each case. Here the Court might rest and remand the case to the Court below for corection of its proceedings, 195
but it may not be inappropriate to discuss some other points raised in the cause.

It is contended by the appellee that the record shows that there were issues before the jury and issues joined; but we can discern nothing showing such to be the fact, further than that after the submission of the case, certain persons were elected, tried and sworn to speak the truth upon *the issues joined*.

The pleadings certainly exhibit no issue either of *fact* or of *law*. "As the object of all pleading or judicial allegation (says Mr. Stephens,) is to ascertain the subject for decision, &c. the main object of that system of pleading established in the Common Law of England, is to ascertain it by the production of an *issue*."

The counsel for appellee insists that by the statute of jeofails of our State, the error, if any existed, is cured by the verdict; but that does not apply where there has been no issue or non-joinder. An *immaterial issue* is not aided at Common Law, or by statute. (Buller's Ni. Pr. 321—2d Saunders, 319. In such cases Courts will grant *a repleader*)—and Green J. in the case of Truss vs. Old, 6 Ran. 560, remarks, "that the statute of jeofails gives the effect of curing errors, only where a verdict is given without exception."

Although the record states the jury were sworn to try the *issues* joined, that cannot remove the irregularity of the verdict, or prove that issues really existed.

In Sydner against Burke and wife, 4 Ran. 161, we see that the act of jeofails will not sustain a verdict and judgment in a case in which the record states that the jury were sworn to try the *issue joined*, but does not show that any plea was filed by defendant, upon which issue could have been joined.

The case of Stevens vs. Thornton's adm'rs. 1 Wash. R. 156, is in point. In that case there was an entry upon the record after the replication, that *"issue was thereupon joined* between the parties." the entry was deemed not sufficient, because in fact, there appeared no *issue*.

With these views, and there having been no issue properly made, up for submission to the jury, we think the error well assigned by appellant.

It appears that there were motions for a new trial and in arrest of judgment, and these remained, so far as appears by the record, 196
undisposed of. A presumption may arise, that these motions were refused, but it will not be necessary to advert further to the assignment of errors in relation to them, inasmuch as the first verdict has been declared irregular. And so in relation to the second verdict, for there appears to have been two verdicts in one cause, the Court feels no hesitation in declaring that it should be set aside. It seems that after the rendition of the first verdict, on Saturday, and their discharge, the jury were recalled by the Court on the ensuing Wednesday, for the purpose of apportioning the damages by them returned in their verdict. After their *discharge*, the Court below erred in again assembling them to put their verdict in form, as this should have been done before their discharge, and a *venire de novo* should have been the proper order.—After a jury have returned their verdict, have been discharged and separated, they cannot be recalled to alter or amend it. Sergeant against the State, 11 Ohio R. 472.

The cases cited by appellee do not refer to cases where the jury had been discharged. The strongest one, that of Winslow against Draper, 8 Pick. 170, was this. The jury had retired to consult on their verdict on Saturday afternoon, and had permission from the Court to separate as soon as they had made up their verdict. On the following Monday morning, they rendered in an imperfect verdict, which the Court made them correct, as they found a substantial verdict on the merits, and it was then put in proper form.

It would be superfluous to dilate upon the instructions as prayed for by the defendants, in the Court below, though it is very clear that the Court should have instructed the jury, that they were not to assess the damages in each case *pro rata*, according to amount, but as to the evidence in each case independent of the other.

As contended for by the appellee, the Court is not to be understood as dissenting from the doctrine, that a Court will not examine the propriety of amendments of the Court below, when these amendments are within the power of the Court, giving it either by Common Law or statute, amendments generally being matter of discretion for the Court. In this case, the error seems to have been the not making suitable amendments. But the Court of errors should certainly have all the proceedings of the subordinate Court before it, so that from a view of the pleadings, the process, continuances,

197 the finding of a jury upon a *proper issue* and the judgment—(for without them a Court would be groping in the dark and find great difficulty)—they might come to a decision.

With these views, we think the judgment of the Court below must be reversed; which is accordingly ordered, and that this cause be remanded to Leon Circuit Court for further proceedings to be had therein, in accordance with the views contained in this opinion.

JOHN MILLER AND BRYAN CROOM, Appellants, *vs.* FREDERICK HOC, Survivor, &c.

HAWKINS, Justice:

This case must be governed by the decision of the Court in the preceding case, as the same points are involved in it; the pleadings seem substantially the same, and the record shows the same errors committed in this case as in the one just decided.

It is therefore ordered, adjudged, and decreed, that the judgment be reversed, and that this cause be remanded to the Court below for further proceedings, in accordance with the views contained in the opinion in the other case between the same parties.

ELI HORN AND JEREMIAH SAVELL, EXECUTORS OF JOAB HORN, *vs.* DAVID GARTMAN.

A petition for a re-hearing must be filed during the Term at which the case was decided.

This cause was argued and decided at the last Term of this Court, but was again brought before the Court at its present Term by a petition for a rehearing, filed on the 18th Feb. 1846, after the adjournment of the Court, but within fifteen days after the decision of the case was pronounced.

198 MACRAE, Justice:

This is a petition for a rehearing of this cause, which has been filed since the last term of this Court, and the question arises whether this application can be entertained in view of the 24th Rule of this Court, which provides that "re-hearings must be applied for by petition in writing within fifteen days after the judgment or decree," and that "the Court will consider the petition without argument," &c. This rule is analagous to that which regulates motions for new trials which requires that every such motion shall be made within the Term at which the cause has been tried, in which such motion is proposed to be made. In the opinion of this Court, the 24th Rule clearly contemplates the filing of a petition for a re-hearing before the expiration of the term at which the decision of the case is had. This is the general rule in all cases of motions to be made before a Court in reference to a case depending before it.—After the term, as a general rule, the Court cannot exercise power or control over a cause which has been determined, further than to perfect and carry out its judgment by orders correcting errors apparent in the proceedings, or similar errors.

It is therefore considered and ordered that this case be stricken from the docket.

THEOPHILUS BEATTY *vs.* THOMAS ROSS.

After entering his appearance and a judgment by default for want of a plea has been entered against him, it is too late for an alien defendant to avail himself of the privilege, allowed by act of Congress, of removing his cause from a State Court to the Courts of the United States.

The Judges of the Superior Courts of the late Territory of Florida, under the clause of the Constitution of the State "continuing all officers until superceded under the Constitution," took possession, after our admission as a State, of the records and papers, and exercised jurisdiction over suits pending and instituted in those Courts as State Judges. The State Judges elected afterwards under the Constitution, succeeded them and became possessed of the records and suits, and being so possessed, it was not only competent for them, but it was their duty to adjudicate them.

In all cases of concurrent jurisdiction, the Court which first has possession of the subject must decide it. 199

There being no provision in the act of Congress for the transfer of cases from the Superior Courts of the Territory to the Courts of the United States, no such transfer could be made.

The Superior Courts of the late Territory were not United States Courts as defined in the constitution of the United States; and the District Courts of the United States were not their successor.

That clause of the act of the Legislature which provides that causes pending in the Superior Court of the Territory, shall be transferred to the Circuit Courts of the proper county, except cases cognizable by the Federal Courts which may be organized in this State, which cases shall be transferred to such courts, is ambigious, and the design of the Legislature was probably directed to cases of *exclusive* jurisdiction in the United States Courts.

Appeal from Jefferson Superior Court, at its Fall Term, 1845, his Honor Judge Douglas presiding, who was thereby disqualified from sitting in the case in this Court.

This was an action of assumpsit commenced in the late Superior court for the Territory of Florida, for Jefferson county. The declaration was filed on the 4th February, 1845, and on the 30th of following October, plaintiff filed in the office of the Clerk of the Circuit court, for Jefferson county, to which court the case had been transferred after Florida became a State, an affidavit of default for want of a plea.

At the Fall Term of the Circuit Court in November, 1845, appellant filed his petition to remove the case to the Circuit Court of the United States, on the ground, that he was an alien, and that it had been improperly transferred to, and placed on the docket of this Court. The Court refused to grant the petition, and judgment by default was entered against him.

To this decision of the Court, appellant excepted and filed his Bill of Exceptions as follows:

Be it remembered, that on the first calling of the docket in this Court, November 3, 1845, defendant, by his attorney, moved the Court to remand and remove said cause to the Circuit Court of the United States for Florida, on the ground that the defendant was an alien, and that the cause had been improprly transferred to, and placed on the docket of this Court, and asked leave until next day to file his petition, which motion to file his petition was allowed.—And thereupon, November 4th, 1845, said defendant filed his said petition in the words following, to wit:

STATE OF FLORIDA, } 200
MIDDLE CIRCUIT. Jefferson Circuit Court, }
November Term, 1845.

Theophilus Beatty, def't. }
ats. } In assumpsit, on promise by note, &c.
Thomas Ross, pl'ff. }

And now the 3d day of November, 1845, on the first calling of said case on the docket of said Court, comes the said Theophilus, defendant, and says he shows to said Court, that said Court should not proceed to render judgment in said case, or further entertain or hold cognizance or jurisdiction thereof, but should order and direct said case to be removed to the Circuit Court of the United States having jurisdiction thereof, because he the said defendant, says said suit was commenced on the 4th of February, 1845, by summons issued out of the Clerk's office of the Superior Court of the Middle District of the Territory of Florida, in and for said county of Jefferson, returnable to and before said Superior court, on the third Monday in April, 1845; that said plaintiff filed his declaration in said cause in said Superior court of the 4th of February, 1845, and said defendant caused his appearance to be entered in said cause at the same April, 1845; the said plaintiff filed his declaration in said cause in such Territory, had jurisdiction as a Circuit Court of the United States) and thereupon said cause was continued. And the defendant says, that when said writ was issued as aforesaid, and ever since this defendant was and has been, and now is an alien, born out of the United States of America, to wit, in Ireland, and a subject of the crown of Great Britain and Ireland, and that he hath never been naturalized, or admitted, or become a citizen of the United States of America, and that matters in dispute in said case, exceed in value, five hundred dollars, exclusive of costs. And this defendant further avers, said Thomas Ross, plaintiff, was and is a citizen of the United States, and a citizen of the State of Florida, residing therein.

And this defendant avers, that the affidavit made in said cause by plaintiff's attorney, on the first day of the present term of this Court, and the docketing said cause in this court, doth not entitle said plaintiff to judgment in said cause by default, for want of a plea in this court, because, that defendant says no order of said Superior court of said Territory, has ever been legally made or entered in said cause, remanding or transferring said cause into this court, so as to give this Court cognizance or jurisdiction thereof, and the defendant

201 was not and is not bound to plead in said cause in this court, and is not in default on account thereof, and this the said defendant is ready to verify: Wherefore this defendant petitions and prays for the order of this court to remand and remove said cause to the said Circuit court of the United States having jurisdiction thereof.

T. BEATTY.

Sworn to and subscribed, Nov. 5th, 1845. C. G. FIFE, Cl'k.

And defendant also filed a newspaper, called the "Florida Star," a newspaper published at Tallahassee, Florida, 2d September, 1845, containing a notice published by order of the Hon. Samuel J. Douglas, Judge of the Superior court of the Middle district of Florida, admitted by the parties to have been published, which printed order is in the following words, viz:

"CHAMBERS, Middle District, Florida.

"Whereas it is made known to me, that a Judge has been elected for the Middle District of Florida,—It is therefore ordered, that the Clerks of the Superior Courts of said District, deliver over to those properly authorized to receive them, all papers appertaining to suits now pending in courts in which the State tribunals have exclusive jurisdiction; also, all such (at the option of the plaintiff) as they may have concurrent jurisdiction with the Federal Courts, and retain in their Office all papers in those suits in which the Federal Courts have exclusive jurisdiction.

"SAMUEL JAMES DOUGLAS,
"Judge U. S. District, Middle Florida.

"A true copy from the minutes,
"Tallahassee, Sept'r. 2d, 1845.
"R. T. BIRCHETT, C'lk,
"By John B. Keen, D. C.

And thereupon said petition and motion were heard and argued, and said defendant offered in open court to give sufficient security for his entering in such Circuit Court on the first day of its session, copies of the process against him, and the other requirements of the law in such case made and provided. And said defendant also offered to show that said Judge of said Superior court, though duly commissioned by the President of the United States and acting as Judge of the Superior court of the Territory at the time of the admission of the Territory as a State, had never taken the oath prescribed by the 11th section of the 6th article of the constitution of
202 the State of Florida, which was admitted by the plaintiff's counsel. It was admitted by the defendant's counsel, that defendant had previously to the institution of said suit, made application to be admitted a citizen of the United States, but that the time had not elapsed since said application to allow his admission under the act of Congress. After argument, the court refused the prayer of the petition, and defendant not filing any plea, judgment by default is ordered and rendered; and said defendant praying this Bill of Exceptions to said decision, the same is signed, sealed and ordered to be filed as a part of the record in said case.

November 5th, 1845.

THOMAS DOUGLAS, Judge &c. &c. [SEAL.]

Appellant assigned the following errors:

1. The Court erred in overruling the objections touching jurisdiction, and in refusing the prayer of the petition to remove the cause into the Circuit Court of the United States.

2. The Court erred in giving judgment for the plaintiff below.

Carmack and *A. E. Maxwell*, for appellant.

1st. The Court had no authority to exercise jurisdiction in this case. No case from the docket of the Territorial Court, which was an United States Court, could get into a State Court without some enactment authorizing the transfer. Either Congress, or the State constitution, or the State Legislature, or whichever of them had power, must have directed such transfer. Congress did not provide for it, nor did the constitution pretend to do so. The State Legislature did pass a law on the subject, but that law did not authorise the appearance of cases of this sort in the State Court. The 5th and 8th sections of the "act to organize the Circuit Courts" of the State, are as follows, viz:—"§ 8th. That all cases in equity and at common law, and civil and criminal, and all motions and proceedings pending in the several Superior courts of the Territory, or County Courts of the Territory, shall be transferred to the proper Circuit Courts to be held for the county, except all cases cognizable by the Federal Courts, which may be organized in this State," &c.

§ 5. Same in substance as above, down to word "except."—[*See Acts, 1st Session*, 1845, *p.* 9.]

From this it will be seen that cases "cognizable in the Federal Courts," are not to be transferred. This case, Beatty being an alien, is so cognizable. As this is the only pretence of authority for its 203 transfer, and, as this expressly excepts from transfer cases like this, how is its appearance in the State Court to be accounted for or justified? There must be some power shown competent to take the case from the old Superior Court into the Circuit courts of the State.—Cases cannot go from one Court to another without law. Where is that law in this case?—[*See* 4, *Howard*, 589, *Hunt vs. Palao.*]

The decision in Stewart vs. Preston, decided at the last term, is not in conflict with the position here contended for. It merely holds that the State was competent to make the transfer. Without denying that, we contend that the State has not made the transfer, nor in anywise authorised it.

2d. But even if the case was properly transferred, and the Court had jurisdiction, it erred in refusing its removal to the Federal court. When it was brought, there was no Court to which it could be removed. The Territorial Court was an United States Court.—When Florida became a State, and the Territorial Court was superseded by the State Court, the case put on a new phase. The cause being transferred to the State Court, was, for the first time in a position which would entitle defendant, being an alien, to the privilege he claims under the 12th section of the judiciary act of 1789.

It is true this case was not "commenced in a State Court;" but this surely can form no objection to the removal. When it was begun it was a United States court. There was then no ground or reason for removal. But when it got into the State Court, the reason of the law of the 12th section came into play, and it is to the reason of the law we must look in all cases. Here so soon as that reason applied, the petition for removal was made, and then it was that his right "commenced." To follow the strict letter of the law in this case, would be to contradict its spirit and reason—it would not be simply carrying out the letter, whether the reason sanctioned it or was silent; but it would be doing this in violation of that reason. The Court will not sanction a construction involving such disregard of the plainest as well as most important principles of construction.

L. A. Thompson, (with whom was *T. H. Hagner*,) for appellee

This is an appeal from the judgment of the Hon. Thomas Douglas, sitting in the Middle Circuit, at Monticello, in Jefferson county, on the application by appellant for a removal of the cause from the 204 Circuit Court of the State, to the District Court of the United States, under the provisions of the 12th section of the act of Congress of September 24, 1789.

This section provides "that if a suit be commenced in any *State Court* against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court, and the *defendant shall at the time of entering his appearance* in such *State Court*, file a petition for the removal of the cause for trial into the next Circuit Court to be held in the District," &c. &c. "it shall be the duty of the State Court to accept the security and proceed no further in the said cause," &c. 1 Story's Laws, p. 57, 58.

To entitle the defendant to the benefit of this section, the following must concur:— —

1. The suit must have been commenced in a *State Court*.

2. It must be brought against an *alien*, or by a citizen of the State in which the suit is brought against a citizen of another State.

3. The matter in dispute must be of the value of $500, exclusive of costs; and

4. The application for removal must be made *at the time of entering his appearance* in the State Court.

This suit was commenced by *sums. ad resp.* issued from the Clerk's office of the Superior Court of the Middle District of the *Territory* of Florida, for Jefferson county, on the 4th of February, 1845, returnable to the next ensuing term of said *Superior Court*, to be held on the 3d Monday of April then next; which was duly executed by the service of a copy on the defendant below on the 8th February, 1845.

On the 3d March ensuing, the *Territory* of Florida was, by act of Congress admitted as one of the States of the Union.

On the 3d Monday of April the Court was held, and although the record does not, and from the practice of the Courts cannot, state the fact of the entering of an appearance by Beatty, yet it may be inferred from the fact that no judgment by default was entered at the appearance term, to which the Plaintiffs would have been entitled, if there was no appearance of the defendant at that time.—

205 The petition of defendant for removal, states that the entry of appearance at April term, 1845. See § 22, Judiciary act of Florida—Duval's Comp. p. 95.

On the 30th October, 1845, in acordance with the rule of practice then in force, *R. Harrison,* Esq. one of the attorneys of plaintiff below, makes search in the Clerk's office *for a plea,* and finding none, and makes the usual affidavit, claiming judgment *for want of a plea.*

At November, 1845, being the *second* term of said Court, and while *in default* according to the rules of practice, because of the omission to plead, the defendant below files his petition setting forth his *alienage,* &c. and prays removal of the case to the District court of the United States for the District of Florida.

The first position we assume is—

1. That the present is an *omitted case* in the laws of Congress.—The provisions of the 12th section of the act of 1789, is for cases commenced in *State* Courts:—This suit was commenced in a *Territorial* Court.

The word "State," in the judicial act is to be construed by reference to that term as used in the Constitution; and means not merely a distinct political society, according to the definition of writers on general law, but a member of the American confederacy. Hepburn vs. Elizey, 2 Cranch, 445. Corp. N. O. vs. Winter, 1 Wheaton, 91.

2. But it shall be contended that before the return day of the summons, the Courts of the late Territorial organization became *State Courts,* by force of the 17th article of the Constitution of the State, and the act of 1789 then applied; then we shall contend, that the application for removal should have been made at April term, 1845, and came too late at the November term succeeding, and when the defendant was in default for want of a plea.

The words of the act of 1789, *"at the time of entering his appearance,"* must be construed to mean the time when, by the rules of practice of the Court, the defendant ought to make his appearance.

In Gibson vs. Johnson, in the third Judicial Circuit of the U. S. before Judge Washington, where, after passing two terms in the State Court, the petition to remove was granted *nunc pro tunc* by the
206 State Court, the Circuit Court determined that the *agreement* of the State Court to consider the petition as filed of a preceding term, when the appearance was entered *nunc pro tunc, could not give* the Circuit Court jurisdiction, when it was apparent that in point of fact, it was not filed until a subsequent term. The motion to docket the cause was overruled. Peter's C. C. R. 44.

3. If the Court should not sustain our first position, the second point, that the application for removal came too late, is equally applicable.

Baltzell, Justice:

The defendant in the Court below applied for permission to take his case to the Circuit Court of the United States, having presented a petition and affidavit stating, that he was then, and at the time of issuing the writ, an alien, and that the matter in dispute exceeds in value five hundred dollars, exclusive of costs. There had been prior to this, a judgment by default for want of a plea required to be filed. days before the second term, and the defendant at the first term had entered his appearance to the action. Under such circumstances, it is quite clear that he was not entitled to his motion under the act of Congress of 1789, allowing to aliens the privilege of removing cases instituted against them in the State Courts to the Courts of the United States.

The main reliance of defendant here, is placed upon the assumption, that the suit was instituted in the Superior Court of the late Territory, which was established by Congress, and at the change of government it belonged to the District court of the United States as its rightful successor. If this be true, it should not have been on the docket of the State Court, and defendant was entitled to his motion. The first question for our consideration is, has the Court of the United States organized for this State, the right to the papers of the late Superior Courts, and to try suits commenced and pending before him.

We have felt that the subject should be approached with a due sense of its importance to the individual whose rights are at stake as well as a proper regard to the rights of a co-ordinate branch of the government, not forgetting what is due to our own position as officers of a State of the Union.

This Court and the Circuit Courts of the State, have alike, without hesitancy, ordered the transfer of all cases where the courts of 207
the United States have exclusive jurisdiction. But the difficulty lies with cases where it is concurrent, where each court has the right to try and adjudicate the matter in controversy. The Judges of the *Superior courts* of the Territory under that clause of the State constitution continuing "all officers until superceded under the constitution," took possesion of the records and papers after our admission, and exercised jurisdiction over suits pending and instituted in those courts. This they did as State Judges for several months after our admission, and in the very case under consideration. They administered the local laws of the State, deciding suits betwen citizen and citizen, and trying indictments for assaults and offences of like character. The State Judges succeeded them in the different counties, and thus became posessed of the records and suits. Being so possessed, it was in the opinion of the Court, not only competent for them to adjudicate the cases presented for trial, but it was their bounden duty to do so. It was clearly not a matter of option with the judge to transfer the case to another tribunal, but it was the right of the party to have his case tried, and the court could not properly refuse it.

A reference to the well established rules of law in cases of concurrent jurisdiction, will show, we think, that we are not mistaken in these views. "In all cases of concurrent jurisdiction, the court which first has possession of the subject must decide it." Smith vs. McIvor, 9 Wh. 532. But there is another fact not to be overlooked in the consideration of this question; the District Court of the United States has only been organized during the present month, so that the State Courts, if inclined to transfer, must have waited nearly two years before the removal, whilst the party would have been subjected to unusual delay without a satisfactory excuse for it. And now, that a court is organized, we do not perceive that the difficulty is either lessened or removed. There is no provision in the act of Congress for the transfer of cases to it from the Superior Courts, and without such provision the jurisdiction does not attach. The courts of the United States take by express grant, and "can exercise jurisdiction in those cases only, where it is conferred upon them by act of Congress." 1 Wash. C. C. R. 231. 1 Brockenbrough, 203.

Situated then as these cases now are, the courts of the State alone have the exclusive right to try and decide them, and there is no 208
other having a right even concurrent with them. If the defendant had been driven to his plea, as was his only course after his motion was overruled, what could he have asserted, how defended himself against the rule well established, that "in a plea to the jurisdiction, the defendant must show that another court has exclusive jurisdiction over a cause of action?" Archbold Pl. and Ev. 280. 6 East, 583.

Whilst free from doubt as to these views, we are not content to rest our decision upon the prior organization of the State Courts, or the fact of possession merely, satisfied that the right of the State Courts is equal, and by no means subordinate to that of the Federal Courts. We attribute no importance to the fact that Congress established the Superior Courts. This did not make them United States Courts. Such an idea was long since rejected by the Supreme court of the United States, who decided that they were "not constitutional courts in which the judicial power conferred by the constitution on the general government can be deposited—they are incapable of receiving it. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the 3d article of the constitution, but is conferred by Congress in the execution of those general powers which that body possess over the Territories of the United States. In legislating for them, Congress exercises the combined powers of the general and of a State government."—Am. Insurance vs. Canter. 1 Peters, 546.

It will not, we apprehend, be seriously contended, that action by the General Government as a State, or whilst in the exercise of State powers, can rightly form the basis of a claim against the State, or that the General Government derived higher or larger jurisdiction or powers from such possession. According to the theory of all our institutions, governments are but trustees for the people, and we hold this to be the true position which the General Government occupied during the existence of the Territory, trustees for the people until they became competent to take the blessings of self government upon themselves. On our admission into the Union the trust expired, and each party was remitted to the position which, according to the structure of the State and Federal governments, each should respectively occupy, neither superior, nor having greater claims,

209 except over particular subjects where exclusive right or jurisdiction may prevail—both equal in cases of concurrent jurisdiction.

This declaration of the Supreme Court as to the character of the Superior Courts, is fatal to the succession which is claimed for the District Court of the United States. Independently of this, it is not perceived how a court of limited jurisdiction as this latter is, "taking only by grant," having cognizance, not of cases generally, but only a few specially circumstanced, amounting to a small portion of the cases which an unlimited jurisdiction would embrace, and in reference to whose action the fair presumption is not as with regard to a court of general jurisdiction that "a cause is within its jurisdiction, unless the contrary appears, and which renders it necessary to set forth upon the record, the facts and circumstances which give jurisdiction." 1 Cond. Rep. 205, it is not perceived how such a court can be the successor of a court, not only of general jurisdiction, but of powers beyond those possessed by any other court in the Union, either State or Federal, indeed combining the power of both courts. If "succession in a body politic be as defined, an inheritance in a body private, the District Court would seem to be rather the devisee than the heir of the inheritance. This latter appellation and that of successor would seem to belong rather to the State Courts, being courts of general jurisdiction, and going to the different counties as the Superior courts did, dispensing justice as they did, and succeeding to most, if not all of their cases—"a successor being defined to be he that followeth or cometh in another's place." 6 Jacob Law Dict. 134.

It is further insisted that the act of the State Legislature makes provision, that "causes pending in the Superior Courts shall be transferred to the Circuit Courts of the proper county, *except cases cognizable by the Federal Courts*, which may be organized in this State, which cases shall be transferred to said courts; and all writs issued by said Superior Courts shall be returned to said Circuit courts, to be tried and decided therein and thereby." The statute is rather ambiguous—the design of the Legislature was probably directed to cases of exclusive jurisdiction, without noticing the distinction between them and such as are concurrent. The jurisdiction of the Circuit Court, by the constitution of the State, embraces "all matters, civil and criminal, within the State, not other-
210 wise excepted in the constitution;" and it may well be doubted whether the Legislature can impair or deprive them of it. We are, however, clearly of opinion that the fourth clause of the schedule and ordinance of the same instrument, is so full and explicit as to leave little or no room for legislation on the subject. That declares that "all actions at law, or suits in chancery, or any proceeding pending, or which may be pending in any court of the Territory of Florida, may be commenced or transferred to such court of the State as may have jurisdiction of the subject matter thereof."—Page 24, State constitution.

We are not insensible of the fact that different sentiments have been announced by the Supreme Court of the United States, in the case of Palao vs. Hunt, decided at its last tem, 1846. Whilst we would defer, with great pleasure, on all proper occasions to the great learning and general accuracy of that exalted tribunal, we are constrained for the reasons stated above, to express our dissent to their opinion in this case, not including the decision on the point presented, the accuracy of which we pretend not to question. This contrariety has made it necessary to extend our own views further than has been our desire or the case itself would warant. The importance of a correct understanding of the true relations between the two governments, so connected as it is with the harmony which ought to prevail between them, and especially the judicial departments, has also induced a more extended discussion of the subject.

The Chief Justice decided this case in the court below, and his decision being sustained by the unanimous opinion of the court, the judgment of the court below is confirmed.

THEOPHILUS BEATTY *vs.* GRANT SCURRY.

Appeal from Jefferson Circuit Court. The facts of this case are similar to those of Beatty vs. Ross, decided at this Term.

BALTZELL, Justice:

The same questions arise and are presented in this cause as have been decided to-day in the case from the same court, between Beatty and Ross, and for reasons there stated, the judgment is affirmed.

BRYAN CROOM *vs.* JOSEPH SWANN, ADMINISTRATOR OF JOHN SHAW. 211

An agent cannot maintain an action against his principal to recover the amount paid by him on a judgment obtained against him for a false warranty of a horse, withou showing that he was authorized by his principal to warrant the soundness of the horse so sold.

The record of a judgment, obtained by the purchaser of a horse in an action for false warranty against the agent who sold, is not, in action by the agent against the principal to recover the amount paid on such judgment, evidence of authority from the principal to the agent to warrant. Evidence of such authority and of a warranty made in accordance therewith should be *aliunde* such record.

Receipt by the principal of the proceeds of the sale of a horse sold by an agent, is not evidence of authority to the agent to warrant; nor is it a ratification of warranty, unless there be evidence to show that at the time of receiving the proceeds, he knew that a warranty had been given by the agent.

Where an agent to sell a horse makes a false warranty, the principal is liable to the purchaser and not to the agent, unless he can show that a deception had been practiced on him by his principal, and that in pursuance of orders or instructions, he *bona fide* made the false representations, and is compelled to pay damages to the purchaser on account thereof.

Appeal from the late Superior Court of the Territory of Florida, for Leon county.

His Honor, Judge Baltzell, having been counsel for appellant, in the Court below, did not sit in this case.

John Oliver, in his life-time, as agent of appellant, sold to one John Shaw a horse. Shaw afterwards sued appellee as administrator of Oliver, in an action for a false warranty, and recovered a judgment against him. It was to recover from appellant, the owner of the horse sold, the amount paid by him, as administrator of Oliver, on this judgment, that this action was brought. Appellee filed his declaration in assumpsit, at the Spring Term, 1842.

Plea, non-assumpsit.

At the trial in the court below, appellee offered in evidence the depositions of witnesses showing that Oliver was in the employ of Croom at the time he sold the horse to Shaw, and that he was authorised by appellant to sell; that appellant had reecived from Oliver the proceeds of the sale; that appellant had said that he expected that appellee would have to refund to Shaw, but that he was the 212
proper person to lose it, if any one did; and that Shaw sold the horse to one John Penny, and Penny to one Jesse Byrd. Appellee also gave in evidence the letters of administration to him; Also, the record of the judgment in the suit of John Shaw against him, as administrator of John Oliver, obtained in Gadsden county, and of the execution thereon, with the receipt of Shaw for the full amount from appellee endorsed.

Appellant moved the Court to overrule said record as being incompetent and inadmissible evidence in this case, and as being *inter alios;* which motion the Court overruled.

Appellant offered no evidence, but asked the Court to instruct the jury that said record was not sufficient evidence of alleged warranty by Oliver, or evidence of any authority by Croom to Oliver to make said warranty:

Also, that the record of the recovery aforesaid, without parol evidence of said warranty and of such authority to warrant was not sufficient to entitle the plaintiff to recover.

Also, that there was not evidence for the jury to find a verdict for the plaintiff.

The Court refused the said motions, and instructed the jury:—

1st. That said record was not *inter alios,* and was legal and competent evidence in this suit.

2d. That said record, together with the parol evidence of the receipt by defendant, from Oliver, of the purchase money, and the letters of administration, are sufficient to enable the plaintiff to recover, and that it was not necessary, to entitle the plaintiff to recover, to prove by evidence *aliunde* the said record that defendant authorised Oliver to warrant the horse to Shaw, or that Oliver did warrant him.

Defendant excepted to the decision and instructions of the Court, and tendered his Bill of Exceptions.

The jury returned a verdict for plaintiff, and defendant appealed.

Long & Walker, for Appellant:

The judgment in this case ought to be reversed, because the record in the case of Shaw vs. Swann, was improperly admitted in evidence before the jury—Croom against whom it was offered, being a stranger to the same. Phil. Ev. 222, 232—3 Johns. Rep. 8.

213 4 Day Rep. 431—2 Hen. & Mum. 139—14 John. Rep. 79, 81—18 John. Rep. 352.

There is no proof that Croom authorised Oliver to warrant the horse sold to Shaw by the latter, and a principal can only be bound by such acts of his agent as are authorized. Newland on Con. 178. Nor is there any proof that Croom authorized his agent, Oliver, to misrepresent the soundness of the horse, or to commit any other fraud. On the contrary, the declaration against Oliver is exclusively upon the breach of warranty. Indeed, it is obvious that Oliver cannot be permitted to aver that he committed a fraud by the instructions of his principal, for which he has been punished by the person upon whom he committed it, and that therefore he must recover from his principal the amount of the recovery had against himself; because in law no man can plead his agency in excuse for an act of terpitude or criminality. An agent is not bound to obey the unlawful instructions of his principal. Paley on Agen. 89—Camp. 395.

If Croom did not warrant the soundness of the horse, (or authorise his agent to do so,) and was not acquainted with the alleged unsoundness previous to the day of sale—(and there is no evidence of either of these facts in the record)—he cannot be liable to any one. 2 Kent's Com. 479. Co. Lit. 102, (*a*). 2 Bl. Com. 452. 2 East Rep. 314. 1 John Rep. 274. 4 Randall's Rep. 5. 2 Dallas Rep. 91. 10 Mass. Rep. 197. 1 Peter's Rep. 317. 1 Murph. Rep. 138. 2 Murph. Rep.. 245. 4 Hayw. Ten. Rep. 227. 2 Cain's Rep. 49. 1 Wend. Rep. 185. 20 John. Rep. 186.

But, if for the sake of argument, it be admitted, that Oliver did warrant the soundness of the horse, and the horse was unsound, still when it is seen from the proof, that Oliver, stated to the purchaser (Shaw,) that he was only acting as the agent of Croom in making the sale and warranty, it cannot be denied that these facts were sufficient to exempt the agent, Oliver, from responsibility. In such a case, Croom, the principal, was only liable. 1 Chitty's Pl. 24. 2 Pr. Wms. 278. 1 East, 507. 2 Kent's Com. 629, 630. Story's Agency 260.

Now the question arises, is it competent for Shaw to put this liability upon Croom without permitting him to contest it? If Shaw may sue Oliver, when he is not liable, and obtain a judgment for
214 breach of warranty, and then Oliver may offer the record of that judgment as *conclusive* evidence that Croom authorized him to warrant, and was therefore liable over to him, it would be tantamount to rendering a judgment against a man without making him a party to the suit. The dilemma seems to arise under this view of the subject, viz: If Oliver had authority to warrant, from Croom, then he was not liable, and the record offered in evidence proves a falsehood, and should not be exhibited against Croom. If, on the contrary, Oliver had no authority from Croom to warrant, (and his liability depended upon this fact,) then it is at once absurd and unjust to say that he can extract from Croom the consequences of his own wilful and unauthorised act.

Finally, but supposing the horse to have been falsely warranted by Oliver, with or without authority from Croom, did Shaw pursue such a course as to entitle him to sue and recover for the same? We think the proof answers this question in the negative. In such a case the purchaser, so soon as he ascertains the unsoundness of the property, ought to return the same to the vendor, and propose to rescind the contract, or he will be presumed to acquiesce in the quality of the goods. 2 Kent's Com. 480. 1 Campl. N. P. Rep. 190.

If therefore, on any of these grounds the recovery by Shaw was erroneous, against Oliver, what better reason can be offered why the record of that wrongful recovery shall not be used in evidence to sustain the present suit? Can one gross error constitute any very conclusive reason for committing another? Surely not.

Carmack & Baker, for Appellee:

HAWKINS, Justice:

This was an action of assumpsit brought to recover the amount of a judgment recovered against Swann by John Shaw, in an action of false warranty on a horse sold by John Oliver, in his life time to Shaw, said horse having been sold by Oliver as the agent of Croom, the appellant.

It would appear by the record that Croom authrized Oliver to sell the horse, but there is no testimony to show that he authorised Oliver to warrant him as to soundness. The price of the horse was one hundred and fifty dollars, and Robert L. Harrison, one of the witnesses, testifies that he heard Croom say, that he had received full compensation from Oliver, for the proceeds of sale of the horse, 215
though he does not recollect that Croom stated the amount.

Shaw, it would seem by the testimony, was aware that Oliver sold the horse *only* as agent of Croom—that Shaw kept the horse for a time, and then sold him to Penny, who sold him to another person.

Shaw subsequently instituted suit against Swann, the administrator of Oliver, the present plaintiff, declaring in assumpsit on a warranty of the soundness of the horse, and obtained a judgment and a verdict for $152 10 damages, and his costs. The suit from which the present appeal is taken, was brought to recover said damages and costs, and on the trial in Leon Superior court, the record of the judgment &c. of the original suit of Shaw vs. Swann, adm'r. was offered in evidence by the plaintiff, the appellee—objected to by Croom, and the objection overruled by the court. The defendant (Croom) in the court below, offered no evidence, but moved the Court to instruct the jury that said record was not sufficient or legal evidence of any authority by Croom to Oliver to make the warranty; that the record of the recovery aforesaid, without parol evidence of said warranty, and of such authority to warrant was not sufficient to entitle the plaintiff to recover.

That there was no evidence for the jury to find a verdict for the plaintiff. The court below instructed the jury that the record was not *inter alios*, and was legal and competent evidence in the suit.

2d. That the record, together with the parol evidence of the receipt of the purchase money, and the letters of administration, were sufficient to enable plaintiff to recover, and that it was not necessary to entitle the plaintiff to recover, to prove by evidence *aliunde* the said record, that the defendant authorised Oliver to warrant the horse to Shaw, or that Oliver did warrant him.

To these instructions, the defendant excepted, and a bill of exceptions framed thereupon. Verdict for the plaintiff Swann, and judgment, from which appeal was taken to this Court.

The propriety of the decision of the court below, rests mainly on the question whether the record of the judgment recovered by Shaw against Swann, the appellee, was properly admitted in evidence against Croom, the appellant.

As contended for by the appellee, the record indubitably proves the amount which the administrator of Oliver had paid to Shaw; but this is not enough to justify a judgment against Croom. If Croom 216
had been a party or privy to the record or suit pending between Shaw and Swann, then it would have been available to the extent of the facts contained in it; but there was no privity. The suit was brought by Shaw against Swann, who declined to shield himself by the agency of his intestate, as he could and should have done, had Oliver acted in compliance with the orders or instructions of Croom.

Oliver in this case seems to have acted as the *special* agent of Croom, and not as a *general* agent. He had, as would appear by the evidence, a power to *sell*, but there is nothing to show that he had authority to warrant.

Mr. Chitty says, "the general rule is, that a person who has contracted in the capacity of an agent, and that fact is known at the time to the person with whom he contracts, such agent is not liable to an action for the non-performance of the contract, even for a deceitful warranty." 1 Chitty on Pl. 38, 7 Am. Ed.

And where a person undertakes to do an act as the agent of another, if he does not possess authority from the principal therefor, or if he exceeds the authority delegated to him, he will be responsible therefor to the person with whom he is dealing, for or on account of his principal. Story on Agency, 264.

It is contended for by the appellee, that though there may be no evidence, that Croom authorized Oliver to warant the horse as to soundness, yet that Croom's acceptance of the proceeds of the sale of the horse, and his remark "that he was the proper person to lose it;" that is, the price of the horse, amounted to an adoption of the act of his agent, even if he exceeded his authority, and acted without or against the orders of Croom.

There is no doubt, that an *express ratification* is not necessary to charge the principal, and a subsequent assent may be inferred from circumstances, which the law considers equal to express ratification. Livermore on Agency, 44. 2 Mass. 186. So where a principal enjoys the fruits and benefits of the act of his agent, he shall not be allowed to say afterwards the act was illegal. 3 Mis. 496. Bell vs. Cunningham, 3 Peters' 81.

But there is no evidence to show that Croom was aware, that his agent had made any warranty as to the soundness of the horse when he accepted the proceeds of the sale, and in the absence of this tes-

timony, his receipt of the money only extends to a ratification of the *sale* of the horse, whilst the remark before set forth would seem only to convey the idea of an admission of moral obligation in ignorance of his legal rights, and upon which no action could rest, unless there had been a previous legal liability.

But admitting the argument of the counsel for appellee, that Croom had rendered himself liable by the assumption or ratification of the act of his agent, to whom is he responsible? Clearly to Shaw, and not to his agent, unless that agent could show, that a deception had been practiced upon him by his principal; and that in pursuance of orders or instructions, he *bona fide* makes false representations as to the goods of his principal, and is compelled to pay damages to a purchaser on account thereof. Story on Agency, 339. In such a case Croom would have been directly amenable to Swann, but no such case is shown.

If Shaw had acquired a right of action against Croom, the latter had the privilege of asserting and maintaining his legal rights in an action against himself, but not through his agent; and he is not to be reached in this indirect, circuitous and sinuous manner. "No one in general," say, Mr. Starkie, "can be bound by a verdict or judgment, unless he be a party to the suit, or be in privity with the party, or possess the power of making himself a party." He has no power of cross examining witnesses, of adducing evidence in furtherance of his rights, &c. 1 Starkie on Ev. 191.

No one can be affected, still less concluded by any sentence, decree or judgment in any suit or legal proceeding, to which he was not actually or in consideration of law, a privy. Ib. 181, 1300; and besides, he loses the benefit of appeal.

The reason of these rules are founded in justice and morality; for besides these, reflection must at once suggest the extreme danger at all times of fraud and collusion between the agent and purchaser.—Every consideration of propriety, public policy and sheer justice, forbid the idea, that Croom is to be estopped by the record introduced in the court below, and denied the privilege of making defence of his legal rights.

If otherwise, the grossest injustice might arise. For instance, the record in this case shows that the horse was resold by Shaw. Where are the proceeds of this sale? If an action had been main-

218 tained successfully against Croom by Shaw for damages, the former would have been entitled to an allowance or discount for such proceeds, as the verdict would have been for the difference between a sound and an unsound horse.

With these views, we are of opinion that the record in the case of Shaw vs. Swann was inadmissible as evidence further than as already stated, that there should have been evidence *aliunde* the record to show that Oliver was authorized by Croom to warrant the horse, and that he did warrant him in accordance with such instructions. If he, Oliver, warranted the horse *bona fide*, and fraud had been practiced upon him by Croom, he could look to Croom for redress. That Shaw having purchased of Oliver with a full knowledge of his agency, he should have proceeded against Croom directly, and not against Oliver's administrator.

We think the court below erred in not giving the instruction prayed for by defendant in the court below, and also, erred in giving the instructions it did on the trial of the case.

It is therefore ordered, adjudged and decreed, that the judgment of the Court below be reversed, and that a *venire de novo* be awarded.

Per Curiam.

JAMES T. ARCHER, ASSIGNEE IN BANKRUPTCY OF WILLIAM H. 219
FRANCIS, A BANKRUPT, *vs.* THO'S BROWN, WILLIAM H. BROCKENBROUGH, IN RIGHT OF HIS WIFE ELLEN A. BROCKENBROUGH, ADMINISTRATORS, &C. OF SAMUEL H. DUVAL, DECEASED.

Nil debet as well as not guilty, may be pleaded to an action suggesting a *devastavit* against an Executor.

By the 8th section of the act of Congress to establish a uniform system of Bankruptcy throughout the United States, the assignee in Bankruptcy cannot maintain an action, unless it be brought within two years after the declaration and decree of Bankruptcy.

Under the Statute of the State, a party is entitled, after his demurrer has been overruled, to withdraw it and reply to the pleading. If he fails to do this, judgment final will be entered against him.

Error to Leon Circuit Court.

This was an action of debt, tried in Leon Circuit court, at its Fall Term, 1845—Hon. Thomas Douglas presiding.

The declaration set forth that William H. Francis, since a bankrupt, on the 17th February, 1842, recovered a judgment against Thomas Brown and Ellen A. Duval, since intermarried with William H. Brockenbrough, Administrator and Administratrix of Samuel H. Duval, for the sum of $350 38-100, to be levied of the goods and chattels, lands and tenements of said Samuel H. Duval, in the hands of the said Thomas Brown and Ellen A. Duval, administrator and administratrix, to be administered;—that an execution on 22d March, 1842, issued on the said judgment, and was returned on 22d July, 1842, "no property found;"—that William H. Francis had been on the 7th May, 1842, declared a bankrupt, under the act of Congress, approved 19th August, 1841, entitled "an act to establish an uniform system of bankruptcy throughout the United States," and that plaintiff had been appointed his assignee:—and that after the rendition of the aforesaid judgment, Ellen A. Duval had intermarried with the defendant, William H. Brockenbrough. The declaration averred that at the time the said judgment was rendered, divers goods and chattels, which were of the said Samuel H. Duval at the time of his death, to the value of $350 38-100, had come to the hands of the said Thomas Brown and Ellen A. Duval, administrator and administratrix of the said Samuel, to be administered, and 220
suggested a *devastavit*.

Defendants pleaded —1. *Nil debet*:—2. *Nul teil record*:—3. That by the 8th section of the act of Congress, approved 19th August, 1841, entitled "an act to establish an uniform system of bankruptcy throughout the United States," it is declared and enacted in substance, that no suit, at law or in equity shall in any case be maintainable by or against such assignee, (meaning any assignee lawfully appointed under the act) or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid in any court whatsoever, unless the same shall be brought within two years after the declaration or decree of bankruptcy; or after the cause of suit shall first have accrued; and averred that suit was brought on 15th April, 1845, which was more than two years after the declaration and decree of bankruptcy of the said Francis; and more than two years after the cause of suit first accrued. 4. That suit was not brought within two years after the decree and declaration of bankruptcy of Francis, nor within two years after the cause of suit first accrued. 5. That the decree and declaration of bankruptcy was not made, nor did the cause of suit in the declaration mentioned, first accrue to plaintiff within two years next before his suit was brought.

To 1st, 3d, 4th and 5th pleas plaintiff demurred, and took issue on the 2d.

The Court sustained the demurrer to the 3d plea, and after inspecting the record, found for plaintiff on issue joined on 2d plea; but overruled the demurrers to the 1, 4 and 5 pleas, and gave judgment for defendant.

L. A. Thompson and *T. H. Hagner*, for plaintiff in error:

On the 15th April, 1845, James T. Archer, Assignee in Bankruptcy of Wm. H. Francis, brought an action of debt against the administrators of Samuel H. Duval, upon a judgment rendered in favor of William H. Francis before his bankruptcy, to wit on 17th February, 1842, against the same administrators, of Samuel H. Duval for $350 38-100, *to be levied of assetts in hand*. The declaration recites the judgment and execution, and return *nulla bona*;—that on 7th May, 1842, said Francis was declared a bankrupt, and

Archer, Assignee of Francis vs. Duval's Administrators.

221 on same day plaintiff was appointed his assignee. The declaration then suggests *desastavit* in the usual form.

The defendant pleaded sundry pleas. It is only necessary to call the attention of the Court to the 1st, 4th, and 5th pleas.

The defendant pleaded—1st, *nil debet,* to which was demurrer. The Court overruled the demurrer, and gave judgment final thereon. This we hold was error. Judgment should have been *respondeat ouster.*

Defendants' 4th plea is of limitations, grounded upon the 8th section of the Bankrupt Law—the plea is *"that plaintiff's suit was not brought within two years after the cause of suit first accrued."*

Defendant's 5th plea is also of limitations—"that the declaration and decree of bankruptcy in the declaration mentioned, was not made, nor did the cause of suit in the declaration mentioned first accrue to said plaintiff at any time within two years next before this suit was brought against the said defendants in this behalf."

To each of these pleas the plaintiff filed a general demurrer.—There was joinder, and the Court, (Thomas Douglas, Judge,) gave judgment, "that the said pleas of the said defendants, by them firstly, fourthly and fifthly, above pleaded, are sufficient in law to bar the said plaintiff from having or maintaining his aforesaid action against them the said defendants," &c. &c.—"And therefore, it is considered by the Court, that the said plaintiff take nothing by his said suit, but that he in mercy," &c.

The plaintiff in error insisted that these pleas, and the matters therein set up, are no bar to his action.

The question is one of construction of the 8th section of the bankrupt law of the United States.

The 8th section enacts—"And no suit at law or in equity shall, in any case, be maintainable by or against such assignee, or *by or against any person claiming an adverse interest touching the property and rights of property aforesaid,* in any court whatsoever, unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued.

They insisted that this bar does not apply. *Here is not a case of adverse interest touching any property or right of property of the bankrupt.* The bankrupt held this judgment. The right to it was
222 never in contest. The defendants, against whom it was rendered, surely *have no adverse interest in the property,* in his judgment.—The bar designed by the statute to apply to a case of conflicting claims to property or rights of property, has been made to apply to a case where the right of property is clear and undisputed.

They referred the Court to the Bankrupt Act in the Acts of 1841, published by authority, and particularly to pages 14th, 15th, sec. 8.

The counsel for the plaintiff in error have been able to find no adjudication on the limitation clause of this Bankrupt Act, and can therefore turn the Court to no authority.

A. E. Maxwell, for Defendants in error:

He relied upon the 8th section of the Bankrupt act, to show that the 4th and 5th pleas are good, and that the demurrers to them were rightly overruled. The assignee derives his power to sue from the 3d section, and he can sue in no other case than is therein embraced; and by comparison of that section with the 8th, it will be found that the cases barred after two years, are co-extensive with the cases where the assignee has power to sue—consequently, all cases which he can bring into court are subject to the bar given by the 8th section, if two years have passed before suit.

The argument that this is not a case of adverse interest touching the property or rights of property of the bankrupt, proves too much. If not, the plaintiff has no right to be in this Court; for the 3d section does not authorize him to sue, except in such cases, and he cannot go beyond the authority there conferred on him. But giving the statute a proper construction, this is a case within its meaning. The interest of the plaintiff in the judgment *is adverse* to that of the defendant, and it is, also, a case "touching""—in other words, relating to or concerning—the judgment, which was the "property" of the bankrupt; not, to be sure, a case where the *right* to the judgment is involved, but one touching or relating to the property, viz: the judgment.

But independent of this, the bar extends to "any case" by or against the assignee, which is certainly broad enough to cover this case, whatever be its character.

Baltzell, Justice:

To an action instituted by the plaintiff as assignee of Francis, on a judgment recovered against defendants, suggesting a devastavit, 223
they plead—1st, That they were not indebted.—2dly, No such record.—3dly, Reciting the bankrupt law of the United States as to the time of maintaining suits, &c. that the suit was not brought within two years after the decree of bankruptcy, and more than two years after the cause of action accrued.—4th, That the suit was not brought within two years after the decree of bankruptcy, nor within two years after the cause of action accrued.—5th, That the declaration and decree of bankruptcy was not made, nor did the cause of suit accrue to plaintiff at any time within two years before his suit was brought. Plaintiff demurred to the 1st, 3d, 4th and 5th pleas, and took issue upon the second.

The court below adjudged the 1st, 4th, and 5th pleas to be sufficient, and overruled the 3d plea, declaring it to be insufficient. The issue on nul tiel record was tried, and found for plaintiff; but the other issues being with the defendants, the Court gave judgment in their favor. Plaintiff has assigned for error, the overruling the demurrer to the first, fourth, and fifth pleas, and giving judgment for defendants.

We are of opinion that the Court decided correctly as to the first plea. Nil debet as well as not guilty may be pleaded to an action suggesting a devastavit against executors. Williams on Executors. 1225. Coppin vs. Carter, 1 T. R. 402.

The sufficiency of the other pleas depends upon the proper construction of the 8th section of the act to establish a uniform system of bankruptcy throughout the United States. This section provides, "that the Circuit court in and for the District where the decree of bankruptcy is prayed, shall have concurrent jurisdiction with the District Courts of all suits at law and equity, which may be brought by any assignee of the bankrupt, against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt, transferrable to, or vested in such assignee, and no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of suit shall 224
first have accrued."

It is contended by plaintiff that this cause does not apply to or embrace the case of defendants, because there is not in question an adverse interest touching any property or right of property of the bankrupt. The act declares that "no suit at law by such *assignee shall in any case* be maintainable *in any court whatsoever,* unless brought within two years." If this be the correct reading of the text, the act is very explicit, and leaves no room for construction. It is true that the previous part of the section had provided for a concurrent jurisdiction of the Circuit with the District court "in all suits at law and in equity which may be brought by any assignee of the bankrupt *against* any person claiming an adverse interest, or by such person against such assignee touching any property or rights of property of said bankrupt, transferrable to or vested in such assignee." Confining the jurisdiction to the cases thus designated, yet is this designation both of Courts and persons, not only not continued, but expressly excluded by the use of the terms in the clause of limitation, *"no suit in any cause in any court whatever."* So also, whilst the preceding part of the act specifies suits brought by *an assignee against persons claiming an adverse interest,* this latter uses the terms *"by such assignees,"* without any qualification.

We are the better satisfied with this view of the subject in consideration of the very peculiar character of this law, the object of which was to secure a prompt and efficient administration and settlement of the estate of all bankrupts, within a limited period. Thus by the 10th section, it is made the duty of the court "to order and direct a collection of the assets, and a reduction of the same to money, and a distribution thereof at as early periods as practicable,"—dividends are required to be made "as often as once in six months from the time of the decree declaring bankruptcy;" and "all the proceedings in bankruptcy in each case shall, if practicable, be *finally adjusted, settled* and *brought to a close by the Court within two years after the decree declaring the bankruptcy.*"

It will cease to be regarded as singular that the law requires the assignee to commence suits within two years, when by the same law it is made his duty to *adjust, settle, and finally bring* to a close, all the proceedings in the case within the same period. Concurring with the

225 Court in overruling the demurrer to these pleas, it remains to enquire whether the court erred in giving judgment absolutely for defendants. By the Common Law, judgment followed the decision on a demurrer as matter of course, it being considered as a confession by matter of record of the facts pleaded. The law in force in this State, provides that "no demurrer shall be considered as an admission of the facts set forth in the pleadings demurred to, so as to bar the person demurring from any substantial claim or defence which he might have urged if said demurrer had not been filed." Duval 95. If application had been made to the court below to withdraw the demurrer, and for permission to reply to the pleas, we do not hesitate to say that the Court should have granted it; but this was not done; on the contrary, plaintiff has abided by his demurrer, by taking his writ of error. How then can this Court decide that the party has been barred from a substantial claim or defence he might have urged? How determine that there is a substantial claim or defence when none has been preferred?

It is at his option on overruling his demurrer, to withdraw it, or allow it to stand. If he does not withdraw it, it concludes his case. He is here entitled to the decision of this Court on the correctness of the judgment overruling his demurrer, and could also have claimed our decision on a like judgment in overruling his motion to be permitted to reply to the pleas after the decision on his demurrer. The jurisdiction of the Court is appellate merely, to re-examine and to rejudge—to correct erroneous decisions already made—it is not a jurisdiction to determine in the first instance cases or questions which have not been submitted to the decision of the Judge below.

Being of opinion that there is no error in the judgment of the Circuit Court, it is ordered that the same be affirmed.

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226 T. LANE BETTON, TRUSTEE OF SARAH ANN BETTON, CLAIMANT *vs.* JESSE H. WILLIS AND WILLIAM P. MOSELEY, PLAINTIFFS IN EXECUTION.

When a claim to property has been interposed under the 9th and 10th sections of "an act concerning executions," approved 17th February, 1833, it is the duty of the officer to return the affidavit and bond of claimant, and the execution levied, to the next term of the Court whence the execution issued. But it is not necessary that the execution appear as a part of the pleadings in the cause; and if the record shows that it was used in evidence at the trial of its right of property, it will be presumed to have been returned by the officer according to law.

In the trial of the right of property on a claim interposed, the statute does not require a formal issue: The jury are sworn "to try the right of property," and not "to try the issue joined."

This case, being a claim interposed under the statute to property levied on under executions in favor of Willis and Moseley, was tried in the Superior Court for the late territory of Florida, at its Spring Term, 1845. A jury being sworn to try the right of property levied upon by plaintiffs in execution, returned the following verdict:—"We, the jury, find the property claimed to be the property of Alfred M. Gatlin, deceased, in the hands of Luke G. Lamb, executor, to be administered, and liable and subject to these executions," and judgment was entered accordingly.

An appeal was taken and a Bill of Exceptions filed, which among other things, set forth the executions in favor of Willis and Moseley as having been introduced in evidence by claimant.

The facts are contained, at large, in the opinion of the Court.

A. E. Marwell, and *Carmack,* for claimant.

Thompson & Hagner, for Willis.

J. & L. Branch, for Moseley.

DOUGLAS, C. Justice.

This case was brought up by an appeal from the Circuit Court of Leon county.

It was commenced in the late Superior Court for that county, and is a collateral proceeding arising out of the cases of William P. Moseley and Jesse H. Willis, plaintiffs in execution, against the executors of the last will and testament of A. M. Gatlin, deceased, and 227 was instituted under the ninth and tenth sections of "an act concerning executions," approved Feb. 17th, 1833. Duval's Compilation, page 10. The ninth section provides—"That when any marshal, sheriff, or other officer shall levy on goods and chattels claimed by any other person than the defendant, such person may make oath that said property belongs to him; and it shall be the duty of the officer to postpone any further proceedings under said levy until the *right of property* shall have been tried: Provided, the person claiming such goods and chattels, shall give bond with surety, to be approved by the marshal, sheriff, or other officer levying the execution, payable to the plaintiff, in a penal sum of double the amount of the sum for which execution issued, conditioned to deliver said goods and chattels, upon demand of said officer, if the same shall be adjudged to be the property of the defendant in execution, and to pay the plaintiff all damages which the jury 'on the trial of the right of property,' may find in his favor, if it should appear to the pury that such claim was interposed for the purpose of delay."

Section 10, provides, that when an execution has been levied, and a claim to the property interposed as aforesaid, it shall be the duty of the officer to return said execution to the next term of the Court whence it issued; together with such affidavit and bond; at which term *a jury shall be sworn to try the right of property,* "and also, to give the plaintiff such damages, not exceeding twenty per cent, as may appear reasonable and right, in case of its appearing to the Jury that such claim was interposed for delay, and the court shall give judgment for the amount of damages so found."

The 9th section above recited was amended by "an act to amend the law in reference to executions and attachments," approved 15th March, 1843, which provides, "that claim bonds, and replevin bonds, whether under execution or attachment, shall be for double the value *of the property* claimed, and not in doube the amount of the execution or attachment." See acts of 1843, pages 41 and 42. In all other respects it remains as originally enacted.

It appears by the record sent up, that on the 25th day of April, A. D. 1844, the said William P. Moseley recovered a judgment in the said Superior court against the said Executors, &c. of Alfred M. Gatlin, deceased, and that on the fourth day of the succeeding month 228 of May, Jesse H. Willis recovered in the same court another judgment against the same Executors, and that on the 15th day of the same month, an execution was issued on each of the same judgments, which on the next day were placed in the hands of the marshal of the Middle District of Florida, and that he on the 16th day of the same month, levied said executions upon certain negro slaves, which were claimed by T. Lane Betton, the present appellant, as Trustee of Sarah Ann Betton, "under a deed of trust and in virtue of a marriage settlement between the said Sarah Ann and Turbutt R. Betton." That the said T. Lane Betton gave bond to the marshal (as required by said 10th section) in which bond the names of the slaves levied upon are stated, and to which the appellant, T. Lane Betton, made oath in the following words, to wit: "Leon, ss. T. Lane Betton, trustee of Sarah Ann Betton, being duly sworn, says, the within specified slaves and property, belong to him as trustee of said Sarah, being assigned to her as her dower, and being in litigation, and that the same is not subject to levy and sale under said execution within mentioned."

This execution, affidavit, and bond were returned by the marshal, according to the requirements of the 10th section of the act first above mentioned, and afterwards, to wit, at a Supreme Court for the county of Leon, continued and held at the court house in the city of Tallahassee, on Friday the ninth day of May, A. D. 1845, *"a jury was sworn to try the right of property,"* levied upon by said plaintiffs in execution, who upon their oath returned the following verdict, viz: "We, the jury, find the property claimed to be the property of Alfred M. Gatlin, deceased, in the hands of Luke Lamb, executor, to be administered, and liable and subject to these executions." Upon which verdict, judgment was entered as follows, to wit:—"Therefore it is considered by the Court, that the plaintiffs in execution may proceed to execute the levys made as aforesaid, on the property aforesaid, ascertained by the jury to be liable and subject to these executions, and that they recover against the said claimants their costs by them about their defence expended, and the said claimant in mercy, &c."

The only error relied upon by the appellant is, that there is no issue in the case. And it is contended by them:—

229 1st, That without a formal issue joined, there was nothing for the jury to try, and that it was error to submit the matter to a jury without such an issue.

2. That it does not appear by the record that the said executions were returned by the marshal as required by the 10th section of the act first above cited.

3d. That if the Court should be of the opinion that no formal issue was necessary, that at least the bond and executions ought to have been returned according to the provision of the statute, and to have appeared as pleadings in the cause—and

4th. That this is a statutory proceeding in derogation of the Common Law, and that a party proceeding under it should be held to a strict compliance with its provisions.

On the other hand it is insisted that there was a full compliance by the appellees with all the requirements of the statute. No authorities were cited on either side—no analagous proceedings referred to.

The court fully recognizes the doctrine that where a summary remedy is given by statute, those who wish to avail themselves of it, must be confined strictly to its provisions, and shall take nothing by intendment. Logwood vs. Huntsville, 1 Minor's Alabama Reps. 23. Childress vs. McGehee, Ibid. 131. Crawford vs. State, Ibid. 143. Yancy vs. Hawkins, Ibid. 171. Young vs. Martin, 2 Yeates, 312; and that statutes in derogation of the common law are to be strictly construed. Commonwealth vs. Knobb, 9 Pick. 496. Lock vs. Miller, 3 Stew. & Port. 13. Melody vs. Reab, 4 Mass. 471-73.—In giving a construction to a statute, the court must consider its policy and give it such an interpretation as may appear best calculated to advance its object by effectuating the design of the legislature. Allen vs. Parrish, 3d Hammond, 198. The object here undoubtedly was a summary *"trial of the right of property,"* levied on without a resort to the technical rules of special pleading.

What does the statute require? We answer that it requires the claimant to make oath that the property levied on belongs to him, and to give bond with security, &c. It also makes it the duty of the officer to return said execution to the next term of the court whence it issued, together with such affidavit and bond, and that a jury shall be sworn to try the right of property, and to give the plaintiff dam-
230 ages, &c.; and that the court shall give judgment for the amount of damages so found. These are all the requirements of the statute on the subject, and we are of opinion that these requirements were all substially (at least) complied with. The return of the executions, affidavit and bond were necessary to give the court jurisdiction in this case. McKnight vs. Smith, 5th Arkansas Reps. 410. The statute requires the officer to return them; but it is the interest as well as the duty of the claimant, to see that he does so. The *return* of these executions was essential to enable the Court to ascertain whether bond had been given according to law. It is not pretended that the bond and affidavit were not duly returned; but it is insisted that there is nothing to show that the executions were thus returned. It appears, however, by the bill of exceptions in the record, that they were present and introduced as evidence on *the trial of the right of property*, by the claimant himself. The presumption therefore, is, that they were returned by the marshal according to law. The statute having made it his duty to return them, and being found in their proper place, it is to be presumed that they were properly returned, upon the principle that "all things are presumed to be legitimately done till the contrary is proved." Coke Lit. 232. And this presumption is rendered a moral and legal certainty by the fact, that the parties, by their attorneys, appeared at the said trial in the court below, and that no objection was there taken to the return of the marshal, or to the jurisdiction of the Court for want of such return. The court below having jurisdiction of the subject matter and the parties before it, this Court will presume that all things necessary to give it jurisdiction had been done—nothing to the contrary appearing by the record. 5 Arkansas Reps. 411, 412. Thus far then, all that the statute requires to be done was done. We deem it unnecessary that the executions should appear as pleadings in the record. It is sufficient that they appear to have been duly returned. But if they should not thus appear, as the counsel for the claimant insists, whose duty was it to see that they did appear? The claimant was the actor in the court below. The onus probandi rested on him. He too, is the complainant in this Court, and it was incumbent on him to bring up a complete record. By the 7th rule of the practice, he was not entitled to be heard until a complete record was filed with the Clerk of this Court.

The only remaining question, and the more important one arises 231
upon the error assigned—"That there was no issue." But this we think is met by the peculiar provision of the statute, which declares that "a jury shall be sworn to *try the right of property,*" not to try the issue. Had the legislature intended that the strict rules of special pleading should be applied to this class of cases, the language would naturally have been "a jury shall be sworn to try the issue," and the manner of making up that issue (it is reasonable to suppose) would have been prescribed, as it was in case of garnishees. The oath required to be administered to the jury is inapplicable to *a formal traverse*, and shows that the Legislature did not intend to prescribe one. The 7th section of the act of 15th Feb. 1834, to amend the (above cited) act concerning executions, contains the provision in relation to garnishees just alluded to. It declares that "whenever any person garnisheed, as is provided for by the seventeenth section of the act to which this is an amendment, shall deny or fail to answer in accordance with the provisions of the said section, it shall be lawful for the plaintiff in execution to *traverse* the said *denial* or answer, and the issue so made up shall forthwith be submitted to a jury for their decision." Duval's Comp. p. 13. This repeals no portion of the former act, but adds to it, and is to be considered as a part of it, and both must be construed together. Pearce vs. Atwood, 13th Mass. Reps. 324, 344.

The legislature having had the subject of issue before it, in relation to one summary collateral proceeding, provided for by this statute, and having made no provision for such an issue in the case of a claim to property levied on by execution, is evidence that it did not consider a formal issue necessary in such a case, and we do not think such an issue is required in the case before us. This is not a solitary instance of the swearing of a jury without such an issue upon the record. It is done in all cases brought up by appeal from Justices of the Peace to the Circuit courts in which the trial is *de novo*. And in all cases of judgment by default for want of a plea in the Circuit Courts, where the sum claimed is not certain, and cannot be rendered certain by calculation, a jury is sworn to enquire of the damages. And upon a writ of *ad quod damnum*, a jury is sworn to assess the damages. In the two classes of cases last mentioned, there is of course no issue.

Upon the whole, we think there is no error in the judgment of 232
the Court below, and it is therefore affirmed with costs.

Per Curiam.

T. LANE BETTON, TRUSTEE OF SARAH ANN BETTON, CLAIMANT, *vs.* UNION BANK OF FLORIDA, PLAINTIFF IN EXECUTION.

This case is similar to that of T. Lane Betton, Trustee, &s. vs. Willis and Moseley.

A. E. Maxwell and *Carmack*, for Claimant.

Long & Walker, for Plaintiff in Execution.

DOUGLAS, Chief Justice:

This cause was also brought up from Leon Circuit Court by appeal, and is in all respects similar in principle to the preceding case, and must be governed by the principles laid down in the opinion of the Court delivered in that case.

Indeed it was understood to have been agreed by the respective counsel in these cases, that the one should abide the fate of the other.

The judgment of the court below is therefore affirmed with costs.

Per Curiam.

233 ABNER M. SESSIONS, WHO SUES FOR THE USE OF HAMILTON W. SHARP *vs.* JOHN STEVENS.

A judgment against a garnishee *prima facie* is a bar to a subsequent recovery on the same note in the hands of any one. The law in such case constitutes the execution creditor an assignee of the note from the time of the service of the notice of garnishment, and entitles him to judgment as if the note had been regularly assigned to him by act of the party.

By the judgment against the garnishee, the note in legal contemplation, becomes extinguished, loses its identity and character, and ceases to be the subject of future action.

If however the Plaintiff be a *bona fide* holder of the note before service of the notice of garnishment, it would be otherwise, and he would be entitled to recover on the note, notwithstanding the judgment against the garnishee.

It is irregular to sue out a writ of garnishment prior to a return of "no property found" on the execution, and the court will, in such case, upon application, set aside the writ or excuse the party from answering. If however, the Defendant in execution neglects to make such application, he will be presumed to have waived the irregularity, and neither he nor his assignee will be permitted to disturb the judgment afterwards in another suit, by presenting the question in a collateral manner.

Appeal from Jefferson Circuit Court—His Hon. Judge Thomas Douglas, presiding.

This was an action of *assumpsit*, brought by plaintiff as endorsee of a promissory note, of which the following is a copy:

$106 46. By the 1st day of September next, I promise to pay Adam Wyrick one hundred and six dollars for value received.—July 30th, 1842.

(Signed) JOHN STEVENS.

[ENDORSED]

1843, Feb.—Received by Wm. West of the within $5—*A. Wyrick.*

For value received, I endorse and assign the within note to A. M. R. Sessions, for benefit of H. W. Sharp—1843. *Adam Wyrick.*

The declaration contained special and the money counts.—Pleas 1, *non assumpsit.* 2d That "before and at the time of the transfer of said note in the first and second counts of the said plaintiff's declaration mentioned, to wit, 21st February, 1843, and before defendant had any notice of said alleged transfer of said note, and before and
234 at the time of the commencement of this suit, the said defendant was duly served with a certain process of garnishment issued from the Superior court of Jefferson county, in a suit and upon a judgment in, and execution thereon, issued out of said Superior court, in which James Branon was plaintiff and the said Adam Wyrick defendant, to answer concerning his indebtedness to said Adam Wyrick according to law, and upon such answer made at November Term, 1844, of said court, judgment was accorded against the said defendant for the amount then due on the said note in said plaintiff's declaration mentioned, to wit, the sum of $71, and $3 94 costs on same, paid James Branon towards satisfying his said judgment; and in consequence of said judgment said defendant was and is bound, liable and made obliged to pay said note to the said James Branon, as creditor of said Adam Wyrick, being the sum of $71. The whole balance due on the said note by the said defendant and said costs, which judgment is yet unannulled," &c.

To 2d plea, plaintiff replied "that in the garnishment case referred to by defendant in this said plea, the above stated plaintiff was not a party to the record in any way whatever, and ought not to be affected by said garnishment process and the judgment thereon.—Said plaintiff also saith that if at the commencement of this action, said debt was held and bound by said garnishment process, said plaintiff says that said defendant had not then answered to said garnishment case; that there was at said time no judgment in said garnishment case against said defendant, and that said defendant was also held and bound by this the said action. Plaintiff saith further, that no such judgment as mentioned in said defendant's plea was obtained in favor of James Branon at said November Term, 1844," &c.

On the trial the endorsements on the note by Adam Wyrick, were proved.

The defendant gave in evidence a certain execution in favor of James Branon against Adam Wyrick, issued out of the Superior court for Jefferson county, on 4th May, 1841, on which was endorsed:—May 22, 1841, levied on 1 wagon and six mules, &c. June 5, 1841, levied on 4 mules, 1 gray horse, &c.—and that a claim bond had been interposed by Ann Christopher; also, a writ of garnishment, sued out by James Branon, the plaintiff in the execution against Adam Wyrick, on 21st February, 1843, and directed to de- 235
fendant, and which was duly served on him the same day it was issued, with the return of the defendant as garnishee that he owed Adam Wyrick a balance of $71; also, the judgment of the court in favor of James Branon, the plaintiff in execution, against him for this amount. Plaintiff objected to the admission of the execution, writ of garnishment and judgment of the court thereon, because it appeared by the execution that property had been levied on, and that return of "no property found" had not been made on the execution before the garnishment issued, and because the said process was illegal; also, because the said judgment was not a proper subject of set-off, nor binding on plaintiff, he not being a party thereto.

The Court overruled the objections, and plaintiff accepted.

Defendant then offered one Watson, who testified "that Adam Wyrick called on witness some time in February, 1843, and asked to loan him money, and agreed to pledge to him, as security, the note now sued on as he believes; Wyrick said it was a note of Stevens, though he did not show the note; afterwards, in March, 1843, after the garnishment, witness was present at Ellenwood's house, where John Stevens then was, and Wyrick asked payment of Stevens on this note; Stevens said he had been garnisheed; Wyrick asked Stevens to give him another note, as he wanted to transfer it; Stevens declined, saying he had been garnisheed: Witness saw the note; Wyrick had it and showed it to him and Stevens; then told Stevens that if he paid the money on the garnishment process, he, Stevens, would have to pay it again."

The plaintiff asked the Court to instruct the jury.

1. That if Stevens confessed to the judgment creditor upon a garnishment illegally issued, and which he was not bound to answer, because irregular and illegal, then that the judgment confessed cannot be set up against the note.

2. That if the note was taken after due, the equities then existing, when so taken, only can apply.

3. That Stevens having confessed the debt due to Wyrick when he had notice of Sessions's claim, has no right to set up against plaintiff the judgment rendered on his admission of debt.

Which instructions the Court refused, and instructed the jury:— 236

1. That Sessions was bound to take notice of the garnishee process, taking the note after due.

2. That defendant is liable to plaintiff unless bound by the garnishee notice; that he was bound by the garnishee notice; that Stevens was concluded from paying this note after service of the garnishee notice. In this case it was clearly proved that Sessions took the note long after it became due, and that before he took it, the defendant had been garnisheed by one James Branon; that Sessions, the plaintiff, was not entitled to recover; that Stevens was not bound to go to the expense of defending the garnishee notice; that all was regular, and that his acknowledging that Sessions pretended to claim the note, made no difference, he having taken the note after it was dishonored.

To which instructions the plaintiff excepted, and took an appeal. The jury rendered a verdict for defendant.

Randall & Hogner, for Appellant:

The Appellant is the assignee of a promissory note of Appellee, whom he sued in the court below. The defence set up was that the defendant had been "duly garnished" by a creditor of the original payee, before he had notice of any transfer, and that upon his answer made concerning his indebtedness, judgment was accorded against him, and in consequence of said judgment, defendant "*is bound and liable and made obliged to pay,*" &c. The answer of defendant to the alleged garnishment notice abundantly shows that he had notice of plaintiff's claim as assignee of the note; but defendant affected to treat the claim as a mere *"pretence,"* and confessed that he owed the money to the original payee.

This garnishment notice, and this judgment, are set up as a bar to the recovery of plaintiff as assignee upon said note.

They would examine the whole defence, in the order of the objections made to it.

The garnishee writ, answer and judgment were offered in evidence, and objected to by plaintiff, but overruled by the court. Objected to by plaintiff.

1st. Because the garnishment notice was ILLEGAL, NULL AND VOID. It was issued without authority of law, before return made

237 of "no property found" on the execution. See Duval, p. 11, sec. 17.

The garnishee was bound to see that the proceedings was regular. 1 Howard's Rep. 49.

It was issued on an execution, long before dead and inoperative. The execution was issued in May, 1841, returnable to November Term, 1841. This garnishment pleaded to have been issued "upon said judgment and execution," was issued in February, 1843, nearly two years after the execution had run out.

Next it was issued after a levy under the execution, made in due course of law, in May 1841, after claim bond filed.

Now this levy was a satisfaction of the debt, and the bond took the place of the levy—and the statute expressly orders the marshal "to return the execution to the court." Sec. 10, p. 10 of Duval. And also, makes it his duty—Sec. 9, p. 10 of Duval—"to postpone any further proceeding under said levy until the claim is tried."

The return of "no property found," is essential to base any proceeding for satisfaction of the debt out of assets and effects in the hands of third parties, because without such return, and where there is a levy, the debt is satisfied. *"Pro hac vice."*

2d. Because said judgment is not a proper subject of set-off.—*Nothing less than satisfaction* is a bar, even when all is regular, in a case like this.

They cited Wise vs. Hilton, 4 Greenleaf, 435—"A trustee judgment is no protection to the trustee against the claims of the person whose effects or credits were in his hands, unless it has been satisfied."—Also, 1 Washington Circuit Court Reps. 425.

The Court admitted the evidence, and refused to instruct the jury as asked for by plaintiff—"That if Stevens confessed to the judgment creditor upon a garnishment illegally issued, and which he was not bound to answer, because illegal and irregular, then that the judgment cannot be set up against the note." They insisted the Court erred herein.

The Court will notice next, the 3d instruction asked for by plaintiff and refused—"That Stevens having confessed the debt due Wyrick, while he had notice of Sessions's claim, has no right to set up the judgment on his admission of debt against the plaintiff."

Now it is a principle of the law touching the trustee process, that *"upon the answer so made the Court is to give judgment,"* and no
238 evidence can be admitted to charge or discharge the trustee, except what he discloses in his answers. Haws vs. Longton, 8 Pick'g. 67, and many other cases.

Now, here Stevens declared that he owes the money to Wyrick, though he had notice of Sessions's claim. He calls that claim "a pretence," and yet afterwards introduces witnesses to show that he had not notice of it. Now his answer is the best evidence.

As a stakeholder he was bound to make the parties in interest INTERPLEAD. Oldham vs. Ledbetter, 1 Howard's Mississippi Rep. 47. If the case required it, further time would have been given him for the purpose of bringing all the parties before the Court. He had a right to require the adverse title to be legally settled; but he chooses on the contrary, to *deny to Sessions all legal claim,* and confess the judgment.

They would turn the attention of the Court now to the 1st instruction given by the Judge:—

"That Sessions (the plaintiff) was bound to take notice of the garnishee process, taking the note after due."

On what principle of law this is grounded, they were at a loss to conceive. Taking the note after due, he was liable only to the equities at the time. So far from Sessions being bound to take notice of the garnishment, he held the note; this transferred the title to the debt to him, and as the holder of the note he had a recourse against the maker. Now if the creditor knew of any alledged assignment, he should summon the assignee and compel a discovery. Dix vs. Cobbs, 4 Mass. 508. Sessions held the paper—an assigned security for money—and there were no equities between him and Stevens, except such as were between Stevens and Wyrick.

The 2d instruction is we think, correct, at least, according to our interpretation:—"He is bound to Sessions unless bound by the garnishee notice."—Now it is clear he is not bound by the garnishee notice. It was clearly illegal, null and void, and he had only to say so to have defeated it.

Here defendant confessed a debt as due, which was *not due,* to Adam Wyrick. He confessed it in favor of a man as a creditor of dam Wyrick, whose debt, at the time was in view of the law *satisfied.* He confessed it then to one not a creditor, not entitled to receive it. He conferred it upon a *void process,* which he takes not the trouble to examine; nor yet claiming to be a *stakeholder,* does 239 he give any opportunity to the plaintiff here to *interplead.* He has not, however, paid the money, and this of itself, defeats the attempted bar to the plaintiff's recovery, while it will enable defendant to set himself right.

Judgment on a trustee process against the defendant as garnishee of the plaintiff, is no defence in a suit for the debt, if the plaintiff in the original trustee process has *by his neglect to comply with the local law,* put his judgment in a state of suspension, so that an execution can no longer issue upon it, and it cannot be revived by a scire facias. Flower vs. Parker, 3 Mason, 247.

Here at all events, that judgment may be reversed, and declared to be null. The broad principle in any event, is that "a trustee judgment is no protection to the trustee against the claims of the person whose effects or credits were in his hands, unless it has been satisfied." Wise vs. Hetton, 4 Greenleaf, 435. So that even as against Adam Wyrick, the judgment would be no bar to this recovery.

BALTZELL, Justice:

This is a suit instituted by Sessions against Stevens, in the Court below, on a note for $106, payable the 1st of September, 1842, to Adam Wyrick, and by him assigned to plaintiff. The defence principally relied upon was, that "defendant was served with a process of garnishment issued from the Superior Court of Jefferson county, upon a judgment and execution issued out of said court, in which James Branon was plaintiff, and said Wyrick was defendant, to answer concerning his indebtedness to said Wyrick, according to law, and upon such answer at November Term, 1844, of said court, judgment was rendered against said defendant for the amount due on the note, to wit, the sum of $71, and $3 94 costs, which record he brings into court, &c." To this there was a replication "that no such judgment as mentioned in said defendant's plea, was obtained in favor of James Branon at said November Term, 1844."

The Court below directed the jury that plaintiff was not entitled to recover, and the propriety of this instruction is now presented to the consideration of this Court by the assignment of errors. The instruction would seem to follow as a consequence from the state of the pleadings, and the successful maintenance by defendant of his plea of judgment recovered. A judgment against a garnishee, pri- 240 ma facie, is a bar to a subsequent recovery of the same note in the hands of any one. The law in such cases constitutes the execution creditor an assignee of the note from the time of the service of the notice of garnishment, and entitles him to judgment as if the note had been regularly assigned to him by act of the party, otherwise there would be the strange and extraordinary anomaly of a tribunal of justice committing an act of injustice, by compelling a party to pay twice on the same engagement.

Such a judgment is the action of a court of competent and general jurisdiction, and is entitled to all the attributes of an adjudication upon the subject matter. By it, the note in legal contemplation, becomes extinguished, loses its identity and character, and ceases to be the subject of future action. "It is evidence not only of the judgment, but of the right which it has decided." 3 Peters' Cr. Ct. Reps. 74. "A judgment in its nature concludes the subject in which it is rendered, and pronounces the law of the case. It puts an end to all enquiries into the fact, by deciding it." 3 Peters' Reps. 204, 205.

If the plaintiff, instead of taking issue on the plea as to the existence of the judgment, had replied, that he was a bona fide holder of the note before service of the notice of garnishment, a different case might have been presented. 3 Pick. 67. But this was not done, and it is questionable whether such evidence was admissible on the trial. Yet the evidence shows the note to have been assigned after service of the notice. The assignment of the note bears date the year it became due. Omitting the day and the month, a suspicious circumstance, and the proof on the part of the defendant, was that Wyrick, the original holder in March, 1843, (the notice being served in February preceding,) asked payment of Stevens of the note. Stevens said he had been garnisheed. Wyrick asked for another note. Wyrick had it, and showed it to Stevens." The plaintiff did not prove when or how he obtained the note. Under this state of facts, we concur in the opinion of the Circuit Court as to the propriety of the instruction given.

It was objected that the notice of garnishment was illegal, there not being a return of "no property" on the execution, which is made a pre-requisite by the statute to the issuing of notice of gar-

241 nishment. That there was an irregularity in this respect, does not admit of doubt, and if the application had been made to the court rendering the judgment to set aside the notice, or objection had been made to the answer of the garnishee, the court would probably have quashed it, or excluded him from answer. In case of overruling his objections, the party might have appealed, or had his writ of error. But this is his privilege, and he may waive it. By declining this course, he is presumed to have assented to it, nor is he or his assignee permitted to disturb the judgment afterward in another suit, presenting the question in a collateral manner. These principles will be found to be asserted in repeated decisions of the Supreme Court of the United States. Thus "a court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to a final judgment, without setting forth in its proceedings the facts and evidence on which it is rendered, whose record is absolute verity not to be impunged by averment or proof to the contrary, is of the description of courts whose judgments are conclusive if not removed to an appellate court. There can be no judicial inspection behind the judgment, save by appellate power." Voorhees vs. Bank U. S. 10 Peters' Rep. 479. Grignon's Lessees vs. Astor, 2 How. 343. Considering this view of the subject conclusive, we have not deemed it necessary to notice the other points in the case; being fully satisfied that the judgment should be affirmed—which is decreed accordingly.

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242 THE TERRITORY OF FLORIDA, FOR USE OF WILKINS C. SMITH, SURVIVING PARTNER OF HOLLOMAN & SMITH, *vs.* WILLIAM H. REDDING, ELIAS E. BLACKBURN, NEEDHAM BRYANT AND LITTLE BERRY PARKER.

On the death of a partner, the moneys, goods, and merchandise of the firm belong to the surviving partner, and a Sheriff as administrator *ex officio* of the deceased partner, has no right to collect, discharge or meddle with the partnership property in any way, except to obtain the deceased partner's share after the settlement of the debts.

A suit cannot be maintained by a surviving partner against a Sheriff, as administrator ex officio of the deceased partner, and his securities, on his official Bond, for the moneys, goods, and merchandise belonging to the firm, collected and received by him as such administrator.

The securities of a Sheriff who is administrator *ex officio*, are only liable on his administration bond after the judgment of a court fixing the liability against him as administrator.

Error to Jefferson Circuit Court. This case was decided at the Spring Term, 1846—His Honor Judge Macrae presiding.

Debt on the official bond of William H. Redding as Sheriff of Jefferson county, instituted against defendants in the late Superior Court of the Territory of Florida.—Plea *non damnificatus*.

Replication assigned as a breach of the bond, "that while the said William H. Redding was Sheriff of the county of Jefferson and administrator *ex officio* of James M. K. Holloman as aforesaid, he the said William H. Redding, received as such administrator as aforesaid, divers large sums of money, and divers large quantities of goods and merchandise, which he the said Redding should have paid over and delivered to said Wilkins C. Smith as surviving partner of the said James M. K. Holloman, to wit, the sum of one thousand dollars, which the said Redding, though often requested so to do, wholly refused and neglected to pay and deliver the same, whereby the said Wilkins C. Smith, hath been greatly damnified, &c."

To this replication defendants demurred, "because they the said defendants say, that if the said William H. Redding did take charge and receive divers large sums of money, and divers large quantities of goods and merchandise, while he the said William H. Redding

was administrator ex officio of the estate of James M. K. Holloman, 243
and which goods, money and merchandise, he the said William H. Redding should have paid over and delivered to the said Wilkins C. Smith as surviving partner of the said James M. K. Holloman; that the statute did not require him the said William H. Redding to receive said sums of money and quantities of goods, as administrator ex officio on the estate of James M. K. Holloman; and the said defendants say that they are not liable to an action of debt upon the said William H. Redding's Sheriff's Bond for any use, waste, or detention of money, goods, or merchandise belonging to Wilkins C. Smith, surviving partner of James M. K. Holloman, deceased. And the said Elias E. Blackburn, Needham Bryan, and L. B. Parker further say that the last aforesaid defendants are not liable to an action at law for any reception, or management of the money, goods and merchandise of the said plaintiff by the said William H. Redding, administrator as aforesaid."

The Court sustained the demurrer, and judgment was entered for defendants.

A. E. Maxwell, for Plaintiff in error.

Long & Walker, for Defendants.

BALTZELL, Justice:

It is an established rule of pleading that "if the plaintiff by his replication show that he has no cause of action, there shall be judgment, though the bar be defective, for the Court will form their judgment from the whole record." Arch. Pl. & Ev. 240.

The replication of plaintiff to a plea by defendant of non damnificatus to debt on bond for Sheriff, sued as administrator by virtue of his office, assigns for breach, that while the said Redding was Sheriff and administrator ex officio of James K. Holloman deceased, he the said Redding received as such administrator as aforesaid, divers large sums of money and divers large quantities of goods and merchandize which he should have paid over and delivered to said Wilkins C. Smith as *surviving partner of said Holloman.*"

To this there was a demurrer, and we are of opinion it was rightfully sustained by the Court below. The design of the replication, as we conceive, is to show that as administrator of the deceased partner, the Sheriff had received this money and these goods and chattels. If so, the replication shows no cause of action in plaintiff.

On the death of a partner, the money, goods, and merchandize of 244
the firm belong to the surviving partner, who is sole owner, and alone at law entitled to sue and be sued for them. Gow on Part. 143. The Sheriff as administrator obviously could not release or discharge an account against the partnership, nor had he the right to interfere with the affairs of the firm in any way, except to obtain the intestate's share of the partnership property from the surviving partner after the settlement of the debts. He had no better right to meddle with these assets or effects than other property of the plaintiff; and plaintiff has no better right to sue him on his official bond than if the administrator had disturbed him in the possession of any property of his own. But there is another view of this subject entirely conclusive, without resting on this point.

Admitting that the Sheriff as administrator, was liable for this money and these assets, his securities on the administration bond are only liable after judgment of a court fixing the liability against him as administrator. 9 Mass. 114. 3 John. 437. 1 Wash. Rep. 31. 4 McCord 113.

For these reasons the judgment is affirmed with costs.

245 CORNELIUS TAYLOR vs. JOHN BAKER.

That clause of the pre-emption laws of the United States which declares "all assignments and transfers of the rights hereby secured prior to the issuing of the patent, shall be null and void," does not make void a contract for the sale and transfer of the rights which a settler expected thereafter to acquire, but refers only to a sale and transfer of the rights already secured.

A sale by a settler on the public lands of the improvements made by him forms a good and sufficient consideration for any contract or price the purchaser may agree to pay for the possession of such improvements.

The relinquishment, by a settler on the public lands, of the bounty of land which he expects to receive from the General Government and the surrender of his improvements, and of the possession, to the vendee, is a good and valid consideration to support a contract for the sale and transfer of such expected bounty of land and the improvements thereon; and such sale and transfer is not prohibited by the act of Congress granting pre-emption rights.

It is not enough in this Court to show that a plea was on file in the Court below; the party complaining must go farther, and show that that Court either refused to act upon the pleading, or decided it wrongfully.

Appeal from the late Superior Court of the Territory of Florida, sitting for the counties of St. John and Musquito.—His honor Judge Douglas, having been counsel for the appellant in the court below, retired from the bench at the hearing in this Court.

Assumpsit on an instrument of writing, of which the following is a copy:

I promise to pay to John Baker, on or before the first day of January, eighteen hundred and forty-three, the sum of three hundred dollars, provided he complies with an agreement made with me for his portion of land, which he is to receive from government as an actual settler, as also for his year's services.

(Signed) C. TAYLOR.

May 30, 1842.

The declaration contained six counts. 1st, On a promissory note; 2d and 3d on an agreement that Baker should proceed to Lake Monroe and take possession of a certain piece of land, and cultivate the same, and surrender his pre-emption right and improvements to appellant; 4th, for work and labor; 5th quantum meruit; 6th, for goods, wares, merchandize, and the money counts.

246 Pleas—1st, *non assumpsit*. 2d, That note was without a valuable consideration. 3d, That the consideration had failed. 4th, Set-off. 5th, That defendant never made such an agreement as that set out in 2d and 3d counts of the declaration; and if he did, that plaintiff had not complied.

Plaintiff took issue on the fourth plea, and demurred to the 5th.—This demurrer does not appear to have been in any way disposed of.

At the trial, plaintiff read in evidence the note or instrument of writing on which the suit had been brought, and which is set forth above. He called Andrew Floyd, who testified that Taylor was engaged in buying up the claims of settlers to their lands; and on cross examination—that he, the witness, staid there till about the middle of July, and that Baker continued in defendant's service until he left. John Simpson was also sworn, who testified that he was at Fort Mellon, where defendant lived, in December, 1841; that plaintiff was there; that in the Spring of 1842, defendant told him that he had an agreement with Baker; that he knew that Baker staid there and worked for defendant over a year; that he knew the land on which Baker settled or established himself, and that he had not lived on it since he left defendant; that they were not settlers under the armed occupation law; that the year previous Baker's services would have been worth $30 per month, but that year wages were low. Henry A. Crane testified that the plaintiff turned over his land to defendant, and that defendant took possession of it and improved it; that the land was an island, known as Baker's island, on which Baker settled; that he knew that plaintiff worked for defendant during the summer of 1842, and that he continued on until some time in May, 1843; that on the first conversation he had with Taylor about this matter, Taylor told him that he had made a bargain with Baker for his land, and had him at work for him. He further stated that Baker's services were worth $300 per annum.

Defendant gave in evidence the agreement with Baker, referred to in the instrument sued on, of which the following is a copy:

"TERRITORY OF FLORIDA, }
County of Musquito. }

"Know all men by these presents, that I, John Baker of the county and Territory aforesaid, for and in consideration of the sum of three hundred dollars, lawful money of the United States of America, to me in hand paid by C. Taylor, likewise of the county and 247
Territory aforesaid, at and before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, and I the said John Baker therewith fully satisfied, contented and paid, have remised, released and forever quit-claimed, and by these presents do remise, release and forever quit-claim unto the said C. Taylor, his heirs, executors, administrators and assigns, all that certain lot or parcel of land to me due by the United States Government under an act giving and granting unto actual settlers within the country claimed and possessed by the Indians, a bounty of one hundred and sixty acres of land: which said bounty of one hundred and sixty acres of land for the consideration above mentioned, and by these presents relinquish and convey to the said C. Taylor, with all my right, title and interest, claim and demand unto or in anywise appertaining, together with all and singular the hereditaments and appurtenances thereunto belonging, and the remainder and remainders, reversion and reversions, rights, profits and issues thereof.

"It is further understood, that I the said John Baker, shall serve out the time required of settlers by law which entitles them to either donation or pre-emption, as the same may be.

"To have and to hold the aforesaid bargained premises to him the said C. Taylor, his heirs, executors, administrators and assigns; and the said John Baker for myself, and my executors, administrators and assigns, all and singular the above described property unto the said C. Taylor, his heirs and assigns as aforesaid, do relinquish and convey by these presents. In witness whereof, I have hereto set my hand and affixed my seal, this 30th day of May, one thousand eight hundred and forty-two.

(Signed) JOHN BAKER.

Signed, sealed, and delivered in presence of—
ANDREW FLOYD,
JOHN W. SWINNY."

"It is further understood, and by these presents agreed, that I, John Baker shall and will work for the said C. Taylor, for the term of one year, and the said C. Taylor is to pay me three hundred dollars for his year's services and his share of the land as aforesaid, which sum is considered as full payment for the whole."

Defendant introduced several witnesses whose testimony it is un- 248
necessary to insert.

The proofs being closed, defendant asked the Court to instruct the jury, "that the instrument of writing or any of the matters and things therein contained afforded the plaintiff no ground or evidence upon which he could recover in this case against defendant anything for the land in the said instrument of writing mentioned:" Which instruction the court refused to give; but charged the jury, that if they were satisfied, from the evidence, that the plaintiff had worked for the defendant a year, and had surrendered the land on which he had settled to defendant, who had taken possession of the same, then the plaintiff was entitled to recover the amount of the note and interest from the time the note fell due, deducting, however, any sums which the defendant had paid to the plaintiff in clothes or tobacco, or such sum for the clothes and tobacco furnished as they might deem reasonable from the testimony, and that they should find a verdict accordingly."

To which charge and refusal to instruct the jury, as prayed by defendant, defendant excepted.

The jury returned a verdict for plaintiff for $338 88, and defendant repealed.

Appellant assigned the following for errors:

1. Because the Court erred in refusing the instructions prayed by counsel for appellant.

2. Because the Court erred in giving the instructions which it did.

3. Because it erred in not instructing the jury upon the *issues submitted* and the evidence contained in the Bill of Exceptions, to find for plaintiff in the court below *only so much as his work and labor* were worth.

4. Because the Court erred in not instructing the jury, that the deed, from Baker to Taylor, *was void*, under the laws of the United States; and that the promise of Taylor was, consequently, without consideration; and that no action could be maintained against him, on such promise or agreement.

5. Because it erred in regarding the agreement or promise of Taylor, as a promissory note; and in not requiring plaintiff, in the Court below, to prove a valuable consideration therefor; as, (ex. gr.)

249 that the lands, in the deed of bargain and sale, had been legally and properly secured to Taylor, in compliance with the provisions of the deed, referred to in the instrument sued on.

J. & L. Branch, for Appellant, contended:

I. That no issue was submitted to the jury, in which the value of the land was involved, or under which it could be recovered for. The 2 and 3 counts of the dec. (which alone refer to the land) having *been demurred* to, the jury could not return a verdict for the value of the land.

II. That the instrument of writing sued on, is not a promissory note which imports a consideration, but only a promise, the consideration of which should have been proved by plaintiff, as set forth in the deed to Taylor, before he could recover. As to what constitutes a promissory note, see Bayley on Bills, page 1 and 14: A contract consists both of a promise and consideration. The instrument sued on, is evidence only *of the promise.*

III. If, however, the six counts were all in issue and properly submitted to the jury, the plaintiff, under the evidence, was not entitled to recover for the land, because the 2 and 3 counts set forth an agreement entirely different from that contained *in the written deed or agreement.* The allegata and probata must correspond: nor could plaintiff, the consideration *being in writing,* prove any other than that set forth in the agreement. 1. Greenlf. on Ev. 103—Emery vs. Chase—5. Greenlf. R. 232—Schermerhon vs. Vandurheyden—1. Johns. R. 139.

IV. The variance between the agreement set forth, and that contained in the written instrument, purporting to be a deed, introduced in evidence, is too palpable to be overlooked. On the accuracy required in settling forth the agreement, see Chitty on Pleading, 325—333-4. 1 Selwyn, N. P. 108.

V. If, however, the agreement had been correctly set forth in the declaration, the plaintiff was not entitled to recover.

1st. Because he did not prove that he had fully complied with the agreement referred to in the instrument of writing sued on. This being a *condition precedent* on his part, and the burden of proof resting on him, he was not entitled to recover until he had shown, *by proof,* performance. Bank of Columbia vs. Hagner, 1 Peters, 465 467.

250 2d. Because the consideration, pretended to be conveyed, never existed; no such laws as an act giving and granting unto actual settlers within the country claimed and possessed by the Indians, a bounty of 160 acres of land, having been passed; and because the promise of Taylor is *nudum pactum,* the deed *of bargain and sale* being *void* under the laws of the United States.

It is evident the agreement and promise were made in contemplation of the *armed occupation law,* passed in the following August. This law makes all such transfers *void.* See Act of Congress providing "for the armed occupation and settlement of the unsettled part of the peninsula of East Florida, approved 4th August, 1842." If, however, it be contended that it refers to the pre-emption laws, then those laws also make such transfers and *sales void.* See Act of Congress, passed 4th September, 1841, relative to pre-emptions

The deed being thus illegal, or contrary to the policy of the law, the promise of Taylor is not obligatory. See Selwyn N. P. 58—59.

VI. No such law, or act of Congress, as that referred to in the deed of bargain and sale, having passed, Baker attempted to sell what he had not, and could never have. He undertook to do what was not in his power to perform. There was, consequently, no consideration for the promise of Taylor.

A vendor, or person promising a benefit, is bound to know that he has title, or that he has the power to confer the benefit up to the extent to which the benefit professes to go; and that, not only in fact, but *in law.* 1 Selwyn N. P. 53—59. 1 Leigh's N. P. 40. Nerot vs. Wallace, 3 T. R. 5—8. Allen vs. Hammond, 11 Peters, 76. McDermed vs. McCastlan, Hardin R. 18.

VII. And lastly. Had Taylor given his *promissory note,* which would import a consideration, and place on Taylor the onus of proving the consideration to be illegal or to have failed, under the circumstances and proofs of the case no action could be maintained thereon against him. Bayley on Bills, 538-9. Hayne, et al. vs. Maltby, 3 T. R. 248. Fowler vs. Shearer, 7 Mass. R. 22. Tillotson vs. Grapes, N. Hamp. R. 445,—and, particularly, the case of Bliss vs. Negus, 8th Mass. R. 46.

Appellant might take the farther ground, that the contract *being entire,* and a part of the consideration being against the law and having failed, the plaintiff, Baker, is entitled to recover nothing for his 251 services, or work and labor. 15 Pick R. 159.

L. A. Thompson & G. T. Ward, for Appellee.

J. & L. Branch, in reply, remarked:

That the act of the Legislative Council of the Territory of Florida, approved September 16th, 1822, cited by Counsel for Appellee, referred exclusively to the *improvements* on the public lands, and not to the sale of an expected interest *in the land.* The deed from Taylor to Baker, purports to be a deed *for land.*

They insisted further that, if the Court should be of opinion that the above act of 1822, was applicable to the present case, it could not be relied upon to maintain this action, inasmuch as it *had been repealed* by act of the Legislative Council of the Territory of Florida, approved March 4th, 1842. See Acts of 1842, page 14.

BALTZELL, Justice:

This is a suit on an agreement by Taylor to pay Baker $300, "provided he complies with an agreement made with me for his portion of land, which he is to receive from Government as an actual settler."

The defence was, a failure of consideration, established, it is alleged, by a deed, the provisions of which are claimed to be in violation of an act of Congress. This deed (being the agreement referred to in the note sued on,) is first asserted to be in violation of the act of Congress, approved 4th August, 1842, "providing for the armed occupation and settlement of the unsettled part of the peninsula of East Florida"; but it was not in existence at the date of the deed, and can scarcely be construed to operate on a contract made prior to its passage.

The terms of the deed very clearly refer to an act in force at its date, and as the law granting pre-emption rights, approved 4th September, 1841, is the only one, to which we have been referred, as then in existence, its provisions must be regarded as having been in contemplation of the parties. The tenth section of that law provides, that "all assignments and transfers of the *right hereby secured,* prior to the issuing of the patent, shall be null and void;" and the question is presented, Whether the deed above alluded to, is in violation of this provision? The law declares, *"assignments of rights secured* to be void." Now, such a right was only to be secured by a compliance with the 10th and 12th sections, declaring, that "the person 252 who has made, since the 1st of June, 1840, or shall make, a settlement on the public lands, &c., and inhabit and improve the same, and who has, or shall, erect a dwelling, such person shall be entitled to enter any number of acres, not exceeding 160, upon paying to the United States the minimum price of such land"—and, "prior to such entry, proof of the settlement and improvement, thereby required, shall be made to the satisfaction of the Register and Receiver, agreeably to such rules as shall be prescribed by the Secretary of the Treasury, who shall be entitled to receive fifty cents from each applicant for his services; and all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void."

The fair construction of the act would seem to be, that the assignment of the certificate of the Receiver, made after payment of the purchase money and proof of pre-emption, would be void; this would be the assignment of a *right secured* under, or by virtue of the act, and such the law invalidates.

But this is not teh case under consideration. Here, there was no right secured; no money paid to the Government, and no proof of pre-emption. The subject was a bounty, not a right—a thing in expectancy, which the party agrees not to prosecute, but relinquishes and abandons, leaving it to his vendee to obtain it, if he chooses, for himself. An assignment of a pre-emption certificate, or a *right secured* under the pre-emption law, is usually very concise and simple, as, indeed, are generally most acts of assignment. Thus, "for value received, I assign and transfer the within to A. B." "The words required in assignments are, grant, assign, and set over."—1 Jacob's Law. Dic. 140. 1 Inst. 301.

The deed, under consideration, has not the words "assign, nor grant, nor set over":: its terms are *"remised, released, and quit claimed,* that parcel of land *due me,* under an act *giving a bounty,* which bounty I relinquish and convey," &c. The terms of the deed are approriate to the transfer of a claim and improvement on the public lands, held under expectancy of a pre-emption, a relinquishment of the right, and a transfer of the possession and occupancy.

This view is confirmed by the 13th section, which provides, "that before any person claiming the benefit of this act, shall be allowed

253 to enter such lands, he shall make oath before the Receiver or Register, that he hath not settled upon and improved the land to sell the same on speculation, but, in good faith, to appropriate it to his own exclusive use or benefit, and that he has not directly, or indirectly, made any agreement or contract with any person or persons whatsoever, by which the title he might acquire from the Government should enure, in whole or in part, to any person except himself." It would have been in the height of folly to have made a transfer or assignment in the hope of obtaining a pre-emption in defiance of this provision; nor can we intend that there was such design, whilst the instrument is capable of a different construction. It must be sustained, if possible: *"ut res magis valeat quam pereat,"* "The construction shall be favorable; and, therefore, if words are susceptible of two senses, one agreeable to, and another against law, the former shall prevail. The Courts will, if possible, so construe an instrument that it may have some operation, rather than invalidate it on the ground of illegality." 2 Black. Com. 279—380. Coke Litt. 42. Chitty on Cont. 20. Cowper, 714.

This view is also confirmed by the fact, that there is no evidence in the record showing that there was any application for a right of pre-emption by either of the parties, or that Taylor expected or relied, in any way, upon obtaining a pre-emption through the cultivation and improvement of Baker. Whilst coming to this conclusion, we are free to declare, that if there had been proof of anything approaching to turpitude in the transaction, it would have produced a different result.

By the law of the Territorial Legislature, as early as 1822, the sale of improvements on the public lands was allowed and rendered valid, nor was there ever a disapproval by Congress, of this action of the Territorial Government. Duval Comp. 45.

Whilst we admit that there is a difference of opinion in some of the States of the Union, as to the validity of such sales, we desire to express our hearty concurrence in the sentiments expressed by the Supreme Court of Missouri, in the case of Clark vs. Shultz. The objection there, was, that the contract was not in writing,—an objection not prevailing here,—and the Court say, "We feel the more inclined to follow the New York decisions, and to leave the settlers free to dispose of their improvements, as of their horses and cattle.
254 In truth, the very offer to sell the improvement, and give up accommodation and comfort, which the squatter has obtained for himself by his labor on the public lands, excludes altogether the idea that he intends, by the sale, to pass away any title or interest in the soil.—These improvements are often of much value to the new settler, and the person making the improvement in building the cabin and clearing the field, is regarded by the Government as entitled to remuneration therefor, rather than as a trespasser, &c. It forms then, a good and sufficient consideration for any contract or price the purchaser may agree to pay for the possession of such improvements." 4 Missouri, 235. 9 Missouri, 866. 5 John. 272.

"A man may renounce his possession, and such abandonment in favor of another, is a sufficient consideration to support the contract growing out of such renunciation or abandonment." 9 Missouri, 866.

We are of opinion, then, that the relinquishment by Baker, of the expected bounty of the Government, the abandonment and surrender of his improvements, and the possession taken by Taylor, of themselves formed a good and valid consideration for the agreement, and were not prohibited by the act of Congress alluded to.

Another ground assumed, is, that plaintiff did not prove that he had fully complied with the agreement. This must allude to the provision, that "Baker shall serve out the time required of settlers by law, which entitles them to either donation or pre-emption": but this provision would seem to be superseded by another engagement attached to the deed, and which is incorporated in the *agreement sued on*, that Baker was to work for the term of one year, and Taylor was to pay him $300 for his year's service and his share of the land, which is considered full payment for the whole."

The first provision, left the time of service indefinite; the latter, made it certain, and was more favorable to Taylor, as by the pre-emption law, only a few weeks service was required to entitle a party to its benefits. But, supposing the first provision in force, we are not prepared to say that there is no evidence to prove a performance; on the contrary, we see little room to doubt the sufficiency of the proof in this respect.

Again, it is maintained, that there was a plea to the second and third counts, which was demurred to; and, as the demurrer was not disposed of, these counts, reefrring alone to the land, must be regarded as not in issue. The plea alluded to is, in effect, the general is- 255
sue, which had already been filed, and gave to defendant no new advantage which he had not secured by that plea. It seems not to have been relied upon by the parties, and was properly treated as a nullity. And here we take occasion to say, that it is not enough in this Court, to shew that a plea was on file in the Court below: the party complaining, must go further, and shew that that Court either refused to act upon the pleading, or decided it wrongfully; otherwise, this Court would lose its appropriate office of an appellate tribunal, by deciding, originally, questions never raised in the Court below, and which, if presented, would probably have been correctly decided there.

The view we have taken of this case, is so strongly fortified by the other testimony in the record, as to leave us entirely satified with the justice and equity of the verdict and the decision of the Court.

The services of Baker for the year, are estimated by one witness at $300, and by one of the defendant's witnesses at $200 and his clothes, and $300, is the entire consideration for the improvement and services, both.

Upon the whole case, we are of opinion, that the judgment be affirmed with costs.

HAWKINS, Justice, dissenting:

With due deference to the opinion pronounced in this case, I feel constrained to differ with the majority of the Court as to its conclusions of law, and also as to what constitutes the subject matter and consideration of the agreement, upon which the suit was instituted. It would appear by the evidence in the cause, that on the thirtieth day of May, 1842, Baker executed to Taylor, in substance, the following instrument:

Know all men, that I, John Baker, for and in consideration of the sum of three hundred dollars, to me in hand paid by C. Taylor, have remised, released, and quit claimed, and by these presents do remise, release, and quit claim to said Taylor, his heirs, &c., all that certain lot or parcel of land, to me due by the United States' Government, under an act *giving and granting to actual settlers within the country claimed and possessed by the Indians*, a bounty of one hundred and sixty acres of land, which said bounty of one hundred and sixty acres of land, for the consideration above mentioned. and by these presents
I relinquish and convey to the said C. Taylor, with all my right, title 256
and interest, claim and demand unto or in anywise appertaining, together with all and singular the hereditaments and appurtenances thereunto belonging, and the remainder and remainders, reversion and reversions, rights, profits and issues thereof. It is further understood, that I, the said John Baker shall *serve out the time required of settlers by law*, which entitles them to either donation or pre-emption as the case may be. To have and to hold the aforesaid bargained premises to him the said C. Taylor, &c.

(Signed,) JOHN BAKER.

"It is further understood, and by these presents agreed, that I, John Baker shall and will work for the said C. Taylor, for the term of one year, and the said Taylor is to pay me three hundred dollars for his year's services and his share of the land aforesaid, which sum is considered as full payment for the whole."

Simultaneously with this instrument, the following agreement was entered into by Taylor:

"I promise to pay to John Baker, on or betore the first day of January, 1843, the sum of three hundred dollars, provided he complies with an agreement made with me for his portion of land *which he is to receive from Government as an actual settler*, as also for his year's services. May 30, 1842. "C. TAYLOR."

The first of these instruments is inartificially drawn, and somewhat vague in its terms; and where this is the case, it is always difficult to arrive at the true meaning of parties. In construing agreements, for the purpose of ascertaining their intention, we may look at concomitant matters and circumstances, if, by a view of the instrument, they may seem to have had a relation to, or connexion with the subject matter of the contract. Upon an inspection of the paper alluded to, I incline to the opinion, that it was an agreement for land that Baker might have become entitled to, under what is ordinarily termed the armed occupation bill; and I have come to this conclusion, not only owing to the intention fairly to be inferred, as I think, from the face of the instrument, but also that, at the time this agreement was entered into, the bill referred to was before Congress. Its passage was, the subject of notoriety and discussion, a theme of general concern to the people of the (then) Territory, and one of peculiar interest to

257 those who wished to avail themselves of the provisions of the bill, whenever it should become a law. I think, therefore, that this anticipated law was in contemplation of the parties to this instrument, as it does not seem to have direct reference to the pre-emption law. I think the praseology of the instrument sustains me in the view I have taken, and that it was not a right of pre-emption that Baker intended selling to Taylor. The words of the agreement are, "all that certain lot or parcel of land, to me due by the United States Government, *under an act giving and granting to actual settlers within the country claimed and possessed by the Indians.*" Now, there was no such act in existence at the time of the contract; and, in the pre-emption law, it appears that settlements are to be made *on those public lands* to which the Indian title had been, at the time of such settlemen, *extinguished.* It is true, the words of the agreement would seem to apply to an existing act, and Baker speaks of the land due him by the Government, under *an act* giving and granting to actual settlers, &c.; but, at the same time, he uses the words "do remise, release, and quit claim," and yet he clearly had no pre-emption or other right at the time, but he conveys only that which he shall afterwards acquire. I consider that all these words, though *in presenti,* are, as to their effect, prospective, and apply as strongly to the anticipated act of Congress, as to the terms of the contract.

Besides, Baker agrees "to serve out the time required of settlers by law, which entitles him to either *donation* or pre-emption, as the case may be." No time is required by the pre-emption law to enable settlers to make their entries, and I think that the words "donation or pre-emption, as the case may be," convey the idea that there was something contingent or alternative, that there was an uncertainty as to the form or manner in which the bounty of the Government was to be bestowed. If the language of the agreement was intended to apply to the pre-emption act, would it not have been explicit and definite, and alluded to it in clear anl precise terms? The passages I have particularly adverted to, in conjunction with the whole tenor of the transaction, impress me with the conviction, that the contract was made with a view to the passage of the armed occupation bill.

The views I have thus expressed, I confess I have taken with some diffidence, owing to the difficulty I have before alluded to, in ascer
258 taining the true and real intentions of parties, where the instrument is vague and uncertain in its terms, and I feel this diffidence increased when my opinions are not in unison with those of my brethren on the Bench.

If I am correct in the view I have taken of the subject, the contract between Baker and Taylor, even if legal at the time, became illegal by virtue of the "act to provide for the armed occupation and settlement of the unsettled part of the peninsula of Florida," for by the fourth section of that act, it is declared, "That all sales, gifts, devises, agreements, &c., to sell transfers or liens, whatsoever, private or judicial, of the lands or any portion thereof acquired by this act, made at any time before patents shall have issued for the same, shall be utterly void and without effect, to every intent and purpose, whether in law or equity." Even if the contract had not been illegal at the time, as I have before remarked, and became so afterwards by act of law, still it cannot be enforced. 10 East. 530. 3 M. and S. 267.

If, on the other hand, I am wrong in the view I have taken of the contract, and it does not relate to the pre-emption law, still, I think, the action should not have been sustained, if being void for want of a good and legal consideration. A portion of it being founded on an illegal consideration, and the contract being an entirety, the whole of it becomes illegal.

There was clearly not the least shadow of title to the land conveyed, or agreed to be conveyed to Taylor, and the bare and naked improvements made by Baker, were all which were pretended to be conveyed. There are authorities which certainly go the length to say, that the sale of improvements on public lands, is a good consideration for a promise, but I agree with the opposite decisions, thinking they are founded on the true notions of law and public policy.

In Merrill vs. Le Grand, 1 Howard Mis. R. 150, it was decided, that a promissory note given in consideration of the purchase of an improvement upon vacant government land, is for an illegal consideration, and cannot be recovered.

Persons settled upon the lands of the United States, without a right of pre-emption, are made trespassers, and an agreement to transfer their posession would be an agreement for the continuance of a trespass, and would be illegal and void.

So in Carr vs. Allison, 5 Blackford, 63, a bond was given in 1833, 259
in payment of a certain sum, in consideration of an improvement previously made on United States' land, and of the obligee's promise not to enter the land on which the improvement was made. The pre-emption law of the United States, in force in February, 1833, did not authorize the transfer of a pre-emption right before a patent had issued for the land. It was held, that the improvement, was not a valid consideration for the bond, and that the promise not to enter the land was void as against public policy. See also, 4 Yerger, 1, 3.

These sales, or transfers, are clearly against the policy of the statute, which seems to have had for its object the protection of *bona fide* settlers from the grasp or imposition of capitalists or speculators.—Among the requisites as prescribed by the pre-emption law of 1841, is that party, before claiming the benefit of the act by entering the land, shall swear that he has not entered upon and improved the land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use or benefit. Any attempt to contravene the policy of a public statute, should not meet with the aid of law to give it success, or enforce a contract which may be the result of such intended contravention. The statute of 1841, declares, "that all assignments and transfers of the right hereby secured," (that is, after the requisites of law have been complied with) "prior to the issuing of the patent, shall be null and void." If these transfers, even *after the right is secured,* are void, I should suppose also, that transfers and signments and transfers of the right hereby secured," (that is, after pre-emption rights are mere bounties to settlers, to encourage the settlement of the public domain. They would seem to be privileges confined to the person, and incapable of assignment, so as to form a legal consideration for their sale or transfer.

The various States may certainly legislate as to the remedies in their own tribunals, and regulate the disposal of the property of their own citizens; but Congress, by the Constitution, has the sole power of disposal of the public lands, and of making all needful rules and regulations thereto. See 13 Pet. U. S. R. 498.

I cannot perceive, therefore, how a State enactment can regulate the sale of portions of the public domain, or legislate, in regard to rights growing out of it. And, in point of morals, I can see no difference whether the Government, or an individual, is owner of the land 260
upon which improvements are made, and attempted to be sold.

I deem it my duty, upon this occasion, further to remark, that I cannot assent to the proposition so broadly laid down, that "the Court would lose its appropriate office of an appellate tribunal by deciding, originally, questions never raised in the Court below, and which, if presented, would perhaps have been correctly decided there." The case is before us upon the errors apparent upon the record; but I do not propose to discuss this question in reference to its bearing upon the case at bar, but to manifest my dissent to it as a general proposition, which, as it is laid down, may reach all future cases, and preclude this Court from looking into any error not presented in the Court below, although that error might shew that the cause of action had entirely failed. Such an error, if presented in the Court below, is it to be presumed would have been corrected there; but if, because in the hurry of a trial at *nisi prius,* it has escaped the attention of both the Counsel and the Court, are we precluded from deciding it here? In the case of Powell vs. Waters, 8 Cowen, 701, Spencer, Senator, said, that, "If the foundation of the action had manifestly failed, we cannot, without shocking all common sense of justice, allow a recovery to stand." And it is worthy of our serious consideration, how far we can constitutionally disregard a manifest and palpable error on face of the record which is presented to us, whether that defect has been pointed out in the Court below, or insisted upon in this Court, or not. As was remarked by the Judge, who gave the opinion of the Court, in 14 John. R. 501—517: "The object of Counsel is to aid the Court in its investigations, and it would be strange if the Court were bound to shut their eyes upon every point not suggested by them—it would make the rights of parties depend more upon the vigilance and ability of Counsel, than on the law of the land." Judges must decide according to the law; and if it is not presented to them by Counsel, or their attention is not called to the true points of a case, still, if they themselves discover those points, or ascertain the law, they are bound by their obligations to pronounce it. In the case of Baird & Co. vs. Mattox, I Call, 257, the Court said: "If the defendant is sued as heir, or devisee, and pleads that he has no assets by descent, on which plaintiff takes issue, and verdict be found for the defendant, *a repleader* will be awarded (by the Appellate Court,

though not prayed in the Court below,) because the issue has only 261
tried the rights as to descent, and *not* as to the demise"; and, in Speaks vs. Shepherd, 6 Harr. and John. 84—86—87, it was held, that upon a writ of error, the Court are not only authorized, but *bound* to examine the *whole record*, and if there be error, it is their duty to reverse the judgment below, although the Court were right in the opinion they gave on the particular point upon which their opinion is prayed, and 7 Bacon Abr. 448, it cited to sustain this position.

There can be no doubt (said Mr. Justice Woodbury, in delivering the opinion of the Court in the case of Garland vs. Davis, 4 Howard S. C. R. 143,) that exceptions to the opinions given by Courts below, must be all taken at the time the opinions are pronounced. But it is equally clear, that when the whole record is before the Court above, any exception appearing upon it can be taken by Counsel, which could have been taken in the Court below, and the case of Roach vs. Hulings, 16 Peters, 319, is cited, which sustains the first proposition.

So, it is the duty of the Court to give judgment on the whole record, and not merely on the points started by Counsel. Slacum vs. Pomeroy, 6 Cranch, 221. 16 Peters, 319, Garland vs. Davis, 4 Howard S. C. R. 143. In the case of the United States vs. Burnham, 1 Mason C. C. Reports, 62, the Court alone took notice of the defect, which was the sole ground of its opinion; and Judge Story, who pronounced the opinion of the Court, said, "The Court must pronounce upon the whole record": and in the case of Patterson vs. The United States, 2 Wheat. 221, Justice Washington says: "The Court considers it unnecessary to decide the questions argued at the bar, as the verdict is so defective, that no judgment can be rendered upon it," and upon that account the proceedings below were reversed. Harrison et al vs. Nixon, 9 Peters, 483—535, is also in point, and see Stephens on this doctrine.

In the case of Slacum vs. Pomeroy, 6 Cranch, 222, before cited, Chief Justice Marshall said: "It is not too late to allege as error in this Court, a fault in the declaration, which ought to have prevented the rendition of the judgment in the Court below."

I have thought proper to be thus prolix, lest I might, by my silence on the subject now, be precluded in a future case from noticing a vital error in the record, merely because it was not presented in the Court below, and which, from the views I entertain of my constitutional duty, I should not feel at liberty to disregard.

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262 GEORGE W. PHILLIPS, Claimant, *vs.* WHITEHURST J. HAWKINS, Plaintiff in Execution.

On failure of a mortgagor to comply with the condition of the mortgage, the title in personal property becomes absolute in the mortgagee, and he may reduce it to possession; and his interest may be levied upon and sold under an execution.

The condition of the mortgage being forfeited, an execution against the mortgagee of a slave, will have the preference over a bill of sale by the mortgagee, made subsequent to the coming of the execution to the hands of the Sheriff, although such bill of sale be accompanied by possession and an assignment to the purchaser, by the mortgagor, of his equity of redemption.

Appeal from Gadsden Circuit Court, on trial at Spring Term, 1846, of a claim interposed by George W. Philips, to a negro woman, Dolly, levied on under an execution in favor of Whiteburst J. Philips vs. Stokeley Sadbury and Uz Wood, his Honor Judge Macrae, presiding.

Phillips claimed under a bill of sale from Wood, the mortgagee, and an assignment to him by Sadbury, the mortgagor, of his equity of redemption. Upon the trial, claimant gave in evidence an indenture of mortgage from Stokeley Sadbury to Uz Wood, on this, and other negroes and property made to secure Wood from loss, by reason of his endorsements, therein specified, for Sadbury, and which was executed and recorded, on 4th May, 1842—also, a bill of sale by Wood, the mortgagee, to claimant, recorded on the 2d July, 1845, but which has no date, and of which the following is a copy:

STATE OF FLORIDA, }
County of Gadsden. }

Whereas Stokeley Sadbury, by deed of mortgage executed and bearing date on the fourth day of May, A. D. 1843, did among other things, and for the purposes therein mentioned, conveyed unto me, Uz Wood, a certain negro woman named Dolly, and described in the said mortgage as thirty-five years of age—and whereas it is the desire of the parties to the said deed of mortgage, that the purposes for which the same was given should be effected with as little delay and expense as practicable, which can be best accomplished by dispensing with a suit to foreclose the said mortgage (and having the property or such portion thereof as may be desired) disposed of at pri- 263
vate sale; which desire has been fully manifested on the part of the said Stokeley Sadbury, by his written assent thereto had, bearing even date with this instrument of writing:—Now, know all men by these presents, that I, Uz Wood, of the county and State aforesaid, in consideration of the premises and of the sum of five hundred dollars of lawful money of the United States, to me in hand paid by George W. Phillips of the same county and State, at and before the sealing and delivery of these presents, the receipt whereof I do hereby acknowledge, have granted, bargained and sold, and by these presents, as mortgagee as aforesaid, do hereby grant, bargain, sell, assign, release and convey unto the said George W. Phillips, his executors, administrators and assigns, all the right, title and interest which I ever acquired by virtue of the terms of the deed of mortgage aforesaid, in and to the said negro slave Dolly and her child Mary, about nine months of age:

To have and to hold the said negro slave Dolly, and her child Mary, unto the said George W. Phillips, freed from the claim or claims of any person or persons claiming or to claim by, through, or under me, as mortgagee as aforesaid.

UZ WOOD, [L. S.] *Mortgagee.*

Signed, sealed, and delivered in presence of—

WM. RUSSELL.

Also, an assignment by Sadbury, the mortgagor, to claimant, of his equity or redemption, executed the 30th June, 1845, and recorded 2d July, 1845, of which the following is a copy.

STATE OF FLORIDA, }
County of Gadsden. } ss.

Whereas, I, Stokeley Sadbury, of the county and State aforesaid, by deed of mortgage executed and bearing date on the fourth day of May, A. D., 1842, did mortgage unto Uz Wood, for the purposes therein mentioned, to wit, for the purpose of indemnifying him, the said Uz Wood, against any loss as an endorser or surety for me, amongst other things, a certain negro woman slave named Dolly, and described in the said deed of mortgage; and whereas the said Uz Wood has been compelled, by process of law, to expend and advance, as surety or endorser as aforesaid, certain sums of money, amounting to more than the value of the said negro woman; and it being the desire of the said Uz Wood to reimburse the monies so expended as aforesaid, at the least possible delay and expense; and I 264
being also desirous of avoiding the expense of a suit to foreclose the said mortgage, and willing that a sale thereof should be effected by private arrangement, which sale is contemplated to be made to George W. Phillips, of the county and State aforesaid:

Now, know all men by these presents, that I, Stokeley Sadbury, in consideration of the premises, do hereby fully accord my assent to the aforesaid contemplated sale, so far as may be necessary to bar me, or any person or persons claiming or to claim by, through, or under me, of any right or title to any equity of redemption, in or to the aforesaid negro slave or her increase; and I do further renounce, release, and forever quit claim unto the said George W. Phillips, all right, title, or interest, of whatever kind, whether at law or in equity, which I have heretofore had, now have, or may hereafter have, in and to the said negro slave and her increase, so mortgaged as aforesaid.

In witness whereof, I have hereunto set my hand and affixed my seal, this 30th day of June, A. D., 1845.

STOKELEY SADBURY. [L. S.]

Signed, sealed, and delivered in presence of us—

C. H. DUPONT, *Justice of the Peace.*
WM. RUSSELL.

STATE OF FLORIDA. }
Gadsden County. }

The foregoing release, duly recorded in book D, page 349, this 2d day of July, A. D., 1845.

William Russell, the witness to the bill of sale from Wood to Phillips, testified, that he saw the delivery of the slave to Phillips and the consideration, which was three hundred dollars in cash, and a credit of two hundred dollars on a note held by Phillips against Wood. Claimant also gave in evidence, several executions against Wood, to satisfy which his property had been sold; and one of which, for $616, it was admitted, was on account of a security debt for Sadbury. It was also admitted, that all the slaves mentioned in the mortgage to Wood, except the one in controversy, and one or two others, were held by Sadbury only for the life time of his wife, who died some time previous to the sale to Phillips, and that they had reverted to the estate of William D. Harrison.

Defendant gave in evidence the writ of *fi. fa.* vs. Sadbury and Wood, under which the levy had been made, and the following endorsement thereon:

"Came to hand, 13th May, 1845.

J. G. CAMP, *Marshal.*

By JAMES HINES, *D. M.*"

"By virtue of the annexed *fi. fa.* I have this day levied on a negro slave by name of Dolly and her child named Mary.

August 4th, 1845. JOHN G. CAMP, *Marshal.*

By JAMES HINES, *D. M.*"

Claimant asked the Court to instruct the Jury:

"First"—That the respective interests of Sadbury & Wood, in the property, as mortgagor, and mortgagee, is not such a joint interest as will subject the property to a joint execution at law, as against a bona fide purchaser, for a valuable consideration.

"Secondly"—That if the Jury believe the sale and purchase of the slave to have been made *bona fide*, and for a valuable consideration, that then, according to the evidence in the cause, the said slave cannot be made subject to an execution at law, as against the claimant": which instructions the Court refused to give,—but in lieu thereof, instructed the Jury as follows, to wit:

"That notwithstanding any mortgage of the slave mentioned from Sadbury to Wood, or other transactions between them, no other right or interests intervening at the time the execution in question came to the Sheriff's hand, the said slave was liable to said execution, the same being against said Sadbury & Wood; and no after disposition or sale of said slave by said Sadbury & Wood, or either of them, could in any wise divest or impair the lien, or effective operation of said execution upon said property."

To which refusal and instructions, claimant excepted.

The Jury returned the following verdict:—"We, the Jury, find the property claimed herein, to be subject to the said plaintiff's execution."

L. A. Thompson & C. H. Dupont, for Claimant:

Upon the facts of this case, they assumed the following propositions, to wit:

I. The interest of Sadbury, being only an *equitable* interest, viz.: an interest in the "equity of redemption," was not subject to be sold.
266 under a fi. fa. emanating from a *common Law Court,* and could be reached only through the process of a *Court of Equity.* 3 Atkin's, 739. 8 East. 467. 1 Arch. Prac. 293.

II. Wood, as mortgagee, held only a *trust estate* in the property, and this was such an *equitable* interest as could not be taken under the process of a *Court of Law,* for his personal debts.

If, in opposition to this position, it be contended, that the mortgagee is in possession of the *legal title,* the reply is:

First—That although this may be *technically* true, yet the *interest* conveyed to the mortgagee is a *qualified* and *limited* interest, which cannot be taken by any *process of law,* for his private and individual debts. 1 Mad. Ch. Pr. 455. 2 Story Eq. 289. Fonb. Eq. b. 11. chap. VII, sec. 1, note A.

Secondly—Vide 3 Durn. & East, 646, as applicable to executions. The doctrine, that the "legal title" is in the mortgagee, is to be received in a purely *technical* sense, and if it ever were intended to make the terms "title and estate" synonymous, that doctrine is now exploded; for a deed of mortgage is now viewed as a *mere* "security," and it is now necessary to resort to Chancery, as the *only* tribunal in which the mortgagee can make his estate available. 2 Story Eq. 326 to 330. Fonb. Eq. b. 2, chap. 1, sec. 2. 4 Kent, 157.

Thirdly—The term *"legal title"* does not mark the *quantity* or quality of the *interest* possessed by the mortgagee, and is to be distinguished from the term *"estate"*—the term, *"title"*, is only the evidence of a *"right"*—the term, *"estate"*, is the *right itself.* The latter is tangible, and alone subject to *levy and sale*: the former is intangible, a mere evidence or muniment of estate.

The legitimate deductions to be drawn from the foregoing argument, are as follows, viz:

1. If the interest of Sadbury, as mortgagor, (being a mere "equity of redemption,") was so purely an *equitable* estate, as not to be reached by a common law process, or writ of execution issued against him singly, and the estate of Wood, as mortgagee, was in the nature of, and so essentially a trust, as to relieve it from responsibility for his personal or individual debts; then, the mere circumstances of the *writ of fi. fa.* being "joint" against mortgagor and mortgagee, can impart to it no additional virtue or superior energy, so as to make it as a *joint writ,* avail against the interest of *both* defendants, when, as 267
against the separate estate of either, it was wholly inoperative.

2. The first proposition being admitted, viz: that "an equity of redemption is not subject to an execution at law," if the levy, under this joint writ of fi. fa., be sustained, it inevitably leads to this absurdity, that, the mere form, or character of the writ, charges the respective interests of the mortgagor and mortgagee, both as to quantity and quality, and converts a purely *equitable,* into a strictly legal estate.

III. The trust, created by the deed of mortgage, although *primarily* intended for the indemnity of the mortgagee, inured to the benefit of *all* the creditors named in the deed, and could be enforced in a *Court of Equity,* against the mortgage.

If his levy, by *one* of the creditors, (made by virtue of a common law process,) be sustained, then, it gives to that *one* creditor the power to appropriate exclusively to his individual demand, an equitable fund, which a Court of Chancery would distribute to the creditors named in the deed, according to the dignity and magnitude of their several demands.

IV. Thus far the argument has proceeded upon the ground, that the property was in that position that it could not be reached by a *common law* process, and was subject alone to the decree of a Court of Chancery. We now proceed to show, that (if the property was not subject to the fi. fa.) claimant obtained a full and complete title under the bill of sale from Wood, and deed of release from Sadbury

1st. The mortgagee, acting as a "trustee", has a right, with the assent of the mortgagor, to sell and convey the mortgaged property.

2d. As to the appropriation of the purchase money, the rule is, that "when the *trust* is of a *complicated* character, or the debts to which the fund is to be applied are *numerous,* the purchaser of a trust estate is not bound to see to the application of the money." 2 Story Eq. 477-8-9. Fonb. b. 2, chap. VI, sec. 2, and cases cited 12 Wheaton, 489.

V. The remedy of the appellee, (as plaintiff in execution) is by Bill in Equity against Wood & Sadbury, to compel an appropriation of the property to the payment of the debts mentioned in the deed of mortgage.

VI. When the claimant was in *possession* at the time of the *levy,* 268
it became requisite for the plaintiffs in execution to show a *"legal lien"* paramount to the title of possession.

Douglas & Hogue, for Plaintiff in execution:

The positions taken by them were:

1st. That the execution, in this case, has relation back to the time of the delivery of the writ to the Sheriff. Bingham on Executions, page 80, XIII vol. Law Lib. This property belonged to the defendants in execution jointly, and was, therefore, like all other chattel interests, subject to the execution.

2d. If the property, so situated, was not subject to execution, then we contend, that the mortgage from Sadbury to Wood, his co-defendant, while the suit was pending, is void against the plaintiff in execution: because, its necessary effect, if allowed to stand good, is, to *hinder, delay* and *defraud* creditors. The principle settled in the cases of Edwards vs. Harben, Ryall vs. Rowles, and many others in England, followed up the case of Hamilton vs. Russel, in the Supreme Court of the United States, and by many cases in the State Courts of this county, was this: that, in the case of an absolute sale or mortgage of goods, unless the possession accompanies the transaction, it is fradulent, *per se.* The reason of these decisions was, that the necessary effect of such transactions is to hinder, delay and defraud creditors, and it was contrary to the policy of the law to sustain such sales or mortgages. The same principle applies to a case of this sort, it being a mortgage from one defendant to another, no matter whether possession is delivered or not. The effect of sustaining such an act is, to hinder, delay and defraud; and thus it comes within the principle settled in the cases referred to, which principle is applicable to all cases of constructive fraud. See Kent, II vol. pages 515 to 531.

3d. If this will not hold, then, they contend: That, at the very time when Sadbury released his equity of redemption, the necessary legal operation and effect of his release was, to convey his equity to Wood; thus saving the necessity of a foreclosure, and thus enabling him to sell to Phillips. At that very point of time then, the property in the hands of Wood became subject to the execution; and this, though it is called an assignment of the equity. The instrument shews on its face that it was a release, and was intended to enable Wood to sell. That

269 being the case, it must operate between parties between whom there exists some privity of estate. See 1 Tucker, page 252—Releases.

4. The mortgage was forfeited at the time when the execution was placed in the officer's hands and levied; and thus the legal estate was in one of the defendants.

BALTZELL, Justice:

This was an appeal from a trial of the right of property in a negro woman Dolly, had, under the laws of the State permitting a party, whose property is levied upon under execution or attachment, to have a trial of the right, on presenting an affidavit and giving bond as required by the statute.

Sadbury, the original owner of the property, on the 4th May, 1842, mortgaged it to Uz Wood, "to pay all of certain notes on which Wood was security, together with interest, &c., so that Wood shall in no way be interrupted or injured in consequence of his having become security therefor, or shall, by any other lawful means, keep and save harmless said Wood, from the payment of said notes or any part thereof, and all costs, damages and charges, as security," &c.

About the 2d of July, 1845, (for the bill of sale has no date,) Wood, "for the consideration of $500, sold and conveyed to Phillips the negro in question, as mortgagee."

Sadbury, by bill of sale dated 30th June, 1845, reciting the mortgage, and "that Wood had been compelled by process of law to expend and advance, as surety or endorser, certain sums of money to more than the value of the said negro woman: to reimburse Wood, and to save the expense of a suit to foreclose, and willing that a sale should be effected by private arrangement, he gives his assent to the sale to Phillips, and renounces and releases all right, title and interest to the said negro slave."

On the trial it was admitted that the $616 29 paid on a case of Wm. Williams, one of the debts enumerated in the mortgage, was paid on a security debt of Sadbury.

The plaintiff in execution, contesting the claim of Phillips, relies on an execution from the Superior Court of Gadsden county, against Wood & Sadbury, for the sum of $795 04, with interest, &c., levied upon this negro woman and her child, the 4th of August, 1845.

The question is, Who has the better title? It is too well established both by the English and American authorities, to admit of ques-
270 tion, that, "on failure by a mortgagor to comply with the condition of the mortgage, the title in personal property becomes absolute in the mortgagee, and he may reduce it to possession." 4 Kent, 138-9. Pow. on Mort. 3. 2 Vesey Jr. 378. 10 John. 471. Brown vs. Bement, 8 John. 96. 5 John. 258. 2 Pickering, 610. 7 Cowen, 290. So, "his interest may be levied on and sold under execution."

The case of Ferguson vs. Lee, is precisely in point. "C. Lee had a mortgage upon personal property, which became absolute on the 1st of December, 1828. The property, therefore, became *his* on that day, as the mortgage was then forfeited. Subsequent to that day, the deputy Sheriff levied on the property, as the property of C. Lee—the levy was good and held the property." 9 Wendell, 258.

In the case under consideration, claimant asserts a forfeiture of the mortgage, by producing the deed of Sadbury, which admits, "that Wood had been compelled, by process of law, to expend and advance as endorser, sums of money to more than the value of the woman." The title in the negro woman was then absolute and complete in Wood at the date of the bill of sale, and was subject to the execution of Phillips, it being operative and in force at that time.

We do not conceive it necessary to go into a more minute consideration of the case, either as to the instructions given, or those refused, satisfied that the right is with the plaintiff, and that the verdict was properly rendered. We see no objection to the instruction given by the Court below. The judgment is, therefore, affirmed with costs.

CHANCEY WARD AND CHARLES P. MAY, PARTNERS, &c., TRADING 271
AS WARD & MAY, FOR THE USE OF JOSEPH F. CROSBY, *vs.* JABEZ B. BULL AND RICHARD A. SHINE.

This Court can only reverse a judgment for error of law.

The correct rule, in cases tried by the Court sitting as a Jury, would seem to be, that where facts alone are submitted, and the Court has only to weigh the evidence and teremine accordingly, no Writ of Error lies; and where mixed questions of law and facts are presented to the Court for decision, no writ of Error lies, unless the Court is called upon to decide a question of law, or such question of law necessarily arises out of the facts, and is distinctly presented to the Court upon them, so that the decision of the point of law will decide the merits of the cause, and the decision of the Court is wrong.

To support an action for use and occupation, a demise must be shown, or some evidence given to establish the relation between the parties of landlord and tenant.

A lessee, who covenants to pay rent and repair, with express exception of casualties by fire, is liable upon the covenant for rent, though the premises be burned down, and not re-built for the lessor after notice; and a Court of Equity will not restrain the lessor from suing for the rent.

Where the lessor re-builds before the expiration of the term, and leases to a third party, the lessee, who had paid his rent in advance, but had abandoned the lease after the destruction of the property, is entitled to recover back the rent so paid by him from the time of the second lease, and at the rate which the landlord had received from him.

ERROR, to Leon Circuit Court.

By consent of parties, a Jury was waived, and this case, at the Spring term of Leon Circuit Court, 1846, submitted to be tried by the Court—His Honor, Judge Macrae, presiding.

The facts will be found in the opinion of the Court.

S. Towle, for Plaintiffs in Error, contended:

I. That a writ of error would lie in this case; for although a Jury was waived at the trial below, and no questions of law appear to have been expressly raised, yet the *amount* of the judgment below, itself, shews what legal construction was put by the Court upon the facts, which facts are spread upon the record. If that *legal construction* was erroneous, this Court may correct it; that being a matter of *law*.

II. The Court below erred in not giving judgment for a larger amount. It decreed that the rent paid by the lessees in advance, should be refunded from the date at which the lessors re-let the prem- 272
ises to the new tenant; and not from the beginning of the current year, from the date of the fire, or from the date of the landlord's re-entry for the purpose of re-building. In this there was error, whatever view is taken of the facts. Shep. Touch. 90. 21 Pick. R. 28.

1. If the lease conveyed, as we believe it did, the land as well as the store, (meaning store-house) then, the right of possession of the lot and of all erections thereon, vested in the lessees to the end of their term, only to be divested *by surrender* or *eviction*. Baker vs. Holtzapfell, 4 Taunt. 45. Same case, 18 Ves. 116. 16 Mass. 449. There was no surrender or eviction in this case. Chit. on Contr. 263. Baker vs. Holtzapfell, *ubi supra*. 2 Vern. 112. The lessees became, in fact, the landlords, and entitled to demand from the original lessors the rents received by them from the new tenant, from the 5th December, 1843, to wit, $132 70, or the same amount as rent, under the count for use and occupation—the tort being waived.—Bell vs. Sibbs, 8 T R. 327. Birch vs. Wright, 1 T. R. 378. 3 M. & Sel. 191. 1 Taunt. 44. 8 Bing. 43.

But admit there was a surrender: it took effect, not from the date of the new lease to the third party, but from the date of the fire, or, at latest, from the date of the lessors re-entry; and the lessees were entitled to a return of their rent from the commencemnt of the then current quarter, to wit, 1st May, which was the beginning of the year. Chit. on Contr. 261—263—569. Carr. J. in Briggs vs. Hall. 4 Leigh R. 484.

Admit there was an eviction: it took place on the 15th July, when the lessors re-entered to re-build, which they had no right to do. 4 Taunt. 45. And the result would be the same as if a surrender were made: the rent should be refunded to the lessees from the bginning of the year.

2. It may be contended, that the lease did not convey the land, but only the *store*, viz.: "The new brick store, on 100 foot street next," &c., and when that was destroyed the lease was ended. Admit this for the sake of argument. The store erected after the fire, complies in all respects with the description of that actually leased. It was "the new brick store, on 100 foot street," &c. &c. It was to all intents the same store as that first leased; and the lessors are estopped by their deed, from contending otherwise. The lessees then,

273 are entitled to the new store and its rent, and may recover in this action.

3. It may possibly be contended, by the defendants in error, that "store" means only the building—the mere bricks and mortar—a mere room—the destruction of which puts an end to the lease. If but a mere room, a personal chattel, the lease is a sort of bailment—a *locato rei*. The bailor is bound to keep the thing bailed in good repair; (Story on Bail, 377) and failing to do so, to refund the rent from the date of the fire; or restore the thing, when repaired—Story on B. 376—or its rents, &c.

In an equitable point of view, the defendants in error have no claim for favor from the Court. By the original lease to the plaintiffs in error, they sold for an adequate price, the right to use and possess the store and land till the 1st May, 1844. There is no justice in allowing them to retake possesion of those premises, violate their first contract, and then make a profit by their own wrong. The fact of their re-building, when not compelled to do so, entitles them to no favor. They built for the sake of the rent to accrue thereafter, as long as the building should stand. They should not be allowed to trench upon rents which they had already once sold, to wit, those prior to 1st May, 1844. On the other hand, the appellants having, as lessees, taken all risks; having, in any event, lost by the fire the use of the premises for a considerable time, have justice as well as law to support their claims.

L. A. Thompson, for Defendants.

Douglas, Justice:

This is an action of assumpsit, and was brought up from the Circuit Court of Leon county by Writ of Error. The declaration contains two counts:

First—Money lent and advanced, money paid, laid out and expended, and money had and received.

Second—For use and occupation. Plea, non assumpsit.

A Jury, to assess the damages, was waived by the parties to the suit by their respective attorneys and the facts were submitted to the Court for its decision, pursuant to the provision contained in the first section of the act of November 21st, 1829, "To amend an act regulating judicial proceedings." Duval's Compilation, page 105. The plaintiffs having introduced their testimony rested.

274 Whereupon the deefndants, by their counsel, demurred to the evidence of the plaintiffs; and the plaintiffs, by their counsel, having put in their joinder to the demurrer, "all the matters of law and of fact were submitted to the Court for its decision." The demurrer brought upon the record the following proof:

1st. A lease, by one William Wyatt, to the plaintiffs in error, which is as follows, viz.:

"This Indenture, made this the 10th day of February, A. D. eighteen hundred and forty, between William Wyatt of Leon county, Territory of Florida, of the one part, and Ward & May, merchants, in the county and Territory aforesaid, of the other part, witnesseth:—That the party of the first part, has rented and leased to the parties of the second part, the new brick store, south of F. Towle's building, on one hundred foot street, at four hundred dollars for the first year, and four hundred and fifty dollars for the three succeeding years, with the refusal of the same, after the expiration of that time, at a fair rent: the party, of the second, to have possession by the first of May next, when the rent is to commence. The parties of the second part are to pay the parties of the first part, his heirs and assigns, the aforesaid rent in *quarterly installments*. The party of the first part, is to counter and shelve with drawers the said store, as per plan annexed. It is further understood, that whatever other improvements the parties of the second part may make in the said store, shall be at the expense of the second party; but with the understanding and agreement, that the party of the first part shall, on the removal of the parties of the second part, pay the cost of all such improvements, or allow them to be removed by the second parties." The only additional proof which the record discloses, is that, "on 1st May, 1843, plaintiffs paid $450, in Union Bank bills, worth 33 1-3 cents in the dollar in good funds, in advance for rent up to 1st May, 1844: on the 25th May, 1843, the store was destroyed by fire: on the 15th of July, 1843, the defendants commenced the erection of a new building on the lot and site where the store stood, which being completed, was on the 5th of December, 1843, re-leased by defendants to a third person, at the rate of $325 per annum, in good funds, and the rent received by them to 1st May, 1844, and afterwards; the plaintiffs being out of the country after the fire. The defendants offered the plaintiffs to pay them, or refund them rent from the 5th December, 1843, at the same rate which they had received, say, $450 per annum, in Union 275 Bank funds, of the value of 33 1-3 cents per dollar."

The Court having duly considered all the matters of law and fact referred to, proceeded to render judgment as follows, to wit:

"It appears to the Court, that the matters shewn in evidence by the plaintiffs, are sufficient in law to maintain the issue joined herein; and it being by consent of parties referred to the Court to assess the damages which the plaintiffs had sustained, by reason of the matter shewn in evidence as aforesaid; it is therefore considered by the Court, that the plaintiffs do recover from the said defendants the sum of sixty dollars and forty-two cents, the damages which the said plaintiffs have sustained by reason of the matter shewn in evidence as aforesaid, and their costs by them about their suit in this behalf expended, and the said defendants in mercy," &c.

Whereupon the said defendants, by their attorney, filed their Bill of Exceptions, &c.

The plaintiffs in error took no exceptions; but being dissatisfied with the amount of their judgment, have brought it up to this Court for revision. No errors are in form assigned. The counsel for the plaintiffs in error, however, insist that the Court erred in not giving judgment for a larger amount; and this, they contend, is entirely a question of law, and ask the Court to give such judgment as the Court below ought to have given. That a party may bring a writ of error to reverse his own judgment for error, if injustice has been done him in the Court below, is well settled. Ingalls vs. Lord, 1 Cowen, 503. But this Court can only reverse a judgment for error in law, Cranch, 126. Teal vs. Russell, 2 Scammon, 32. Johnson vs. Jebb, 3 Burr, 1772. Tidd's Pr. 1134. Bissel vs. Marshal, 6 John. 100. Nor is there doubt that the Court may proceed to give such judgment as the Court below ought to have given, if the case is properly before us for that purpose. Duval's Comp. 109, sec. 5. 2 Bac. Abr. 503. But this Court can only reverse a judgment for error in law, not for error in fact. Upon a writ of error, containing error in fact and error in law, the Court ordered the error in fact to be stricken out, and reversed the judgment for error in law. Lewis vs. Lawson, 1 Root, 162. In the case of Neilson vs. McCabe, 9 Missouri Reps. 48, and Von Pheel vs. The City of St. Louis, ibid, 49, the Supreme Court of Missouri held, that the decision of the Circuit Court, sitting as a Jury, will not be set aside, unless the record shows, that the Cir- 276 cuit Court was called upon to decide some question of law, and its decision was wrong. Those cases were followed by that of Young vs. Kelly, in the same Court, where the same principle was maintained, and the Court said: "In a case like this, where the Court discharges the duty of a Jury, as well as its own peculiar duty, it seems more particularly necessary that the appellant should call on the Court to decide the law arising on the facts detailed in evidence. No such decision being made, this Court, feels no disposition to disturb the verdict of the Court sitting as a Jury." In the case of Reynolds vs. Rogers, 5th Hammond, 169, the Court held, that where matter of fact was submitted to the decision of the Court, neither party could sustain a writ of error, and the cases of Dovenor vs. Swafford, 1 Scammon, 166, Gilmore vs. Ballard, ibid, 252, and Stringer vs. John & Wm. Smith, ibid, 295, are all in point. An appeal, or writ of error, (the Court said, in the cases of Gilmore vs. Ballard, and Dovenor vs. Swafford,) if recognized in such cases, would be equivalent to a new mode of obtaining a new trial. It undoubtedly would be so, and we are not disposed to countenance this mode of practice. In the case last cited, the Court remarked: "It is of importance that innovations on the rules of proceedings should not be sanctioned, and that those which are found, after long use and practice, to be best adapted to the decision of causes, should be adhered to." A proposition founded in good sense and reason, and to which we most fully assent. The correct rule in the cases tried by the Court sitting as a Jury, would seem to be, that where facts *alone* are submitted, and the Court has only to weigh the evidence and determine accordingly, no writ of error lies; and where mixed questions of law and fact are presented to the Court for its decision, no writ of error lies, unless the Court is called upon to decide questions of law, or such question of law necessarily arises out of the facts, and is distinctly presented to the Court upon them, so that the decision of the point of law will decide the merits of the cause, and the decision of the Court is wrong. In this case, the facts were distinctly presented to the Court by the demurrer to the evidence, and several questions of law were incidentally involved in determining the rights of the parties upon them, as connected with the facts of the case; but no particular question involving the whole, or to any great extent the merits of the cause, was

277 prominently and distinctly presented to the Court by counsel, nor did any such necessarily arise out of the evidence, so as to make a decision upon it the subject of a writ of error. The remedy of the plaintiff, if the verdict was too low, was a motion for a new trial in the Court below, upon which all these incidental questions might have been heard. And here we might with propriety stop; but this case has been pressed upon the Court by the counsel for the plaintiffs, with a zeal and earnestness which evinces his confidence in the justice of his client's claim to a reversal of this judgment, and is deserving of further notice from us: and we, therefore, proceed to give our views briefly upon the merits.

The only question of law expressly raised, and distinctly presented to the Court in this case, was decided in favor of the plaintiffs in error, and a writ of error will not lie in favor of the party applying.—Sterrett vs. Creed, 2 Hamm. 343. Tribue vs. McKiterick, 4 Bibb, 180. Hammond vs. Buttell, 1 Call, 567. Hughes vs. Stickney, 13 Wend. 280. Henry vs. Smoot, Minor, 18. Carry vs. The State, 4 Port. 186. Indeed, the plaintiffs in error do not complain of that decision, but only that the amount found by the Court to be due to the plaintiffs, and for which judgment was rendered in the Court below, is too small. In order to determine the correctness of this proposition, and ascertain the rights of the plaintiffs in error to this suit, we must look to the nature of the action, and the circumstances of the case as disclosed by the evidence.

The declaration, as before stated, contains two counts, one, for money had and received, and the other, for use and occupation. We will reverse the order, and enquire, first, whether the plaintiffs are entitled to recover on the last count. This count is founded on the statute of 11 Geo. 2., chap. 19, sec. 14, by which it is enacted, that "it shall be unlawful for a landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the lands and tenements, or hereditaments, held or occupied by the defendant in an action on the case, for use and occupation of what was so held and enjoyed; and if in evidence, on the trial of such action, any parole demise, or any agreement (not being by deed,) where a certain rent is reserved, shall appear, the plaintiff in such action shall not, therefore, be nonsuited, but may make use thereof, as an evidence of the quantum of damages to be recovered." Chitty on Contracts, 105—106. 1 Chitty's Pl. 338.

278 Assumpsit for the use of land by permission and assent of the plaintiff, or an express promise to pay a certain sum, or, in general, to pay to the plaintiff's satisfaction for such use, lies, at common law, indeepndent of the statute. Eppes vs. Call, et ux. 4 Hen. & Munf. 161. And it has also been held to lie on an implied promise: Sutton vs. Mandeville, 1 Munf. 407. Gunn vs. Scovie, 4 Day, 299.—Logan vs. Lewis, 1 J. J. March, 3. But, to support an action for use and occupation, a demise must be shewn, or some evidence given to establish the relation between the parties of landlord and tenant. Stoddert vs. Newman, 7 Harr. & John. 251. Boston vs. Binney, 11 Pick. 1. Pott vs. Lester, 1 Yeates, 576. Follan vs. Baisman, 3 Miss. 405. Featherstonehaugh vs. Bradshaw, 1 Wend. 134.—Smith vs. Stewart, 6 John. 46. Story on Contracts, p. 398, sec. 656. There is nothing in the evidence in this case, which shews a contract, either express or implied, on the part of the defendants in error to pay rent for the premises in question, to the plaintiffs in error. They only offered to return the amount of the rent which they had received for the time that intervened between the 5th of December, 1843, and the first day of May, 1844. The plaintiffs in error cannot, therefore, recover on that count, but must fall back upon their count for money had and received, to recover back the rent which they had advanced. There is no evidence either of money lent or advanced, or money paid, laid out, or expended. The charge for money had and received, is therefore the only one on which the plaintiffs in error can rest their case. This kind of equitable action, to recover back money which ought not in justice to be kept, it is said, is verey beneficial, and therefore much encouraged. Chitty on Contracts, 182. It lies only for money, which "ex aequo et bono", the defendant ought to refund. 3 Tucker's Blackstone, 163. 1 Chitty's Pl. 341. Chitty on Contracts, 182. By bringing this action the tort is waived. 2 Smith's leading cases, page top 131, side 89.—What then, are the plaintiffs in error entitled to recover on this count? A lessee who covenants to pay rent and repair, with express exception of *casualties by fire*, is liable upon the covenant for rent, though the premises are burned down and not rebuilt by the lessor after notice. Story on Contracts, page 376, sec. 605. Towle vs. Bate, 6 Mass. 63. Izon vs. Garton, 5 Bing. New Cases, 501. Balfour vs. Weston, 1 Term R. 311. And a Court of Equity will not restrain him from suing for the rent. Leeds vs. Cheetham, 1 Sim 145. 279 Haltzapffel vs. Baker, 18 Ves. Jr. 117. Balfour vs. Weston. 1 T. R. 312. At the trial of the last case, Buller, Justice, read the following note of the case of Pindar against Ainsley and Rutter, at the sittings at Westminster, after Michaelmas Term, 1767. That was an action of ejectment, by the tenant against the landlord, to recover the possession of some houses which had been burned down during the term, and rebuilt by the landlord. In the lease there was an express covenant, on the part of the tenant, to pay rent; but he had paid none subsequent to the time of the fire. Lord Mansfield, before whom the cause was tried, said, the consequence of the house being burned down is, that the landlord is *not* obliged to rebuild, but the tenant is obliged to *pay* rent during the whole term. The premises consisted of houses *only*, and the fire has made them *quite useless*. In March, 1763, the premises were *worth nothing;* but the landlord, if he had insisted on the rigor of the law, might have obliged the plaintiff to pay the rent for nothing, during the remainder of the term. Then the plaintiff would have been glad to have delivered up the premises; therefore he left it to the jury to consider, whether it was not to be presumed that the tenant had *abandoned* the lease at the time of the fire, and, accordingly, the defendant had a verdict. So, in the case before us: the store being burned down, the defendants in error were not bound to rebuild; but the plaintiffs in error were bound, by their express covenant, for the rent during the whole term; and although they had paid it in advance, had no claim to recover it back. On the 25th of May, the house was burned down. The premises, for aught that appears, consisted of the store only. From that time to the 5th of December, they were worth nothing. The landlords (the defendants in error,) might have laid by during the remainder of the term; in which case the plaintiffs in error would have lost their money entirely. They would have had no claim to recover any part of it. The idea, that the defendants in error were bailors, and bound to keep the bricks and mortar (the rubbish left by the burning of the store,) in repair, as argued by the counsel for the plaintiff in error, seems to the Court a fallacy. On the contrary, if the defendants in error were bailors, the plaintiffs in error were bailees, and bound to take such care of the property as a prudent man would take of his own affairs. Story on Bailments, 8—16. 1 Smith's leading cases, 100. 2 Jones on Bailments, 6—110—119. Tompkins vs. Saltworth, 280 144 Sarg. & Rawle, 775. It does not appear, however, that they took any care of it, or paid any regard to it after the fire. They were out of the country, and do not appear to have left any agent to attend to it. The bricks and mortar, so frequently spoken of at the hearing, were not the property of the lessees, nor could they have used them without the consent of the lessors. Upon the whole circumstances of this case, we think there was quite as strong grounds for the Judge who tried this cause in the Court below, to presume that the defendants in error entered to rebuild the store by the assent of the plaintiffs in error, that they might have the benefit of the return of their rent they had paid from the time the new store should be completed, (as it was the only way in which they could get anything,) as there was in the case of Pindar against Ainesly & Rutter, for Lord Mansfield to leave it to the jury to consider, whether the tenant had not abandoned the lease. It was insisted, however, on behalf of the plaintiffs in error, that they were entitled to all the rent of the new store for the time intervening between the 5th day of December, 1843, and the first day of May, 1844; but there is no proof as to the relative value of the old store and the new one. The latter may, for aught that appears, have been worth ten times as much as the former. This is an equitable action. We must look at the finding of the Court as though it had been the finding of a Jury, and presume that he took into consideration all the equitable circumstances which he might properly have left to a Jury to consider, had that mode of trial been adopted. There was no eviction in this case, for that can only be by title paramount. Bac. Abr. title Rent, 1. Saunders R. 204, n. 2. Ibidem, 322, n. a. 4 Kent's Comm. 462. 2 Jac. L. Dict. 444. There was no expulsion from the store, for it was gone. There was no actual expulsion from the ground on which it stood, for the lessees had left, not only the premises, by the country. There is no trespass—no tort, for that is waived by the bringing of this action. On the 5th of December, 1843, the new store was leased, and from that time the plaintiffs in error were entitled, upon the principles we have assumed, to a return of the rent they had paid, at the rate at which the defendants in error had received it. Until that time the premises, so far as rent was concerned, were *valueless*. The loss must fall either upon the lessors, or lessees; and there is no more

281 equity that the land should bear it, than the tenant. When the tenant (as in this case,) has expressly covenanted to pay rent, and when the landlord must bear the loss of the property destroyed, the calamity is mutual. 3 Kent's Comm. 467. The Court found what, under all the circumstances, apear to us to have been just and equitable; and if eror would lie in such a case as this, we should not be disposed to disturb the verdict.

The judgment of the Court below is affirmed with costs.

Per Curiam.

ORLOFF M. DORMAN, *vs.* ROBERT BIGELOW, EXECUTOR OF FRANCIS RICHARD.

A. made a promissory note to pay B. a sum of money on a day certain, and C. endorsed thereon, "I agree to stand security for the payment of the within amount." Held, in an action against C., that his undertaking, by the said endorsement, was not within the statute of frauds of this State, and that the action was maintainable against him.

A promise to pay the debt of another, made in writing and signed by the party to be bound, but without expressing the consideration on which the promise is founded, is sufficient, and is not within the statute of frauds of this State.

A surety cannot avoid his liability on the ground, that the payee did not use due diligence against the principal, without showing that he had given the payee notice to proceed against the principal, which he had disregarded.

In the absence of a Bill of Exceptions, showing the testimony exhibited in the Court below, the presumption is, that there was full and adequate evidence before the Jury, to warrant and support the verdict, under the declaration to which it was responsive.

A note filed in a cause, but not connected with the declaration by a Bill of Exceptions showing that it had been given in evidence in the Court below, can not be deemed a part of the record submitted for the inspection of this Court; nor can it be brought before this Court by an assignment of errors.

A Bill of exceptions is necessary, when the alleged error cannot otherwise appear on the record.

APPEAL from the Superior Court of the late Territory of Florida, sitting for the counties of St. John's and Musquito.

282 Judge Douglas did not sit at the hearing of this case.

Assumpsit on the following endorsement on a promissory note by Dorman, the defendant: "I agree to stand security for the payment of the within amount." For the other facts, see the opinion of the Court.

G. T. Ward, for Appellant.

J. & L. Branch, for Appellee:

This was an action on a note made by A. W. Walker, payable to Robert Bigelow, Ex'r., and guaranteed by appellant.

The appellant relies on the 10th section of our Statute of Frauds, (Duval's Comp. 206) and pretends that, under that section, his promise was void, because the consideration was not expressed in writing. The English cases, even if they are to be considered, as having settled the law in England, are not applicable here, where we have a statute essentially different from the English Statute of Frauds. 29 Sar. 2, C. 3. Roberts on Frauds, 467. They, respectively, read thus:—

ENGLISH STATUTE.	STATUTE OF FLORIDA.
"Unless the *agreement* upon which such action shall be brought, shall be in writing."	"Unless the *agreement, or promise,* upon which such action shall be brought, shall be in writing."

The statutes are *verbatim et literatim* the same, except that the words, *"or promise,"* are inserted in ours. No one can doubt, on reading the two statutes and the English cases, that our statute was drawn by a lawyer, and that the word, *promise,* was introduced for the express purpose of meeting the difficulty which had arisen in the English Courts, and to obviate the rigid and inconvenient rule which the Court of King's Bench had felt itself constrained to adopt in Wain vs. Warlters—5 East. 10—because of the failure to insert in the English statute, the words, *"or promise."* No case was ever more reluctantly sanctioned by the Courts even in England. Lord Eldon never approved it—Minet, ex parte, 14 Vesey, jr. 190. In this country, C. J. Parsons disapproved it—5 Mass. 360—and C. J. Parker, after an elaborate examination, expressly refused to abide by it. 17 Mass. 122. The rigor and inconvenience of the rule were so universally complained of, that several of the United States, Florida of the number, have introduced the words, "or promise," into their Statute of Frauds, which exactly accomplishes what was intended by 29 Car. 2, C. 3.

The reasoning of the English cases is, that their statute having 289 been drawn by C. J. Hale, (it is now known, however that he did not draw it,) the words of it ought to have their technical signification given to them; and as the technical word *agreement* embraces the *"consideration* for the promise, as well as the *promise* itself, "it must follow, that the consideration for the promise, as well as the promise itself, should be in writing. In Wain vs. Warlters, Lawrence, Judge, said: "If the question had arisen merely in the first part of this clause," that is, where the word promise is used, "I concur that it would only have been necessary that the promise should have been in writing." Le Blanc, Judge, said: "It would have been better if the Legislature had used the words, 'unless the promise or agreement, upon which the action is brought, shall be in writing,'—but not having done so, I think we must adhere to the strict interpretation of the word agreement; which means, the consideration for which, as well as the promise by which a party binds himself." So reasoned all the Judges, not only in that, but in all subsequent cases.

As by the express terms of our statute, if the *promise* is in writing, it is sufficient: the reasoning can have no force here. Violett vs. Patten—5 Cranch, 151—was a construction by the Supreme Court of the U. S., of the Virginia statute, which is an exact copy of ours. The Court said, it was sufficient if the promise was in writing, and that the consideration need not be.

This is not a promise to answer for the debt of another. It is an original independent undertaking, concurrent and joint with that of the maker, and does not come under the Statute of Frauds. Hunt, Adm'r. vs. Adams, 5 Mass. 360. Snively vs. Johnston, 1 Watts and Serg. 309. Story on Prom. Notes, 58, and notes.

MACRAE, Justice:

This is an appeal from a judgment rendered by the late Superior Court of St. John's County, in an action of assumpsit brought by Robert Bigelow, Executor of Francis Richard, deceased, against Orloff M. Dorman, to recover from the latter, as endorsee, surety, and promisor, the amount of a promissory note alleged to have been executed by one Augustus W. Walker, to the plaintiff, for the hire of a slave, with the following endorsement, alleged to have been made by the defendant:

"I agree to stand security for the payment of the within amount. 290
O. M. DORMAN."

The declaration contains five several counts. The first, charges defendant as endorser of a promissory note: the second, proceeds upon his promise and undertaking in writing, to pay the plaintiff the sum of $205, the amount of said note, when due, in consideration that plaintiff would hire a slave to one Augustus W. Walker, for one year: the third, charges the defendant upon his undertaking in writing, upon a like consideration, to stand security for the payment of said sum for said hire, when due: the fourth, is founded upon a like undertaking, in consideration that plaintiff had hired said slave as aforesaid: and the fifth sets out, that defendant in consideration that plaintiff had hired said slave to said Walker, for said sum for one year, upon condition that said Walker should give his promissory note with good security, for the payment thereof, made his endorsement in writing on the note so given by said Walker, whereby defendant promised to stand as security for the payment of said sum of money, being the consideration of the hire aforesaid. To this declaration the defendant pleaded the general issue; upon which plea issue was joined, and thereupon verdict and judgment were rendered for the plaintiff.

No bill of exceptions has been returned, or appears to have been taken and filed in this case, whilst the errors assigned by the counsel for the appellant, appear to be exclusively based upon the note or instrument filed with the declaration, in the view taken by him of the legal character and effect of the endorsement thereon. Nor has an assignment of error been regularly made and presented. Those, however, which have, by consent and with the leave of this Court, been informally presented in argument, are of the limited scope just mentioned, and they appear to resolve themselves into two leading objections to the judgment below, to which alone we deem it proper to direct the attention of this Court; and in doing this, we do not, as will be shown in the sequel, consider the determination of these points to be indispensable in making up our opinion and judgment upon the record before us.

The first, and main ground of error relied on is, that under the tenth section of the Statute of Frauds of the State of Florida—Duval's Comp. 206—the appellant is not liable on account of the endorsement in question, for want of a consideration expressed upon the face

291 or it, whereon to predicate his alleged undertaking or agreement. In support of this ground, his counsel here assumes the position, that the tenth section referred to, demands the same interpretation as the fourth section of the Statute of Frauds of England—29 Ch. II c. 3—on the same subject; and for a proper construction of these sections in view of their application to this case, cites the leading English and New York cases of Wain vs. Warlters, 5 East. 10, and Sears vs. Brinck, 3 Johns. 210.

The tenth section of the Statute of Frauds of this State before mentioned, provides, "that no action shall be brought whereby to charge any Executor, &c., upon any special premises," &c., *"or whereby to charge the defendant, upon any special promise, to answer for the debt, default, or miscarriage of another person,* or to charge any person upon any *agreement* made upon consideration of marriage," &c. "or upon any *contract* for the sale of *lands,"* &c., "or upon any *agreement* that is not to be performed within the space of one year,' &c., "unless the *agreement* or *promise* upon which such action shall be brought, or some note or memorandum thereof, shall be in writing and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized." The corresponding section of the English statute referred to, provides, "that no action shall be brought whereby to charge the defendant upon any special *promise* to answer for the debt, &c., of another person, &c., unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be in writing," &c. The Statutes of Frauds, of most of the States, including New York, conform expressly to that of England. Those of Virginia and Tennessee correspond with the statute of Florida, to the extent above recited.

Supposing the case of Wain vs. Warlters at all applicable in the decision of the case at bar, an important preliminary question arises, Whether the decision in that case, is applicable to this, in view of the terms of the 10th section of our statute?—or, in other words, Whether the latter makes it essential to the validity of a written promise to pay the debt of another, that it should express on its face the consideration on which it is based? In the case of Colgin vs. Henly—6 Leigh's Va. R. 85—it was the unanimous opinion of the Court, that under the Statute of Frauds of Virginia, the consideration need not be expressed in written promise, but that it stood as at
292 common law in that regard. This opinion is fully supported by that of the Supreme Court of the United States, pronounced by Ch. J. Marshal, in the case of Violett vs. Patton. 5 Cranch, 142—151.

That the tenth section of our Statute of Frauds, in common with that of Virginia, differs in a material point from the 4th section of that of England, is sufficiently clear, not only from the reasoning used in the American cases just cited, but from that employed by several of the learned Judges in the case of Wain vs. Warlters. Upon this difference, indeed, the latter case seems mainly to have turned; for, in its decision, Lawrence, J., says: "If the question had arisen on the first part of the clause, I conceive that it would only have been necessary that the *promise* should have been stated in writing; "but, he adds, "the statute going on further to say, that no person shall be charged, &c., unless the *agreement,* &c., be in writing, shews that the word *agreement* was meant to be used in a sense different from *promise,* and something besides the mere promise was required to be stated." Le Blanc, J., says: "I should have been as well satisfied, however, if recurring to the words used in the first part of the clause, they had used the same words again in the latter part, and said, unless the *promise* or *agreement,* &c., be in writing. But not having so done, I think we must adhere to the strict interpretation of the word *agreement,* which means the *consideration* for which, as well as the *promise* by which the party binds himself." And it may be fairly inferred, from the language of another of the Judges in that case, that he was of the same opinion. Now, it would appear, that what these Judges desired, or supposed that Parliament might have done, is, what our Legislature has accomplished intentionally. Our statute, certainly, does not mean to give validity to any promise because in writing, which would not have been valid at common law; and, therefore, would not support one, without sufficient legal consideration, which must be averred, and may be proved at the trial by paro evidence, as heretofore required at the common law. As to the mischief which it was supposed the statute meant to prevent, it is perhaps sufficient, in view of the ordinary routine of business transactions, that the *promise* to pay the debt of another should be in writing. It might be safely assumed that, in a very large majority of such cases, the written promise would be found to be sustained by a sufficient legal consideration, which it may be perhaps more proper to leave to parol proof at the trial, than to limit it by a rule, the strict- 293
ness of which may lead to more fraud in pleading, than it would prevent in testimony. But were our statute an exact transcript from the English, or alike subject to the rule of construction laid down in Wain vs. Warlters, it appears that the decision in that case has not met with such universal favor, either in England or the United States, as to make it conclusive authority with this Court, as a precedent. Indeed, it seems to have been received in England with considerable surprise and disfavor, as a new construction given to a statute which had been in operation upwards of a century, in support of which no former case was cited, either by counsel or the Judges, at the time it was decided. Lord Eldon has, in the Chancery Court, positively denied its correctness, and in one instance overruled it. In one case he says: "There is a variety of authorities directly contradicting the case in King's Bench, which is a most important case in its consequences; for the undertaking of one man for the debt of another, does not require a consideration moving between them." And again, in another case he says: "The first objection, viz., that which Wain vs. Warlters was cited to support, is of great importance. Until that case was decided some time ago, I had always taken the law to be clear, that if a man agreed in writing to pay the debt of another, it was not necessary that the consideration should appear upon the face of the writing." Ex parte Minet, 14 Vesey, 189—and exparte Gardom, 15 Vesey, 289.

It is true that the case of Saunders vs. Wakefield, 4 Barn. & Ald. 595, would seem to extend, whilst it recognizes the grounds taken in the case of Wain vs. Warlters; but the case of Jenkins vs. Reynolds, 7 Eng. C. L. R. 328, goes back to the grounds taken in the case of Wain vs. Warlters, referring to the technical import of the word *agreement.* The case of Egerton vs. Matthews, 6 East. 307, would appear too, to conflict with the leading case of Wain vs. Warlters, although the decision turned upon the 17th sec. of the English Statute of Frauds, in application to that case in which it was determined that a memorandum of a bargain for the sale of goods, signed by the party to be charged, would take the case out of the statute, although the consideration of the bargain was not expressed in the memorandum. A bargain is a contract or agreement between two parties, the one to sell, and the other to buy; and the consideration of a bargain would appear to be as indispensably a part of it, as it is of any 294
other contract or agreement; and there would seem to be as much risk of perjury in proving the consideration of a bargain as of any other agreement, by parole evidence.

In New York, the decision in Wain vs. Warlters, is not only adopted in the case of Sears vs. Brinck, but generally; referring in later decisions to the express terms of the revised statutes, which require that the consideration of an agreement to pay the debt of another, must be expressed. Leonard vs. Vredenburg, 8 John. 29. Smith vs. Ives, 15 Wend. 182. Packer vs. Wilson, 15 Wend. 343. Rogers vs. Kneeland, 10 Wend. 218. But in the case of Leonard vs. Vredenburg, Ch. J. Kent observed, that, "He had not been altogether satisfied with the decisions therein referred to," and adds further, "the present motion can be decided without disturbing them."

In Massachusetts, whose Statute of Frauds is the same as that of England, the case of Wain vs. Warlters has been entirely overruled, not only in the case of Hunt vs. Adams, 5 Mass. 360, cited by the counsel for the appellee, but in other cases, particularly that of Parckard vs. Richardson—17 Mass. 122——in which last case, Ch. J. Parker, in pronouncing the opinion of the Court, examines and controverts the English decision in question, with great ability and learning. In that opinion, he says: "Until 1804, when Wain vs. Warlters was decided, there was no case in support of the doctrine of that case, and that decision excited much surprise, both in England and in this country. Our statute is copied from the English, and has been in operation more than a century, and it never, until lately, has been doubted, that if one man, for a sufficient consideration, deliberately signed his name to a promise to pay the debt of another, it is a sufficient compliance with the statute, without any recital in writing, of the consideration upon which the promise is founded. Although, some consideration must exist to give validity to such a promise, it is generally of a nature not to be disputed, and if disputed, has been proved by parole testimony. The consideration is seldom for the benefit of the party making it; forbearance to sue, and the like, being most frequently the consideration of such undertakings; and these being altogether for the benefit of the original debtor. This being the case, it would not enter into the imagination of the parties to such a contract, that, unless the motives and considerations which led to it were down in writing, the agreement was void."

295 In the case of Sage vs. Wilcox—6 Conn. R. 81—Ch. J. Hosner, in delivering the opinion of the Court, comes also the conclusion, after an able and elaborate review of the English and American cases on the subject, that the *consideration* of an *agreement* to answer for the debt of another, is not required by the Statute of Frauds of that State, to be in writing.

Thus, it appears that whatever view be taken of the Statute of Frauds of this State, it is clear that under the 10th section thereof, a promise to pay the debt of another, made in writing and signed by the party to be bound, is a sufficient compliance therewith, without any recital in the writing of the consideration upon which the promise is founded, it being competent for the plaintiff, having averred the consideration in such cases, to prove the same by parol testimony on the trial, as at the common law.

But the binding effect of the endorsement in question, does not depend upon the views just taken. On the contrary, it is manifest that the terms of this endorsement, in connection with those of the note or instrument declared on, take it out of the operation of the Statute of Frauds, giving it the most rigid construction that has been placed upon those of England or New York. It is clear, that in this case, the appellant is bound in virtue of this endorsement, the note in question furnishing a sufficient consideration to sustain the promise or agreement so endorsed, and this, whether the endorser be regarded as a joint and several maker of the note absolutely, or as a guarantor, undertaking for the payment thereof. The note and the endorsement being taken as one instrument, the nature of the consideration and promise are therefore sufficiently expressed in writing. Story on Prom. Notes, s. 58. Hunt vs. Adams, 5 Mass. 358—360. Bailey vs. Freeman, 11 John. 221. Rogers vs. Kneeland, 10 Wend. 218. Adams vs. Bear, 12 Mass. 137. Monroe vs. Durham, 3 Hill, 584. Baker vs. Briggs, 8 Pick. 122. Chaffer vs. Jones, 19 Pick. 260. Luqueer vs. Prosser, 1 Hill, 256. Douglas vs. Howland, 24. Wend. 35.

The next ground of error presented is, that there is no averment and proof of due diligence on the part of the appellee, in pursuing his debt against the principal in the promissory note. As to this objection, we deem it sufficient to remark, that notice to the payee is necessary in order to release the surety, and that nothing appears on the record to that effect, or otherwise sustaining the view thus taken.

296 But, as we have intimated, this case presents itself upon the record in an aspect which might well dispense with the determination of the points set up by the plaintiff in error. There being no bill of exceptions, there is nothing to connect the note, upon which the alleged errors are grounded, with the declaration, so as to shew that the former presented the only testimony exhibited before the jury in support of the latter, or that the note was presented in evidence at all. It is merely recited in the declaration as a promissory note. The note, or a copy of it, is required to be filed with, and appended to the declaration by statute, perhaps for the purpose of enabling the defendant the better to make his defence to the action; and it was in the option of the plaintiff to offer it in evidence or not, as he might deem it expedient; and unless it had been so presented, no notice could have been taken of it, as evidence on the trial below. It is therefore not deemed to be a part of the record submitted for the inspection of this Court, though it might have been made so by a bill of exceptions duly made up in the Court below, as we have hinted. Nor can it be properly brought before us through the medium of an assignment of errors, however formally made. This is too obvious to require discussion.

This case is brought here by writ of error. This letter, or an appeal in the nature of it, is a proceeding in virtue of which a Superior Court examines a record, upon which a judgment was given in another Court inferior to it; and on such examination, to affirm or reverse the same. 6 Wheat. 264. 6 Cond. R. 90. Peters' Digest, 131, s. 19. And when the alleged error cannot otherwise appear upon the record, a bill of exceptions is necessary to that end. 7 Wheat. 530. 5 Cond. R. 334. Peters' D. 132, s. 21.

In 7 Mass. 448, it is laid down, that a note filed in a cause, as evidence in support of the plaintiff's action, or to prove his damages upon default, is not part of the record, and the Court cannot take notice of it upon a writ of error, on the ground that illegal evidence was admitted in support of the action, or in assessment of damages. In further support and illustration of this doctrine, we may also refer to 8 Mass. 383, and 15 Peters, 129. In the latter case the Court held, that the note filed in the cause was not part of the record; that, therefore, that Court could not judicially know when the interest, in regard to which a question of error arose in the case, had commenced running. And it was further remarked, that this ground of error 297
should, for the reason mentioned, have been brought before the Court below, by bill of exceptions setting out the note.

In the case before us, for aught that appears to the contrary, other proof besides the note in question, may have been presented on the trial below, and such as may have influenced or determined the verdict and judgment: and there is nothing to show, that such proof, if so presented, was inadmissible, or otherwise exceptionable in law. In the absence, therefore, of a bill of exceptions, showing the testimony exhibited, the presumption is, that there was full and adequate evidence before the jury, to warrant and support the verdict, under the declaration to which it is responsive.

In this view then, the only ground of error of which the appellant can avail himself upon the record and the pleadings, &c., thereby presented, would be, that the declaration of the plaintiff is wholly insufficient to maintain this action. As to this, it is sufficient to remark, that the second, third and fourth counts in the declaration, do not necessarily rest upon the evidence presented by the note filed. They are sufficient in themselves, if sustained by proof, to entitle the plaintiff to recovery, and there is nothing to show that they were not so sustained before the jury. But it has not been attempted to argue, much less formally to set up a ground of error, that the declaration is insufficient in any respect to support the verdict and judgment. Nor was any such exception taken to it in the Court below, by demurrer or otherwise.

Upon the whole therefore, we are unhesitatingly of the opinion, that there was no error in the judgment of the Court below in the case. It must, consequently, be affirmed with costs.

STATE *vs.* CHARLES, A SLAVE. 298

By the Constitution of the State, the jurisdiction of this Court being appellate only, so much of the act of the Legislature of the Territory of Florida, approved 6th February, 1841, entitled "An Act regulating Appeals and Writs of Error in criminal cases," as enables a Judge, having a doubt upon a legal question arising in the case at the trial below, to continue the case, and make a statement in writing of the question of law, and transmit the same to the Court of Appeals for its consideration and decision, and directs the Judges of the Court of Appeals, without delay to decide the same, is inoperative; and this Court has no jurisdiction of cases brought up under said act.

THIS case was brought up from the County of Hamilton, under the act of the Territory of Florida, approved 6th February, 1841, entitled "An Act regulating Appeals and Writs of Error in criminal cases,"—the presiding Judge, his Honor Judge Hawkins, having continued the case and granted a certificate of a doubt upon a legal question which arose at the trial in the Court below, and transmitted the same to this Court for its decision.

A motion was made to dismiss the case, on the ground that this Court being appellate only, had no jurisdiction of such case.

Attorney General, for State.

Carmack & Baker, for Defendant.

DOUGLAS, Chief Justice:

The prisoner in this case, was indicted at the last October Term of the Circuit Court, holden in and for Hamilton county, under the 39th section of the act 21st November, 1828, entitled "An Act relating to crimes and misdemeanors committed by slaves, free negroes and mulattoes," Duval's Comp. 224, for an assault with an intent to commit a rape on one Zilpha Pennington. The section of the act referred to, declares: "That if any negro or mulatto shall assault any white woman or child, with intent to commit a rape, such negro or mulatto shall be cropped, branded, or suffer death, at the discretion of the Court." Zilpha Pennington was a *white woman,* but the indictment did *not so charge.* A question was raised in the Court below, upon the validity of the indictment on that ground; and the Judge who held the Court at that Term, entertaining a doubt upon that point, made a statement in writing of the question of law, and

299 brought the same to this Court, pursuant to the provisions of the act of 6th February, 1841, entitled, An Act regulating Appeals and Writs of Error in criminal cases, by the first section of which it is enacted, that from and after the passage of this act, no *appeal* or *writ of error*, or *bill of exceptions to evidence*, shall be entertained, allowed or granted to a defendant or defendants in criminal prosecutions, in any of the Courts of this Territory; but if, in the trial of any criminal prosecution, the Judge before whom the same is tried, shall entertain a doubt upon any legal question arising in the case, then, and in that case, the said Judge, after verdict rendered, may continue the same, and shall as soon as convenient, make a statement in writing of the question or law, and carry up, or transmit the same to the Court of Appeals, for its consideration and decision.

Upon this state of the case, a question arises, Whether this Court has any jurisdiction of the matter? The Constitution of this State, Article 5, section 2, declares, that the Supreme Court, except in cases otherwise directed in this Constitution, shall have appellate jurisdiction *only*. This is not one of the *excepted cases*. Is it a case in which this Court is called upon to exercise *appellate power*? Here is no final order, judgment, or decree of the Court below, from which an appeal could be taken, or writ of error prosecuted; and the statute expressly provides, that there shall be *no* such order, judgment, decree, appeal, or writ of error, but when the Judge of the Court, who may be trying such a cause, shall entertain a doubt upon any legal question, authorises him, after *verdict* and *before judgment*, to continue the case and send up a statement of the point of law, that it may be decided in the Court above. If the Court were to consider and decide it, the question not having been before decided, the action of the Court would be an exercise, rather of original jurisdiction, than of appellate power. Whatever power the late Court of Appeals, in reference to which the act was passed, may have possessed in such cases, this Court, upon mature consideration, is of opinion that it has no jurisdiction of a case thus brought up.

This is a case of highly penal character; and that circumstance, together with the fact, that the law recognizes no other method for bringing up a criminal case, caused the Court to hesitate and weigh the matter well, before it declined to take jurisdiction of it. But, it will be preceived, that, if the Court has jurisdiction of a matter thus
300 brought up, it would be competent for the General Assembly to provide by law, that, if in the trial of any civil case, the Judge who tries the same, shall entertain a doubt upon any point of law arising in it, either upon the pleadings, reception, or rejection of testimony, instruction given, or asked and refused to be given to a jury, or any other legal question, such judge, after verdict and before judgment, may continue the same, make a statement of the point of law on which the doubt arose, and certify it to this Court for its consideration and decision thereon; thus, making this tribunal a Court for the trial of all original questions of law arising in the Circuit Courts. No one, it is believed, would seriously contend that this Court could take cognizance of such questions so presented. The question of jurisdiction, as was remarked by Judge Baltzell, in pronouncing the opinion of the Court in the case of Stewart and Preston, at the last Term, on the motion to dismiss, is always a delicate one; and the most prudent and safe course for a Court of dernier resort, where any doubt about the power exists, is deemed to be, to decline to act. The exercise of doubtful powers, by a Court of the last resort, is always extremely dangerous, and tends to excite alarm and distrust. If this, therefore, were a doubtful question, that fact would fully justify us in dismissing the proceeding; but, after having bestowed upon it the most deliberate consideration, we do not deem it such.

Let the case, therefore, be dismissed; and the papers transmitted to the Clerk of the Court below.

Per Curiam.

RICHARD C. SPANN *vs.* GEORGE F. BALTZELL. 301

The endorsement of a note is not a collateral undertaking of the debt of another, within the meaning of the Statute of Frauds; but is a new contract between the endorser and endorsee. The contract of each endorser being thus an independent one, he stands on the same footing as any other contractor, and possesses the same rights and powers as to any alteration, revision, or waiver of his contract of endorsement, by and with the consent of the endorsee.

As a general rule, a verbal agreement between the parties to a written contract, made before, or at the time of the execution of such contract, is inadmissible to vary its terms or affect its construction; but, after the contract is reduced to writing, it is competent to the parties, at any time before the breach of it, by a new contract, not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, subtract from, or vary or qualify the terms of it.

In cases of a substituted agreement, the plaintiff can always declare on the written contract; and, unless defendant can prove performance according to the terms of the contract, or according to the agreement for a substituted performance, the plaintiff would be entitled to judgment.

But these cases of substituted oral agreements being considered in the light of new contracts, it is requisite that they be made upon some new and valuable consideration.

An agreement between an endorser and an endorsee of a note, by which the endorser promised to pay the note at maturity, punctually and without fail, out of his own funds, and the endorsee, in consideration thereof, agreed to receive payment in the bank notes or bills of the Southern Life Insurance and Trust Company, which were depreciated, is a substituted agreement, founded on a good and valuable consideration, and is binding on the parties.

A plea of a tender and refusal of the bank notes of the Southern Life Insurance and Trust Company, on the day the note became due, must be pleaded with a profert in curia of the bank notes.

The Statute of Frauds does not apply to such new and substituted agreement, inasmuch as the endorser had for his object a benefit which he did not before enjoy, accruing immediately to himself, and by which he could pay the note with a less sum than was originally to be paid by him, in case of default by the maker.

Entries made in the usual mode of business, and duly authenticated by the oath of the party who made them, are admissible in evidence, though the party making them can remember and testify nothing as to the facts contained in the entries. The paper must be an original one, made at the time the facts contained in it are alleged to have taken place, and confirmed by the oath of the witness, that he believes it contains a true statement of the facts.

The original Protest of the demand and non-payment of a promissory note is 302
admissible in evidence, and evidence of its contents, when the Notary who made it testifies that it was drawn up at the time of the demand of payment, and that he believes the facts stated therein to be true, and to have occurred; else he would not have certified to their occurrence as Notary; but that he recollects none of the facts independent of the Protest.

Where a Notary testified that he sent notice of non-payment to the defendant, as stated in the certificate endorsed upon the protest of the note, which certificate stated that due notice of the protest was given the endorser, by depositing the notice in the P. O. at Apalachicola, addressed to R. C. S. Franklin, Alabama, the reputed place of his abode; held to be sufficient proof of notice.

No particular form of notice of dishonor of a note being necessary, it seems the notice would be good, if it be sufficient to put the party on enquiry, and prepare him to pay the note, or defend himself; and even if there be some uncertainty in the description of the bill or note, if it does not tend to mislead the party, it will be good.

When a note was made payable at the Agency of the Southern Life Insurance and Trust Company Bank, Apalachicola, which had been removed from Apalachicola some weeks previous to the day of the alleged presentment of the note, such removal rendered the demand at the Agency impossible and when, demand having been made at the place of payment of the note, it was found that the Agency had been removed from Apalachicola, a sufficient demand was made to fix the endorsers.

When facts or circumstances exist, which amount to an excuse, or do away the necessity of a demand, the declaration may be in the usual form, and proof of the facts which dispense with a formal demand, will, in law, be deemed proof of a demand.

ERROR from Franklin Circuit Court.

This case was tried at the February Term, 1845, of the Superior Court for Franklin county, of the late Territory of Florida.

The facts of the case are fully reported in the opinion of the Court.

W. G. M. Davis, for Plaintiff in Error.

Long & Walker, for Defendant:

Baltzell recovered a judgment, in the Franklin Superior Court, against Spann, as the endorser of a promissory note, to reverse which judgment this writ of error is prosecuted in this Court.

The first error assigned is:

1. That plaintiff's demurrer to defendant's special pleas, ought not to have been sustained.

In order to determine this question, the pleas must be examined. They all plead the same matter in different forms, which is in sub-

303 stance, that before the note fell due the defendant agreed with the plaintiff to abrogate his contract of contingent liability to pay the note. If demand was duly made of the maker, and he should fail to pay, due notice should be given of such demand and refusal to the endorser, the defendant; and that in lieu of this contingent liability, the defendant would pay the debt himself, on the day it should fall due, in bank bills. This is the only part of the pleas which is so pleaded as to be admitted by the demurrer. It is true that the plea further alleges, that on the day the note fell due, the defendant, Spann, tendered and offered to pay the said note in bank bills, as he had agreed to do, and that the same was refused to be received. But this fact is not admitted by the demurrer, which is special; because the bank notes alleged to have been tendered, do not accompany the plea in Court. This is assigned as a special cause of demurrer, and is fatal to the plea. (6 *Duncan's Ab.* 464-5.) Stephen on Pleading, 162. Chitty on Pleading.

This is also a mere plea of accord without satisfaction, and therefore bad. Smith's Leading Cases, 253-4. 6 Wend. 390. 19 Wend. 516. 23 Wend. 342.

It is clear, therefore, that this demurrer was properly sustained, upon each of these independent grounds. But there is a third equally clear, which only needs to be named to be perceived, viz.: the promise of Spann to pay this note, before he was absolutely liable on it, was a mere promise to pay the debt of another, and not being in writing was void, and therefore was no consideration in law, for the alleged promise of Baltzell to receive bank notes, in payment of the note, from the endorser.

Before I proceed to examine the other two questions involved in the assignment of errors, by the sufficiency of the demand of the maker and the proof of the notice to the endorser, I will attempt to show that Spann, by his agreement alleged in his plea, waived his right to require, demand and notice, as a condition precedent to his absolute liability to pay. The Court will see that the allegation of tender, being unaccompanied by the notes said to have been tendered, is not admitted by the demurrer, and is, therefore, not to be regarded as true, as the above recited authorities prove. The plea, then, simply amounts to the mutual admission, that, prior to the maturity of the note, Spann, the endorser, agreed to pay it himself, on the day it
304 should fall due, in the manner agreed upon by the parties, and that he failed to do so. Now, this fact is deemed sufficient to show, that it was the express agreement of both parties, that Baltzell should look to the endorser, Spann, and not to the maker, on the day the note should fall due. The agreement can have no other sensible meaning; for it would be absurd for Baltzell to expect payment on the day the note should fall due, from both maker and endorser. Therefore, the promise to receive from the endorser, was tantamount to a promise not to demand or receive from the maker. Spann cannot, in good sense, be presumed to have expected Baltzell to make demand of payment from the maker, in the face of this agreement to pay it himself in bank notes, on the very day when such demand must have been made upon the maker, in order to fix the liability of the endorser, agreement, which is believed to be this: If Spann, the endorser, will is the irresistible conclusion from his conduct. It does not lie in his mouth to allege, that he was only attempting to put Baltzell off his guard, and induce him to omit demand and notice. He shall not take such an advantage of his own fraud and deception. The parties are presumed to have been aware of the legal character of the agreement, which is believed to be this: If Spann, the endorser, will punctually pay the note out of his own means, when it falls due, he may do so in bank notes worth less than coin. For this concession on the part of Baltzell, Spann agrees to consider his liability no longer contingent, but absolute, and, consequently, to dispense with the necessity of demand of the maker, and notice of that fact to himself, according to law. The contract being void in law, so that Baltzell could not have sued upon it, of course could not amount to a consideration for setting aside the legal pre-existing contract. But Spann had a right to waive demand and notice, and he seems to have done so in the most express manner. Bayley on Bills, 301-2. Boyd vs. Cleveland, 4 Pick. Rep. 525. Leffingwell vs. White, 1 Johns. Cas. 99. (*Merton vs. Lewis, 2 Con. Rep.* 478.) Taunton Bank vs. Richardson, 5 Pick. 436. Leonard vs. Gray, 10 Wend. R. 504.

The case at bar is a promise to pay by the endorser, in consideration of being permitted to pay in depreciated bank notes. The case in 2 Con. Rep. 497, was a promise by the endorser the day before the note fell due, in consideration of time given him. The case in 4 Pick. 525, was a promise without any consideration at all. The endorser informed the holder, that he would be in New York, where 305
the note was payable when it fell due, and would take it up. This case is similar to the one at bar in this, that the holder, notwithstanding this promise, attempted to make the demand and give the notice, and the Court held that such attempt, though abortive, did not affect the question. In the case in 1 Johns. Cas. 99, the endorser was negotiating with the holder of the note for terms of payment, by giving a new note, and the agreement had not been completed when the note fell due, and no demand and notice was made or given. The case in 5th Pick. 436, was this: the endorsers procured the discount of the note at a bank, and promised to attend to the renewals, and also directed the bank to send notice to their care to the maker. In the case in 10 Wend. 504, the endorser, before the note fell due, informed the holder, that he would see him paid, and directed him to give himself no uneasiness about it. This promise also, was wholly without consideration. In all these cases, demand and notice was held to be waived by the endorser. To enumerate more authorities to this point would seem to amount to little else than an "affectation of adroitness in case hunting."

2. But if the Court shall, on any account, choose to enquire into the questions raised, or attempted to be raised by the second and third assignment of errors, it is believed that the case is still clearly with the defendant in error. It is contended, that the demand was not made at the proper time of day; that it was made during the business hours of the bank, as proven by the notary, is said not to be sufficient, because it is said that Robbins proves that the usages of the Southern Life Insurance and Trust Company, at which the note was made payable, was, not to consider notes due until four o'clock. To this objection we make three answers, either of which is deemed sufficient. The first is, that the demand being made within the business hours was sufficient, as shown by the numerous authorities heretofore cited in this cause. The three cases cited on the other side, to sustain this objection, deserve but little consideration.— The two cases from Mas. Reps. are mere *dicta;* the question not at all arising in either case. In one, the holder of a note, payable at a bank, sued out an attachment against the goods and chattles of the maker, a little after twelve o'clock, and the Court decided that the action was prematurely brought. In the other, the bank was the holder, and made demand and gave notice before the beginning of 306
the business hours, contrary to the uniform custom. This, the Court held to be unfair and insufficient. The case from Mississippi relies upon those from Massachusetts, above named, and declares them decisive of the question. This is sufficient to prove, that the decision was carelessly made, and unsupported by authority. This, surely, ought not to be regarded as sufficient to overturn the long and well settled doctrine on this subject.

But there are still two other answers to this objection. The first is, that it is not sufficiently proven that it was the custom of this bank not to demand payment of notes until four o'clock. Robbins, the former Cashier, does indeed say so in his testimony; but Ellis, the Notary, says, the custom was different, namely: to make demand between noon and dark. Admitting each of these witnesses to be equally credible, for the sake of argument, it amounts to no proof of any particular usage or custom on the subject; consequently, the demand being made at the place named in the note, any time during the day on which it fell due, was sufficient.

There is still another answer to this objection, flowing from the proof of the cause. Robbins swears, that the bank had ceased to exist long before the note fell due. The custom or usage of that bank, therefore, whatever it was, ceased to exist also. If it be said, that, by the contract the parties agreed to make the demand according to the custom of the bank, that agreement, to be sensible, must be presumed to have been coupled with the proviso, that the custom and the bank should continue to exist until the maturity of the note. There has been no authority shown, and perhaps cannot be, declaring that the law of the land shall be superceded by an extinct, or abolished usage or custom.

3. The third, and last question raised by the assignment of errors is, as to the sufficiency of the proof of notice to the endorser, of the demand made upon the maker. The proof is said to be defective.

Upon an examination of the record, it will appear that this question is not properly before the Court. It is attempted to base this objection upon the sixth and last instruction asked by plaintiff in error of the Court below and refused, viz.: "that, upon the evidence in the case, the plaintiff is not entitled to a verdict," &c. It does not appear that this objection was made in the Court below; and that is

307 a sufficient reason to exclude it here, according to the rule of practice in this respect. This is nothing more than an irregular and informal attempt to demur to the evidence, and therefore ought not to be sanctioned or encouraged by this Court. If the opinion of the Court upon the sufficiency of evidence to prove a given fact, be desired, it can only be directly elicited by demurring to the evidence, and dispensing with a jury. But where the jury is retained, they are to judge of the effect and sufficiency of the evidence, and not the Court. Why have juries at all, if they are merely to record the opinions of the Court upon matters of fact? The instruction was improper, and ought to have been refused.

But whether this question of fact were decided by the Court or Jury, the decision will not be disturbed by this Court, unless there appears to have been a great preponderance of evidence against such finding. Instead of this, it is contended that no fact could have been better proven. In the first place, the certificate of the Notary, proven to be genuine, offered and admitted in evidence without objection, proves notice generally and particularly. It is now too late to object to the competency of this evidence. This is the broad and obvious distinction between this case and that of Morrison and Whitaker, decided by this Court at its last Term, so much relied upon on the other side.

HAWKINS, Justice:

Error from Franklin Superior Court. Action was brought in the Court below, by Baltzell against Spann, under an attachment for $1400, and the declaration was in assumpsit, on the following promissory note against Spann, as endorser:—

APALACHICOLA, Dec'r. 3d, 1840.

By the 22d of May, 1842, I promise to pay to the order of L. M. Stone, at the Agency of the Southern Life Insurance and Trust Company Bank, Apalachicola, fourteen hundred dollars, for value received. JAMES H. CAMPBELL.

Endorsed—L. M. STONE,
JOSIAH S. PATTERSON,
S. SCARBOROUGH,
RICH'D C. SPANN.

Baltzell sued as the immediate endorsee of Spann. The declaration avers, that at the time the note became due and payable, accord-
308 ing to its tenor and effect, it was duly presented for payment at the Agency of the Southern Life Insurance and Trust Company at Apalachicola, but that payment was refused; of all which the defendant had due notice.

To this declaration the defendant pleaded, first, that the plaintiff ought not to maintain his action to recover any more, or any other kind of money, or a verdict for damages against him, than the sum of *fourteen hundred dollars in bank notes, or bills of the Southern Life Insurance and Trust Company,* because that after the making of the note sued on, and before the commencement of this action, to wit, on the 3d day of March, 1842, Baltzell, in consideration that Spann promised to pay the note sued on at maturity, punctually and without fail, out of his own funds, promised and agreed to and with said Spann, to receive payment of the said note in the bills or notes of the Southern Life Insurance and Trust Company. The plea further avers, that on the day the note became payable, Spann offered and *tendered* to pay Baltzell the sum of fourteen hundred dollars, in the said Southern Life Insurance and Trust Company bills, but that Baltzell refused to receive the same; that he had always been ready, and still was ready to pay in such bills.

The second plea is substantially the same as the first, as well as the third, each setting forth a fender, with *uncore prist* and *tout temps prist.*

Besides these pleas the general issue is pleaded.

To the special pleas there was a special demurrer on the following grounds: that the plea was not one of *tender,* but of accord, but of accord without satisfaction; that it aims to discharge a note by payment of bills of a bank known to be insolvent, and worth only sixty cents in the dollar at the time of tender; that the proffer of payment, if good as tender, was good without the agreement set forth, and if good as a tender, the bills should have been filed in Court; that the tender should have been made in *money,* brought into Court and filed with his plea; that the agreement, as stated by defendant, was wholly without consideration moving from defendant to plaintiff. The demurrers to the special pleas were sustained by the Court, and the pleas overruled and the case sent to the jury on the general issue and joinder, and verdict found for plaintiff.

By an inspection of the bill of exceptions in the case, it appears

that, after the note sued on was read in evidence, M. P. Ellis was 309
called by the plaintiff, who testified that he presented said note in the manner and at the time stated in the following protest:

TERRITORY OF FLORIDA, *Franklin County.*

By this public instrument of protest be it known, that on the 25th day of May, 1842, at the request of Geo. F. Baltzell, the holder of the original note, of which a true copy is hereon endorsed, I, Marshal P. Ellis, a Notary Public, residing in the city of Apalachicola, qualified according to law, went to the office of the Southern Life Insurance and Trust Company, and presenting said note demanded payment thereof from the Cashier, who refused to pay the sum—that no funds were deposited for that purpose. Whereupon I, the said Notary, at the request aforesaid, do hereby solemnly and publicly protest the said note, as well against the drawer or maker thereof, as against the endorsers, and all persons who are, or may be concerned therein, for all exchange, re-changes, damages, costs, charges, and interest suffered, or to be suffered for the non-payment of said note. This solemnly done and protested.

Given under my hand and seal at Apalachicola, the day and year first above written.

M. P. ELLIS, *Notary Public.*

I certify that on the 25th of May, 1842, due notice of the foregoing protest was given to the maker and endorsers of said note, by depositing the notice in the Post Office at Apalachicola, addressed as follows: L. M. Stone, St. Joseph—Josiah S. Patterson, Fort Gaines—S. Scarboroufh, Fort Gaines—R. C. Spann, Franklin, Alaba.,—such being the reputed places of their respective residences.

M. P. ELLIS, *Notary Public.*

(*Endorsed*)—COPY.

APALA., Dec'r 3d, 1840.

By the 22d day of May, 1842, I promise to pay to the order of L. M. Stone, at the Agency of the Southern Life Insurance and Trust Company Bank, at Apalachicola, fourteen hundred dollars, for value received. JAMES H. CAMPBELL.

Endorsed—L. M. STONE,
JOSIAH S. PATTERSON,
S. SCARBOROUGH,
RICH'D C. SPANN.

The contents of which protest he testified to as being true,—and 310
said witness further said, that he sent notice of non-payment of said note to said defendant and his co-endorsers, as stated in the certificate attached to said protest. Cross examined. Witness said he had no recollection of any of the facts stated in said protest, independent of the same. He swears to the presentment for payment, notice to endorsers, refusal to pay, &c., because he presumes the acts stated must have occurred, else he would not have certified to their occurrence as a Notary. He recollects no facts beyond the protest. Did not recollect at what hour he made the presentment and demand stated to have been made. It was his custom to present notes at the bank, when they were payable at a bank, between noon and sundown—seldom presented any such before noon—has no recollection of having presented said note more than once. His usual habit, in case of a refusal to pay a note, the payment of which he demanded at the bank, was, to leave the bank immediately on such refusal.—Had the said note in his possession from the time it was handed him to make demand of payment in the beginning of the day, until he protested it; which he usually did about dark. The notice which he gave to the endorsers, was in the form required by law. Sent the notices by mail, deposited in the Post Office on same day that demand and refusal took place, as stated in said protest.

For the defence, Nathaniel C. Robbins was sworn, who testified as follows, to wit: He was Agent, or assistant Cashier of the Southern Life Insurance and Trust Company, at Apalachicola, at which agency said note was payable by the terms thereof; was such agent up to the time at which said bank removed said agency from the city of Apalachicola. The bank did remove said agency, and his said office of agent ceased on the first of May, 1842. After said agency so ceased to exist, witness still continued to occupy the same office room which he occupied whilst said agency existed, up to the 1st June, 1842. He was in his said office off and on through the day; presumes the office was locked when he was out; kept no particular office hours; did not consider his said room an office; generally closed it in the evening at sun-set; has no knowledge of the said note; (before set out)—has no recollection of having had it in his hands on the 25th day of May, or on any other day. When the said agency was in operation and existence, the doors were generally opened af-

311 ter breakfast, and continued so until sundown, and sometimes until 9 or 10 o'clock, P. M., for the purpose of business. Notes not paid on or before 4 o'clock, were considered over due and were protested. 4 o'clock was the hour at which notes payable at said agency, was considered due. Such was the usage of said bank agency. Would not have refused the money on a note after 4 o'clock, under ordinary circumstances, if the maker had called and offered to pay it. Does not recollect that any such occurrence ever took place; but supposes it has frequently so happened. Was in Apalachicola and in said office, off and on, until the last of May. Was assistant Cashier, or Agent of the bank at this place.

The defendant asked the Court to instruct the Jury as follows:

1st. That if they find from the evidence that notes payable at the Agency of the Southern Life Insurance and Trust Company, at Apalachicola, were, by the usage and custom established by said agency of said bank, required to be paid on or before 4 o'clock of the last day of grace, or within any fixed hour, they must be satisfied that the note sued on was presented at said agency, on or before 4 o'clock of the 25th day of May, 1842, (that being the last day of grace allowed by law on said note,) or within the hours so proven to be fixed by said custom, within which notes were required to be paid as aforesaid.

2d. That Campbell, the maker of the said note, had the whole of the banking hours of said bank agency within which notes were by said custom to be paid, to pay said note sued on; and the plaintiff must show that he had the said note at its said place of payment in said note specified, during the whole of said hours on said last day of grace, in the hands of himself or some other person for him, ready to receive payment of, and to deliver up the same.

3d. That the demand made by Ellis, the Notary, was not in law a sufficient compliance with the rule of law governing notes payable at a particular place, and was not such a legal demand of payment of the note sued on as to entitle the plaintiff to recover in this action against the defendant.

4th. That the facts adduced in evidence on the trial of this cause, do not establish such a legal demand of payment of the note sued on, as to entitle the plaintiff to recover of said defendant in this suit.

5th. That the presentment and demand of payment of said note sued on by the plaintiff, or any one for him, made before the hour at
12 which, by the usage and custom of said agency of said bank as proven, notes payable thereat were considered due and payable, and after which said notes were considered protestable, is not in law a proper demand to charge the defendant in this suit as the endorser of said note sued on, and to entitle the said plaintiff to recover in this suit.

6th. That upon the evidence the said plaintiff is not entitled to recover of said defendant in this suit.

To give which instructions the Court refused, and for which refusal the defendant excepted.

The Court then charged the Jury:

1st. The Jury must be satisfied from the evidence, that the note sued on was presented by the said plaintiff or his agent, at said agency of said bank, on the day it fell due, at some time during the banking hours of the bank.

2d. If the Notary attended with the note at any hour at which the officers of the Bank were present for the purpose of receiving and paying money, and within the usual hours of doing business, and presented said note and demanded payment thereof, it is sufficient demand to entitle the plaintiff to recover.

3d. When other person than the bank is the holder of the note, it is usual for the maker of the note to deposit the money in the bank to pay a note payable at such bank, and a demand of payment of such note so held, made at any hour within the business hours of such bank, is a sufficient demand.

4th. If a bank, at which a note is so payable, and which note is so holden by another person than such bank, has quit doing business, and a demand is made at the former place of business of said bank of the former Cashier thereof, and who has ceased to be such Cashier, such demand is sufficient in law to entitle the holder of such note to recover of the endorser thereof, and to render the endorser liable thereon.

To which instructions the defendant excepted:

The errors assigned by plaintiff in error, are:

1st. That the Court below erred in giving judgment, sustaining the demurrer of Baltzell to the plea of Spann.

2d. That the Court erred in refusing to instruct the Jury in the manner asked for by the counsel for the plaintiff in error, as appears by the bill of exceptions.

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3d. The Court erred in giving to the Jury the instructions in the 313
bill of exceptions set forth.

Without regard to the order of the errors assigned, we will endeavor, in a general discussion, to meet and dispose of all the points embraced in the assignment of errors, or which otherwise are incident to the case.

It is contended by the plaintiff in error, that the agreement, pleaded and set forth in his pleas, was binding on the parties thereto, being in the nature of an *agreement substituted*. In the preliminary stage of the discussion, it may be necessary to define the relative positions of Spann and Baltzell, the parties to the suit. Baltzell is the endorsee and holder of the note sued on, and Spann his immediate endorser, liable by his endorsement to all the stipulations and responsibilities of an endorser in blank. The endorsement of a note is not a collateral undertaking for the debt of another, within the meaning of the Statute of Frauds, but is a *new* contract between the endorser and endorsee. 1 Hall Rep. 336. 1 Bailey on Bills, 149. Ib. 411. The contract of each endorser therefore, being an independent one, there can be no doubt but that he stands on the same footing as any other contractor, and possesses the same rights and powers as to any alteration, revision, or waiver of his contract of endorsement, by and with the consent of the endorsee. In this case the original contract is sought to be waived by parol agreement between the parties. As a general rule, no verbal agreement between the parties to a written contract, made *before or at the time* of the execution of such contract, is admissible to vary its terms or to affect its construction. All such verbal agreements are considered as waived by, and merged in the written contract. 3 Met. 489. Chitty on Contracts, 99—102. But, in this case, there is an oral agreement set up subsequent to, and before a breach of the original contract.

Lord Denman, in Goss vs. Lord Nugent, 5 Barn. & Adol. 65, lays down the rule thus: "After the agreement is reduced to writing, it is competent to the parties, at any time *before breach* of it, by a new contract, not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, subtract from, or vary or qualify the terms of it, by a new contract not in writing, which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the 314
written agreement." So, in Chitty on Contracts, 112, 5 Am. ed., we find, "that, in general, where an obligation is created merely by simple contract, it may, whether reduced to writing or not, be entirely dissolved by subsequent oral agreement." 13 Pick. 446. 9 Cowen, 115. 3 Starkie, 1047. Buller Ni. Pri. 152. 1 John. Cases, 22. 6 B. & C. 587.

In these cases of substituted agreement, the plaintiff can always declare on the written contract; and unless defendant can prove performance according to the terms of the contract, or according to the agreement for a substituted performance, the plaintiff would be entitled to judgment. 3 Metcalf, 492. Cuff vs. Penn, 1 M. & S. 21 9 Cowen, 115.

These oral agreements being considered in the light of new contracts, it is requisite that they be based upon proper consideration, and the authorities shew that they must be made upon some new and valuable consideration, proceeding from the defendant to the plaintiff.

The question now arises, do the pleas in this case shew a case of substituted agreement upon good consideration, and are the pleas so framed in accordance with the artificial rules of pleading, as should have rendered them available to the defendant in the Court below? We are of opinion, that a case of substituted agreement, an agreement varied by the act of the parties upon sufficient consideration, has been made out; but that with the pleas of tender of the bills of the Southern Life Insurance and Trust Company, there should have been a *profert in curia*. There having been none, the whole of the pleas are bad.

We will examine these propositions in order; and first, as to the new agreement:

Baltzell and Spann agree as follows: that in consideration that Spann promised to pay said note, the subject of the present action, at maturity, punctually and without fail, and out of his own funds, Baltzell agreed to receive payment of the said note in the bank notes or bills of the Southern Life Insurance and Trust Company. Here, certainly, is a substituted agreement; but to render it valid there must be a new and good consideration. Spann had previously undertaken, in his character of endorser, that, if the note was not paid by Campbell at maturity, upon due demand having been made on

315 Campbell, and upon due and reasonable notice given of such non-payment to himself, that he, Spann, would pay the same to the endorsee or other holder. The promise by Spann to pay at all events, certainly changes a liability *contingent and conditional*, into one *absolute and certain*. In fact, from being an endorser he becomes, as it were, the maker of the note. This would certainly seem to amount to a new consideration in itself; and besides, such a promise would, at law, amount to a waiver of demand and notice, and although this waiver of demand and notice is not set out *in totidem verbis*, yet it follows as a consequence and result of the contract, and, therefore, cannot be disregarded by the Court. There is always a certain degree of labor, trouble, and frequently, expense, in making these demands for payment, and giving the requisite notice, in case of a refusal to pay; and the law books afford the best test of the truth of the assertion, that in all these matters there is frequently uncertainty, and that mistakes are constantly occurring as to the requirements of law, in making demand and giving notice, proving in many instances fetal to the rights of parties. Although a Court may feel itself bound to notice judicially the insolvency of a banking institution, as, for instance, that of the Life Insurance and Trust Company, yet it cannot be presumed to know the precise value of the bills and liabilities of a bank after its insolvency; for, in such an event, the value of its bills and notes must, necessarily, be fluctuating and uncertain. The Court cannot know whether the notes or bills of the Life Insurance and Trust Company were worth ninety cents, or sixty cents, as alleged and admitted by plaintiff, and it can only ask, whether they were of any value, or entirely worthless?

It is urged that the agreement by Baltzell to receive *less* than the original amount contracted for, is *nudum pactum;* the payment having been agreed to be received in the bills of the Life Insurance and Trust Company. The citation from Chitty on Contracts, by the counsel for the defendant in error, does not seem to sustain the point contended for. It is to this effect: "that a promise by a creditor to accept less than the full amount of his demand, or to give time for his existing debt, is void; unless there be some *new* consideration as an *additional or different security*, or a payment varying from that agreed upon, in respect to its being effected in a *manner or at a time more beneficial to the creditor*, or unless an *uncertain claim be reduced to a* 316 *certainty*. Chitty on Con. 52. This law probably refers to *debts due;* but if not, we think it cannot vary the view we have taken of the subject, but goes to sustain it.

The certainty of the debt's being paid at the day it was to become due, may have been deemed by Baltzell a sufficient consideration for agreeing to receive the Life Insurance and Trust bills or notes, and the waiver of demand and notice was certainly advantageous to Baltzell; and if so in the *slightest degree*, provided it was a benefit greater than that before enjoyed, the consideration would be sufficient to sustain the oral engagement. Fetch vs. Sutton, 5 East. 231. In this case there was an acceptance of £17 for £50, and *after* the debt was due. Lord Ellenborough said, there must be some consideration for the relinquishment of the residue; something collateral, to shew a *possibility* of benefit to the party relinquishing his further claim, otherwise *nudum pactum*. In 6 Cranch, 253, it is laid down, if a creditor offers additional security for *less sum* than due, consideration is good.

So we find in 3 Campbell, 57—a parol agreement by a creditor to accept *part payment* of a sum, in satisfaction of the whole debt, will not be binding upon him for want of consideration, although he actually receive such part payment, and give a receipt for the whole debt. But if such part payment be made in a manner more *advantageous* to the creditor, than that agreed upon previously, as if it be made *before* the day upon which *full payment* is due, it operates as a *new consideration*, and rendered such agreement binding, although it be parol,—citing 2 B. & C. 477. 3 D. & R. 649.

The mere fact, that the consideration was, in this case, *inadequate*, does not render the contract *nudum pactum*, for it is not essential that the consideration should be adequate in point of value, for the law cannot decide upon this matter; and in the words of Chitty, "it will not interfere with the facility of contracting, and the free exercise of the will and judgment of the parties, by not allowing them to be sole judges of the benefits to be derived from their bargains; provided, there be no incompetency to contract, and the agreement violate no rule of law." Chitty on Con. 31. 5 Am. ed. So, even equity will not interfere, unless the inadequacy be so great as to shock the moral sense.

As the law will not stop to scrutinize the amount of benefits conferred upon one party, so neither will it scan the extent of trouble, 317
loss or obligation the other party has subjected himself so; and, "it is immaterial," says Mr. Chitty, "that the detriment or charge thus assumed, is, in fact, of the most trifling description; provided, it be not utterly worthless in fact and in law." Ib. 32. Spann, no doubt, was at some trouble in the procuring of the Life Insurance and Trust notes. He may have sustained loss in the re-sale, on Baltzell's refusing to accept them; and the presumption is, that he paid value for them, whatever that value may have been. If Spann's engagement had been simply to do that, which by law he was compelled to do, the agreement would have been *nudum pactum;* but he agrees to pay *before the time* he would have been compelled by law to pay; and this, we have seen, creates a *new* and *valuable* consideration, and, as such, renders the contract binding and efficacious.

The next question, as to the tender being well pleaded, will be discussed:

In 5th Bacon's Ab. tit. Tender, H. 4, it is laid down as a general rule, if a debt or duty be not discharged by a tender and refusal, the tender must be pleaded with a *profert in curia;* for, as the debt or duty continues, it is not enough for the party who pleads the tender, to plead a tender and refusal with *uncore prist*, or with *tout temp prist* as the case may require; but he must also bring the money, or other thing which has been tendered, into Court, that the party may, if he please, accept it.

If the thing, which has been tendered, be so heavy that it can not be conveniently brought into Court, it is not necessary to plead a tender with a *profert*. 2 Rolle. Ab. 524. So in Carley vs. Vance, 17 Mass. R. 392, we find the general rule laid down, that if the debt or duty be not discharged by tender and refusal, the tender must be pleaded with a *profert in curia*. It is not contended that the debt in this case was discharged by tender and refusal, for the plea is in bar of damages ultra. By the terms of the contract the bills of the Life & Trust Bank are to be substituted for money, and to be considered as cash, and by this waiver of gold and silver, when the bills were tendered, the allegation of tender is clearly supported, and if there had been a profert in curia, the Court would have so decided in compliance with the decision in the case of *Warner vs. Mains*, 7 *John. Rep.* 476. In this case there was a covenant to pay three hundred dollars on a certain day, on which the payee covenanted to convey a 318
farm, but before the day it was agreed that the three hundred dollars should be paid and received in bank bills, which were duly tendered at that day. "It was held by the Court that it wa scompetent to the plaintiff to shew that, before the day of payment, the defendant had agreed to accept bank bills as cash, and had dispensed with the necessity of a tender in gold or silver. The tender of bank bills was consequently good at the day, by reason of the previous waiver."—This very case is cited by the plaintiff in error to shew that the tender by the agreement of parties was a legal tender, but to have availed him, the *profert in curia* was indispensable in his plea. We beg leave to cite a case we find in the reoprts of Massachusetts, which seems strongly in point as to the necessity of bringing the money into Court. This was an action of assumpsit, and the declaration contained five several counts. To the four first, defendant pleaded non assumpsit, on which issue was joined. In the fifth count the plaintiff alleged a promise to pay seventy dollars in bank notes of the New Hampshire Banks, except the Coos Bank. To this count the defendant pleaded a tender in bar of damages with *tout temps prist*, and a *profert* of the bank notes into Court for plaintiff. To this plea, the plaintiff replied *non obtulit*, on which issue was also joined. Both the issues thus joined having been found for the defendant, the plaintiff called for the bank notes, of which the defendant had made a profert, but it appeared they had never been brought into Court. A motion subsequently was made by plaintiff for judgment *non obstante veredicto*.

The counsel for the defendant (as in this case) alleged that nothing but money could be brought into Court upon a plea of tender. It was decided by the Court that "judgment be entered for plaintiff in the fifth count, to which the plea of tender was made."

The payment in Life & Trust Bank bills bears no analogy to that of a payment in specific articles. The bills or notes of banks are generally treated as money in the various commercial or business transactions, and are a good tender if not objected to; and how can a promise to pay or deliver a sum of money in bank bills be considered a contract to deliver *specific articles*, when they are so little capable of being distinguished or identified? Besides, if they are to be considered as specific articles, a tender of them at the day and

place would have been a satisfaction of the contract, and upon refusal of them by Baltzell the property in them would have been transferred to him. The relation of the parties would have been changed to that of bailor and bailee, trustee and *cestui qui trust,* and Baltzell would have been obliged to have resorted to the specific articles (bank bills,) and the person who tendered them as the bailee thereof for redress. It is needless to remark how remediless a creditor in such a case would be, and we only pursue the argument (perhaps ad absurdum) for the purpose of showing the consequences of considering bank bills in this case as specific articles.

With these views, we think the tender should have been pleaded with a *profert in curia.*

The point which next presents itself is raised by the defendant in error, that the agreement between Spann and Baltzell was void by the statute of frauds of this State. Duval 206.

The statute of frauds cannot aply to this new agreement of Baltzell and Spann. It is not a collateral undertaking of Spann's, but an *absolute* promise. Spann had for his object a benefit which he did not before enjoy, and this benefit accruing *immediately* to *himself,* this is, in the payment of the note by a less sum than was originally to be paid by him, in case of default of the maker. If Spann's object had been to procure a release of the property of Campbell, or benefit to Campbell, exclusive of any selfish consideration, and he had not been a party to the original contract, the contract would be clearly within the statute. So we see in Roberts on frauds, 232, the statute does not apply, if the consideration "spring out of any new transaction, or move to the party promising upon some fresh and substantive ground of *personal concern to himself.*" So, "where the original transaction is altered, and a new consideration, *moving from the plaintiff to defendant,* takes place, a promise made by the defendan to the plaintiff will not be within the statute." 2 Saund. Pl. and Ev. 527, citing 2 East. 332, 2 Burr 1886, 3 Esp. 87, 4 Taun. 117.

The English doctrine, as declared in 1 Salkeld 27, would seem to be this: a promise to answer for debt, default, or miscarriage of another for which *that remains liable,* must be in writing to satisfy the statute of frauds; *contra* when the other does not remain liable. 1 Smith's leading cases, 134.

320 Under this rule, the statute of frauds cannot apply, for Spann, by virtue of the new agreement, assumes the absolute payment of the debt, whereby Campbell, the maker of the note, is entirely discharged; and the agreement further shews conclusively that Baltzell looked to Spann, and not to Campbell, for payment of the note.

In Massachusetts it has been held, that the promise of a party to pay a debt, on which he once has been personally liable, cannot be treated as within the statutes, although at the time of making the promise his responsibility had ceased. Hopkins vs. Liswell, 12 *Mass* 52.

The New York decisions differ from that cited from Salkeld, and go to the extent, that even if Campbell *remained liable* after this new agreement, still it would not come withint the statute of frauds, for they declare that an oral agreement to pay a debt previously subsisting, upon a new and different consideration, is not within the statute, even when the original debt remains. 5 Wendell 235. 10 Wendell 461. 4 Cowen 439.

It will not be necessary to say aught in relation to the argument of counsel for plaintiff in error, as to the question of the pleas being pleaded by way of accord, without satisfaction, it having already been decided they were good as shewing an agreement substituted.

Having disposed of these questions, the only ones remaining relate to the sufficiency and regularity of the demand and notice. It is contended that the promise of Spann to pay at all events rendered demand and notice unnecessary; but admitting this, if the substituted agreement had been enforced, we cannot permit the defendant in error to avail himself of portions of that agreement, so far as they enure to his benefit, and reject those which tend to his disadvantage. If taken at all, they must be taken altogether, and not detached parts of it. Besides Spann promised to pay only in Life & Trust bills.—Equity and law forbid any other decision.

We think that the facts as set forth in the protest by Ellis, the Notary, and the protest itself, were admissible as evidence to prove demand in accordance with the allegation in the declaration. As this opinion may at the first blush appear to conflict with some of the rules of evidence, it may be apposite to the present case to give somewhat at length the reasons which have guided and conducted us to our conclusions.

It has been repeatedly decided in England that the books of a No- 321
tary, after his death, were admissible in evidence to prove the dishonor of bills left with the Notary for presentment and demand. In Poole vs. Decas, 1 Bingham, N. C. 649, this point was decided by Chief Justice Tindal, who said: "We think it admissible, on the ground that it was an entry made at the time of the transaction, and *made in the usual course* and routine of business, by a person who had no interest to mis-state what had occurred."

This rule of evidence has reecived the sanction of the American authorities. Welsh vs. Barret, 15 Mass. 380. Merrell et al. vs. The Ithaca & Oswego R. R. Co. 16 Wendell, 587. 2 Hill N. Y. R. 537. In Nicholas vs. Webb, 8 Wheat. 326, there was an entry in the book of deceased Notary to this effect: "Endorser duly notified in writing 19 July, 1819, the last day of grace being Sunday the 18th." Judge Story, in commenting upon the evidence, says, that being a promissory note, in which the action of a Notary was not necessary, the protest itself was not evidence in chief of the fact of demand; but from the usage of employing Notaries it may be inferred that "the protesting of notes, if not strictly the duty of the Notary, was in conformity to the general practice, and was an employment in which he was usually engaged." He goes on further to say: "We think it a safe principle, that memorandums made by a person in the ordinary course of his business, of acts or matters, which his duty in such business requires him to do for others, in case of his death, are admissable evidence of the acts and matters so done. *A fortiori,* we think the acts of a public officer, like a Notary Public, admissible, although they may not be strictly official, if they are according to the customary business of his office, and is clothed with public authority and confidence."

The Courts in this country would seem to have established another principle, or rather an extension of the principle, as before set forth in relation to the admissibility, as evidence, of the entries made in the register of the deceased Notary, and it is this: that, when these entries have been made in the *usual mode of business,* and are duly authenticated by the oath of the party who made them, they are admissible in evidence, though the party making them can remember and testify nothing as to the facts contained in said entries. The paper must be an original one made at the time the facts contained in it are alleged to have taken place, and confirmed by the oath of 322
the witness that he believes it contains a true statement of the facts. The true criterion appears to be this, as to the admissibility of the entries: whether after *the death of the maker* of them, they would be admissible; and, if so, when verified by oath of the party who made them they are likewise admissible. Farmers & Mechanics Bank vs. Beraf, 152. 20 Wendell, 72.

The case at bar comes up fully to the foregoing principles. The protest appears to be an original paper, and drawn up at the time of the demand of payment, and Ellis, the Notary, swears that the contents of said protest were true. Upon his cross-examination, however, he said he had no recollection of any of the facts stated in it, *independent* of the same. He swears to the presentment for payment, notice, to endorsers, &c., because he presumes the facts must have occurred, else he would not have certified to their occurrence as a Notary. He recollects no facts beyond the protest.

Evidence very similar to this was admitted in the case of Bullard vs. Wilson. 5 Martin N. S. 196. To prove notice, the Court held "the parish Judge's memorandums of his having given notice of the protest to the defendant, was on the back of the protest, and he deposed that he had no recollection of giving it, but he had no doubt of his having given it, as he never made such a memorandum without having given the notice." The entry having been made according to *the course of the business* of the witness, was admitted by the Court.

It is contended by the counsel for plaintiff in error that this case falls within the rule laid down by this Court, as to the evidence of notice to be given endorsers in the case of Whitaker vs. Morrison. But that case and the one at bar differ in this: the paper exhibited at the trial of the case of Morrison vs. Whitaker was a *copy,* and not an *original* instrument, and that it was the habit of the witness to make a memorandum of the notice of protest on the protest kept by him, and that, *that* one was lost, and the whole amount of the evidence of the Notary, on that case, was based simply *upon his habit of doing business.*

There has been a recent decision in the State of New York, which establishes fully and clearly the doctrine as before stated. It is found in the case of the Bank of Munroe vs. Calvin, 2 Hills R. 532. Ac-

323 tion of assumption a note, the defence was usury, to rebut which the plaintiff offered the Cashier to prove how the note came to the Bank was paid; the offer was to prove, "from the memorandum and entries, in the hand-writing of the witness made at the time of the transaction to which they refer, occurred, and while he was Cashier and had charge of the books and correspondence of the Bank, which momoranda and entries the witness would swear he believed were truly and correctly made, although *independent* of such memoranda and entries, the witness had no recollection of the facts; and ever. *after having his memory refreshed* by their examination, he could not testify to the facts *independent* of the entries and memoranda."—The Supreme Court, per Bronson, Judge, after observing that the entries and memoranda were made in the usual course of business, and were verified in the most ample manner, by the witness who made, and whose duty it was to make them, said: "The question is whether memoranda and entries thus verified should be allowed to speak for themselves? I think they should." See, also, 2 Wendell, 72—1 Smith's leading cases, 228, where the foregoing cases are collected, and the whole question is presented with great clearness and ability by the American editor.

The next question for the consideration of the Court is, Whether the notice given to Spann was efficient? Ellis testifies, that he sent notice of non-payment to the defendant Spann, as stated in the certificate endorsed upon the protest of the note. The certificate states, that due notice of the protest was given to the endorser, Spann, by depositing the notice in the Post Office, at Apalachicola, addressed to R. C. Spann, Franklin, Alabama, the reputed place of his abode.

The protest sets forth the demand of the note and refusal to pay, so that by the ordinary intendment of words, it seems to the Court, the evidence of Ellis goes to shew, that his notice contained the substance and facts of the protest, viz.: description of the note, a statement of the demand and refusal to pay; or, in other words, that the note was dishonored. The term, "due notice", used by the Notary, does not amount to evidence, that proper notice was given. To say so, would be to make the Notary the judge of what is legal notice to fix the endorser. He must state *facts;* and the conclusion of law from these facts, is a question of law for the Court, and not for the Notary. 1 *Harrington.* 10—*Bank of Wilmington & Brandywine vs. Cooper's*
324 *Adm'rs.* We think, however, that the *facts* as stated in Ellis' testimony, are sufficient to enable the Court to declare, that the notice contained sufficient averments to constitute legal notice.

There is no particular form of notice of dishonor of the note necessary. Mr. Story, in his work on Promissory Notes, lays it down, that it should contain, in substance, the following requisites: a description of the note, sufficient to ascertain its identity; the presentment for payment and refusal to pay; and that the holder of the note looks to the person to whom the notice is given, for reimbursement and indemnity. Story on Promissory Notes, s. 348. In section 354, of the same work, however, Judge Story remarks, that, by the rule adopted in the American Courts, "it is sufficient to state in the notice that the note has not been paid, and, either expressly or by *implication,* that the holder looks to the endorser for reimbursment or indemnity." In the case of the Bank of United States vs. Carneal, 2 Pet. R. 543—553, the Court said: "A suggestion has been made at bar, that a letter to the endorser, stating the demand and dishonor of the note, is not sufficient, unless the party sending it also informs the endorser, that he is looked to for payment. But when such notice is sent by the holder, or by his order, it *necessarily implies* such responsibility over. For what purpose could it be sent? We know of no rule that requires any formal declaration to be made to this effect. It is sufficient, if it may be reasonably inferred from the nature of the notice."

It seems that the notice would be good, if it be sufficient to put the party on enquiry, and prepare him to pay it, or to defend himself. Even if there be some uncertainty in the description of the bill or note, if it does not tend to mislead the party, it will be good. 7 Alabama Rep. 212—citing 2 John. Cases, 337—11 Wheat. 431—16 East. 105—Chitty on Bills, 9 Am. Ed. 501. So it has been held, that it need not be stated at whose request the notice was given, or who was the owner of the note. 1 Pick. 401.

As to the demand necessary to be proved in this case, we think a sufficient one has been proved. At the day the note fell due, the Notary went to the place, where the note was payable, to wit, at the place previously occupied by the Agency of the Southern Life Insurance and Trust Company. Robbins, the late Agent or Cashier, testifies, that the agency *had been removed from Apalachicola,* some weeks previous to the day of the alleged presentment of the note. 325
The removal of the Agency rendered the demand, therefore, impossible at the agency. Proper diligence seemed to have been used, and we are satisfied that when demand was made at the place of payment of the note, and it was found that the agency had been removed, a sufficient demand had been made. Of course, if the agency had simply been removed to another house in Apalachicola, a presentment there would have been necessary; but the testimony was, that it had been removed altogether. It is like a case where a note is payable at a particular place, and a demand being made at the place appointed, it was found shut up or deserted. In such an event, it would amount to a refusal to pay, for the demand would be useless and inaudible. 3 Kent, 96. 16 East. 112. If the agency had been continued at Apalachicola there can be little doubt but that a demand should have been made, within the usual hours of business, of the agency, as the parties are supposed to have contracted with a view to the customs of the bank; but there certainly can be extant no rules or customs of the agency, when the agency itself has no existence.

If Robbins, the former agent, had remained at the place of the agency, with power from the bank to do business, that fact may have altered the case; but Robbins testifies, that he did not consider the room formerly occupied as the agency, *as an office;* that he was agent up to the time of the removal of the agency, when he ceased also to be agent. The fact of Robbins' being at the place, would have no greater effect than any other person's being there.

If the note had been made payable generally, and not at *a particular place,* and the maker had removed, in such case it would have been the duty of the holder to have made due and diligent search for him, and made presentment, if within the State; but the case at bar is different. If the note is payable at a particular place, the demand must be made there, because the place is made part and parcel of the contract; and if, as before stated, the place is found shut up and deserted, it amounts to a refusal to pay. Dickinson vs. Bon, 16 East. 110. 8 Bingham, 214. Bayley on Bills, 197—241. Story on Prom. Notes, s. 205—227. Chitty on Bills. 399, 397. 172, 173, 174.

A question may now arise, whether the allegation contained in the declaration, as to the presentment of the note, is sustained by the evidence—but it may be laid down as a general principle, that where facts or circumstances exist, which amount to an excuse, or do away 326
with the necessity of a demand, the declaration may be in the usual form, and proof of the facts which dispense with a formal demand, will, in law, be deemed proof of demand. As in the case at bar, no demand in compliance with the terms of the note could have been made on account of the removal of the agency, and this fact being in evidence, it is a sufficient excuse for the non-presentment, and the allegation of the declaration is sustained.

The American cases go to the extent that the averments of demand and notice, in the declaration on a bill or note, were sufficiently supported by evidence of any thing which render demand and notice unnecessary. Stewart vs. Eden, 2 Caine's Rep. 121. Norton vs. Lewis, 2 Conn. R. 478. Hosmer, J., said: "that this mode of declaring, relying on proof of an excuse for the omission to make demand or give notice, had too frequently been sustained to remain questionable."

So, when no demand has been made of the maker, on account of his absence in a foreign country, it was held by Van Ness, that an averment of presentment in the common form was sufficient. Cummings vs. Fisher, Anthon N. P. 5. See also City Bank vs. Cutter, 3 Pick. 414. 4 Campbell, 52. Hodge vs. Fillis, 3 Camp. 463. 7 Cowen, 523.

So also the fact, that the maker had absconded and could not be found, may be given in evidence, under the allegation that the note was presented and payment refused. Stewart vs. Eden, 2 Caine's R. 121. Williams vs. Matthews, 3 Cowen, 252. Taunton Bk. vs. Richardson, 5 Pick. 436.

So a promise to pay after notice, will be received as evidence of notice. Martin vs. Winslow, 2 Mason, 241. 12 Wheat 183. 9 Porter, 302. As to the forwarding notice of the demand and refusal to pay the note on presentment, Ellis testifies, that on the day of demand of payment and refusal to pay, to wit, on the 25th May, 1842, he deposited the notice in the Post Office at Apalachicola, directed to the defendant Spann, at Franklin, Alabama, the reputed place of his residence. It is necessary that the endorser of a note should be notified of its dishonor, by depositing the notice in the Post Office, when that is the proper medium of conveyance, and properly addressed to him, and his place of residence proved. By the words, *"reputed res-*

327 *idence,*" we understand a residence as fixed by general reputation, established opinion, or common estimation, or a fact of general notoriety.

It would have been better, no doubt, for the Notary to have been in this portion of his testimony, more definite and explicit; but we think this allegation as to the residence of Spann, sufficiently certain. Witnesses frequently, from over caution, or perhaps from carelessness, needlessly qualify their testimony; and expletives, without any very definite meaning, are frequently introduced, which generally tend to produce embarrassment, and, oftentimes, serious results.

The judgment of the Court below is affirmed with costs.

DAVID G. RANEY *vs.* SAMUEL BARON, ADM'R OF ISAAC S. JACQUES.

A surety is bound to the extent of the terms of his obligation, and no further.

A surety on an appeal bond conditioned, "Now if the said A. shall pay said damages so recovered by said B. against him and costs, in case the judgment of the said Superior Court shall be confirmed by the said Court of Appeals, then this bond to be null and void," is only liable for the amount of the judgment in the Court below, and costs, and not for the ten per cent damages awarded by the Court of Appeals, against A., the party taking the appeal.

A plea of payment admits the representative character of plaintiff, suing as administrator, and dispenses with proof thereof.

ERROR to Franklin Circuit Court.

This case was tried at Spring Term, 1846, of Franklin Circuit Court, Judge Douglas presiding.

Debt on an appeal bond, of which following is copy:

TERRITORY OF FLORIDA, }
Franklin County. }

Know all men by these presents, that we, the Southern Life Insurance and Trust Company, and George Field and David G. Raney, are held and firmly bound unto Isaac S. Jacques in the sum of two thousand dollars, for the true payment whereof we bind ourselves, our and each of our heirs, executors and assigns, jointly and severally, firmly by these presents, sealed with our seals, and dated the seventeenth day of December, 1841.

328 The condition of the above obligation is such that, whereas the above bounden Southern Life Insurance and Trust Company is about to take an appeal from a judgment rendered against it at the Fall Term, 1841, of the Superior Court of Franklin county, in favor of Isaac S. Jacques, for the sum of nine hundred and ninety-two 52-100, to the Court of Appeals of said Territory: now, if the said Southern Life Insurance and Trust Company, shall pay the said damages so recovered by the said Isaac S. Jacques against it, and costs, in case the judgment of said Superior Court shall be confirmed by the said Court of Appeals, then this bond to be null and void, else to remain in full force and virtue.

(Signed) SO. L. INS. & TRUST CO.,
BY GEORGE FIELD, *President.* (SEAL.)
GEORGE FIELD, (SEAL.)
DAVID G. RANEY, (SEAL.)

Plea: *Payment.*

At the trial below, plaintiff gave in evidence the following certificate:—

The People of the State of New York, to all to whom these presents shall come, or may come, send GREETINGS

Know ye, that we, having inspected the records of our Surrogate's Court, in and for the county of New York, do find, that on the twenty-third day of August, in the year one thousand eight hundred and forty-two, by David B. Ogden, Surrogate of said county, letters of administration of the goods, chattels, and credits, which were of Isaac S. Jacques, late of Woolbridge, in the State of New Jersey, grocer, deceased, were granted and committed unto Samuel Barron, of Woodbridge aforesaid, and that it does not appear by said records that said letters have been revoked.

In testimony whereof, we have caused the seal of our said Surrogate to be hereunto affixed. Witness David B. Ogden, Surrogate of our said county, at the City of New York, the nine-
[*N. Y. Surrogate's Seal.*] teenth day of December, in the year of our Lord one thousand eight hundred and forty-two, and of our independence the sixty-seventh.

DAVID B. OGDEN.

Defendant objected to its introduction on the ground that it was 329 not properly authenticated, according to the act of Congress; but the Court overruled the objection. Plaintiff also gave in evidence the judgment of the Court of Appeals at its session, 1843, of which the following is a copy:

"Southern Life Insurance & Trust Company, Appellant,
vs.
Isaac S. Jacques, Appellee.

"Upon a certificate from the Clerk of Franklin Superior Court, that a judgment was rendered at December Term, 1841, of said Court in favor of the Appellee, and that an appeal was taken and bond duly filed in the Clerk's Office:

"On motion of the appellee, by his attorney, it is ordered, that this appeal be put on the Court Docket, in its proper place: and the transcript of the record and proceedings in this cause, not having been filed according to law, and the appellants, though solemnly called, came not; therefore, it is considered by the Court, that this appeal be dismissed, and the appellee recover against the appellant ten per centum damages, for retarding the execution thereof; and also, the sum of two dollars and twelve cents, his costs, by him about his defence in this behalf expended: which is ordered to be certified to the Court below."

Defendant objected to the introduction of this judgment; but the Court overruled the objection, and permitted the paper to go to the jury. Plaintiff then gave in evidence the appeal bond herein before set forth, and an execution showing amount due thereon.

Defendant asked the Court to instruct the jury, that plaintiff is not entitled to recover the ten per cent. damages, mentioned in the decree and judgment of the Court of Appeals, as a part of his damages on the bond sued on; which instruction the Court refused, and defendant took his bill of exceptions.

The jury returned a verdict for plaintiff.

Plaintiff in Error, assigned the following for error:

1st. The Court erred in refusing to give the instructions asked for by the counsel of plaintiff in error.

2d. The Court erred in permitting the letters of administration to be offered to the jury.

3d. The Court erred in permitting the paper purporting to be a transcript of the Supreme Court, to be read to the jury.

W. G. M. Davis, for Plaintiff in Error. 330

Carmack & Baker, for Defendant.

MACRAE, Justice:

This is an appeal from a judgment of the Circuit Court of Franklin county, rendered in an action of debt, instituted therein by Samuel Baron, administrator of Isaac S. Jacques, deceased, against David G. Raney, as one of the sureties of the Southern Life Insurance and Trust Company, in an appeal bond executed by it to the plaintiff's intestate.

To the declaration the defendant pleaded payment, and upon the issue joined upon this plea, verdict and judgment were rendered for the plaintiff, for the sum of seven hundred and seventy dollars.

The main ground of error, set up by the plaintiff in error is, that upon the trial below, when the bond sued on was given in evidence before the jury, the Court refused to give the latter the following instruction, asked for by the defendant, viz.: "that the plaintiff is not entitled to recover the ten per cent. damages, mentioned in the decree and judgment of the Court of Appeals, as part of his damages on the bond sued on," and to this refusal the defendant excepted.

The bond executed by the appellant, in conjunction with the Southern Life Insurance and Trust Company, and declared on, must be referred to, in order to determine the extent of his liability. The condition of the bond, after reciting "that the Southern Life Insurance and Trust Company are about to take an appeal from a judgment rendered against it at the Fall Term (1841,) of the Superior Court of Franklin county, in favor of Isaac S. Jacques, for the sum of nine hundred and ninety-two 52-100, to the Court of Appeals of the Territory of Florida," concludes thus: "Now, if the said Southern Life Insurance and Trust Company shall pay the said damages recovered by said Isaac S. Jacques against it and costs, in case the judgment of said Superior Court shall be confirmed by the said Court of Appeals, then, this bond to be null and void, else to remain in full force and virtue."

The covenant of the defendant Raney is, to pay; provided, the said Company, the principal in the bond, shall not pay "the *said* damages so recovered by said Jacques against it," by which, we understand, is necessarily meant the sum of $992 52-100, before mentioned, and the costs. Such is the bond; and its obligation extends thus far, and

331 no farther. We are, therefore, of the opinion, that the defendant below, is clearly not liable on his bond, for the ten per centum damages and costs, for which judgment was rendered by the Court of Appeals of the late Territory of Florida. It is so clear and well settled a principle that a surety is bound to the extent of the terms of his obligation and no farther, that we deem it wholly unnecessary to refer to authorities to sustain it. It may be remarked, however, that the doctrine is well and fully illustrated in the case of Miller vs. Stewart, et al. 9 Wheat. 680, and in 5 Cond. R. 772.

In this view of the extent of the appellant's liability upon the bond in question, we are of opinion that the Court below erred in refusing the instruction asked for by the defendant, as set forth in his bill of exceptions, and asigned as error as before mentioned. And here, we feel justified in observing, that had the precise terms of the condition of this bond been brought to the view of the Court below, we cannot doubt that the learned Judge who presided, would have granted the instruction prayed for. That the Nisi Prius Courts are sometimes liable thus to err unwittingly, must be admitted; and it is much to be regretted, in view of the speedy and satisfactory administration of justice, the great desideratum of both Courts and suitors.

"We have not considered it necessary to determine upon the exception taken to the proper legal authentication of the letters of administration, submitted in evidence, in this case, in the Court below. It is clear that the character in which the plaintiff sued, is admitted by the defendant's plea, and, therefore, was not required to be proved. It is consequently, not material to the right and law of the case, whether the Court erred, or not, in permitting the letters in question to be offered to the jury. It may be regarded as a work of supererogation on the part of the plaintiff's attorney, which should not prejudice his client. Be this as it may, the objection may be made in another trial of the same case below, if it can again be raised under the pleadings.

We consider it equally unnecessary to decide the third error assigned. As to the question of a remititur of damages by this Court, in the alternative which has been decided, we think it needs no discussion, considering, as we do, that it is obvious that the remititur sought for, cannot be awarded in view of the character of the verdict apparent upon the face of the record. We might remark, however,
332 that there appears to be a blunder in the entry of this part of the proceedings.

On the whole we are of opinion, and accordingly adjudge and order, that the verdict and judgment in thise case in the Court below, be set aside, and that further proceedings be had therein in accordance with this opinion.

Judgment reversed, and venire de novo.

OCTAVIUS H. GADSDEN *vs.* GEORGE JONES, ADMINISTRATOR, AND MARY JONES, ADM'X. OF WILLIAM B. NUTTALL.

A., administrator of B., was, by the judgment, or decree of the County Court, under Act of February 15, 1834, sec. 5, discharged as administrator of B. On the same day with the discharge, a suit was instituted against A., as administrator, to which A. pleaded his discharge. Held, that the judgment, or decree, discharging A. from the administration, was a bar to such suit.

A discharge can be obtained by an Executor or Administrator only after six months' notice of his intended application for a discharge has been given, and after he shall have faithfully and honestly discharged the trust and confidence reposed in him; and it is the duty of the Judge of Probate or County Court to see, before granting such judgment or decree of discharge, that he has well and truly administered, paid the debts so far as the assets would go, and made distribution of the rest, or residue, of the estate according to law.

By the Act of 15th February, 1834, sec. 5, a discharge granted an Executor or Administrator by the County Court, or Court of Probate, is an immediate and effectual bar to suits instituted against such Executor or Administrator in their fiduciary capacity; but it is not a bar to a suit against the person so having acted as Executor or Administrator, for any personal liability incurred by him in the management of the assets, if the suit be brought within five years from the date of the discharge.

When a suit is brought against the person who has acted as Executor or Administrator, the *onus probandi* rests on the plaintiff to show by his pleadings and proofs, that at the time when the discharge was granted, the Executor or Administrator had not faithfully and honestly discharged the trust and confidence reposed in him.

ERROR from Jefferson Circuit Court.

Assumpsit by Plaintiff, as Endorsee of a Promissory Note, against

Defendants, the Administrator and Administratrix of William B. 333
Nuttall, the maker thereof. The case was tried at the Spring Term, 1846, of Jefferson Circuit Court, Judge Macrae, presiding.

Pleas. 1st Gen. issue. 2d. Statute of Limitations. 3d. Plene Administravit. 4th. That defendants had been discharged of and from their adminstration of the estate of William B. Nuttall, deceased. The case was decided on a demurrer to the 4th plea, which, with the other pleadings, is recited in the opinion of the Court.

The demurrer to the 4th plea having been overruled, plaintiff sued out his Writ of Error.

T. H. Hagner, (with whom was *L. A. Thompson*), for Plaintiff in Error, argued:

That the main question in the Record, turned upon the validity of the 4th plea of Defendants in Error, as a bar to this action. That plea, is, that "on the day of the commencement of this action, and before its commencement on the 25th March, 1844, the Defendants were duly and lawfully discharged from their administration of the estate of Nuttall, by the County Court of Jefferson County." The Plaintiff in Error demurred specially to this plea, and assigned as causes. 1st. That there was no allegation of full adminstration, nor of their delivery over of the property to any new Administrator. 2d. That the Defendants do not allege that they had no notice of the demands of the Plaintiff in the declaration mentioned before or at the time of their alleged discharge.

On the first point, he cited 2d Wms. on Executors, 1196;—Wentworth on Executors, 472; Packman's case, 6 Coke, 18; 11 Viner's Abridg. 118—9; Keble vs. Keblt, Hobart, 49; 3 Chitty's Pleading, 1240.

On the 2d point, he insisted that whether the discharge set up be by virtue of the Statute (of 1834, sec. 5, p. 188, of Duval) or according to the course of the common law, that it could not operate to discharge the Administrator from liability to satisfy those debts of which he had notice, and for which, therefore, he was entitled to retain.

Upon the construction of the Stat. of 1834, above referred to, he took two exceptions to its operation in this case at bar. In the first place, the discharge by the Statute only is made to operate as a *release* from the duties of Administrator or Executor *prospectively*—not an exemption from liability already incurred, nor to permit him to screen himself from existing responsibility. Having had notice of 334
this demand, his duty as Administrator was fixed by law; and from that responsibility it was not the design of the Legislature to release him. It would have been no valid objection to the release contemplated by this Statute, for any creditor to object that he had not yet paid a debt of which he had had notice; the ready answer would have been, "I retain for it. I cannot exempt myself from *past* responsibility, by being released from *future* duties." Next, the Statute expressly declares that the operation of this discharge as a bar to any suit, shall not commence "until five years from the date of such discharges," against the person so having acted as Administrator or Executor—that is, for their actings and doing prior to their discharge. Of course, it would be answer enough to any action against him as Administrator or Executor, founded upon any new demand against the estate, arisen after the date of the discharge, and of which he had had no notice, that he is not such Executor or Administrator: for as to all such *new* duties, the discharge operated as a *release*. Thus the whole Statute is made sensible, and works no injury to any man.

A. E. Maxwell, for Defendant:

The plea is good, and the demurrer properly overruled. 'Tis a plea of *ne unques administrator;* the subject of it being, that they are not "now Administrator or Administratrix," and the matter about discharge being added by way of explaining the substantial part relied upon. The plea of *ne unques,* &c., can be pleaded in bar. 1 Tidd, 644. It is not a plea in which full adminstration, or the turning over of assets, is ever set up. The fact itself, that the party is not Administrator or Administratrix, is a sufficient bar.

It is contended, however, that it is a plea of discharge, and analogous to a plea of revocation of letters. Admitting that a plea of revocation, and grant of letters to another, should aver full administration, or the turning over of assets, yet that doctrine cannot apply to a plea of discharge under our Statute. A distinction must be drawn between revocation and discharge. The former presupposes error or fault; the latter can only be given when the Court is satisfied that the Administrator has "honestly and faithfully discharged" his duties. While, therefore, in the former, the party might be required to account in the plea as to his administration, there would be no

Gadsden vs. Jones, Administrator.

335 propriety in this in the latter; for the Court which discharged him has given a judicial sanction to his acts.

Besides the notice which Administrators are required by the Statute to give to creditors to present their claims against the estate, full notice is also required before a discharge can be had. Duval, 188. Any person having a claim against the estate, or other objection to the discharge, is by this notice warned to make it known, otherwise not to raise objection afterwards. This must have been the intention of the notice. The discharge must be complete for all purposes, and if there is any liability after that, it must be upon the administration bond—not against the administrator *as such*. but, in the language of the Statute, against "the *person* so having acted" as Administrator.

Douglas, Ch. J.:

This suit was brought up by writ of error from the Circuit Court of Jefferson County. It was instituted, (as apears by the declaration), to recover the amount of a promissory note for two hundred and two dollars, with interest from the first day of February, eighteen hundred and thirty-four, given by William B. Nuttall, (in his life time), to one Francis C. Prioleau, and endorsed by him to the plaintiff. The defendants put in four pleas. *First*, the general issue. *Second*, the Statute of Limitations. *Third*, Plene Administravit; and *Fourth*, a plea in the following words, to wit: And for further plea in this behalf, said defendants come and defend the wrong and injury when, &c., and say *actio non;* because they say they are not now either of them Administrator or Administratrix of the said William B. Nuttall, deceased; but on the day and year of the commencement of this action, and before its commencement, to wit, on the 25th day of March, 1844, in the County aforesaid, they were by competent authority, to wit, the Hon. the County Court of Jefferson County, duly and lawfully discharged of and from their administration of the said estate of William B. Nuttall, deceased, as appears by the record remaining in said County Court, and this they are ready to verify by said record. Wherefore, they pray judgment, &c.

Upon the *first* plea, issue was joined. To the second and third, the plaintiff, by his counsel, demurred; and his demurrers were sustained. To the *fourth*, the plaintiff, by his counsel, put in a special demurrer, and assigned therefor the following causes, viz: For that the said defendants do not allege in their said plea, that they have
336 fully administered all the goods and chattels, lands and tenements, rights, credits and effects, which were of said William in their hands to be administered; nor do they therein allege that they have delivered all and singular the goods and chattels, &c., in their hands to be administered, not administered at the date of their alleged discharge from said administration, to the hands of such person, or persons, (if any such there were), named and appointed Administrator or Administratrx in their place and stead, and to whom administration of the goods and chattels, lands and tenements, rights, credits and effects of the said William, unadministered by the said defendants, hath been granted: and also, for that the said defendants do not in (their said) plea, allege that they had not notice of the said demand of the said plaintiff in said declaration mentioned, before or at the time of their alleged discharge: and also, for that said plea is in other respects uncertain, informal and insufficient.

This demurrer was overruled, the plea sustained, and for that cause alone the case was brought up to this Court.

The errors assigned are: *First*. The Court erred in overruling the demurrer of the plaintiff to the defendants' fourth plea. *Second*. The Judgment of the Court should have been for plaintiff below on said demurrer.

The Statute authorizing the discharge of an Executor or Administrator is in the following words, viz: That if an Executor or Executrix, Administrator or Administratrix, shall be desirous of obtaining a discharge from his or her executorship or administratorship, it shall be competent for him or her to receive the same upon application to the Judge of the County Court, or other person charged with the duties of ordinary. *Provided*, That *six* months' notice of such intended application be given in one or more of the gazettes nearest the place where the letters were granted: And provided also, That it *shall appear* that said applicant has *faithfully and honestly* discharged the *trust and confidence* reposed in him or her; and the discharge so obtained, shall be taken to operate as a release from the duties of Executor or Executrix, Administrator or Administratrix; and shall furthermore operate as a bar to *any suit against the person so having acted* as Executor or Executrix, Administrator or Administratrix, unless the same be commenced within five years from the date of such discharge, saving to all persons *non compos mentis*, infants, imprisoned, or beyond the seas, who may have any interest in the said estate 337 two years from the time of the removal of any disabilities herein enumerated. See Act of 15 February, A. D., 1834, sec. 5, Duval's Comp., page 188.

This presents several very important questions upon the construction of this Statute, which have been very seldom raised, and never, it is believed, settled by any authoritative decision in this State; and which, viewing them in any aspect in which they may be presented, are not perhaps entirely clear of difficulty, although we think that a due consideration of the phraseology of the section referred to; and the application thereto of the proper canons of construction, will leave little room for doubt upon the subject. Whether there is such a Statute in any other State or county, we are not advised; certain it is, that we have not been referred to any decisions made upon a Statute like this, and without the aid of any such decision we must endeavor to construe it by such lights as we have.

This case has been argued on behalf of the plaintiff in error, as though it stood upon the same grounds as if there had been a revocation of the letters of administration granted to the defendants in error upon the estate of Nuttall; but a reference to the reasons for a revocation of such letters, and the mode of proceeding in relation to a revocation, and the mode of proceeding to obtain a discharge under this Statute, and what the Statute requires to be shewn before a discharge can be granted, it will be seen that the two cases are widely different, and bear little or no analogy to each other. If there be an Executor, and administraton is granted before probate and refusal, it will be revoked on the will being afterwards proved, because it is *void*. Comyn's Digest, Title Admr., B. 1. Or, if there be two Executors, and one of them proves the will and the other refuses, and he who proved the will dies and administration is granted before the refusal of the survivor, subsequently to the death of the Co-executor. Abrams vs. Cunningham, 2 Levintz, 182. Toller on Executors, 120, (to which many other cases of a similar description might be added). Also, if granted by incompetent authority. Toller on Exors., 120. In all these instances the administration is nullity. But theer is another class of cases, where administration is not void, but voidable only; as if administration be granted to a party not next of kin. Blackborough vs. Davis, Salk. 38. 1 P. Wms. 43. Or to one of kin together with one not of kin. Comyn's Digest, 338 Title Admr. B. Or to the wife's next of kin, instead of the husband's. 11 Vin. Abr. 11. Or if it be granted on the refusal of an Executor who had before administered. Comyn's Digest, Title Admr., B. 8. Or to a stranger. Wilson vs. Patterson, Moore, 396. Or if the grantee has become *non compos mentis*, or otherwise incapable. 11 Vin. Abr. 115, 116. In all these cases, and many more that might be added, the revocation is made on the ground that it was granted improvidently, or was granted to the wrong person; or that circumstances have occurred since it was granted, which shew that it ought not to be any longer continued in the same hands. Our Statute seems to have added another, viz: "Where the securities on any bond given by Executors or Administrators are insufficient, the Court or Judge shall order that additional security be filed; and if not complied with, within such time as shall be directed in said order, the said Court or Judge may revoke the letters testamentary or of administration and appoint a receiver or other administrator." Act of 20th Nov., 1828, Duval's Comp. page 176, sec. 31. In England, the ordinary cannot revoke the grant on account of abuse, and the reason alleged is, that he ought to take sufficient caution in the first instance to prevent maladministration. 11 Vin. Abr. 15. Thomas vs. Butler, 1 Ventre. 219. Toller on Extos. 125.

At common law the ordinary might reveal an administration at his pleasure; but now, since the Statute 21st Hen. 8, if administration be regularly granted to the next of kin, according to the provisions of the same, the ordinary has no such discretion. If he assign a cause for a repeal, the temporal courts are to judge of its sufficiency. 11 Vin. Abr. 114. Comyn's Digest, Title Admr., Book 8. Blackborough vs. Davis, 1 Peere Wms., 42. How far the Statute of 21st Hen. 8, affects the powers of Judges of Probates in this State, or whether it affects them at all, it is not necessary for us now to enquire. It certainly does not prevent a revocation of letters by them, pursuant to the provisions of the 31st section of the Act of 20th Nov. 1828, above cited. In every case, however, of a revocation of letters of administration, whether absolutely void or merely voidable, the Court, at the instance of some person interested, or upon its own motion, proceeds against the person to whom administration has been committed; and upon the ground, too, that he never had any just

339 claim to such letters, or that the interests of those who have a claim upon the estate would be jeopardied by his being permitted longer to hold it, and not upon the ground that the person to whom such letters had been granted had *fully administered*. In the proceeding now under consideration, the Court (after due notice) acts upon the application of the party to whom administration was granted, (and who seeks a discharge), and cannot grant such discharge until it shall appear "that the said applicant has *faithfully and honestly* discharged the trust and confidence reposed in him or her." Now, what is the trust and confidence reposed in an Executor or Administrator? This will be best answered, perhaps, by referring to the oath which they have respectively required to take in relation to the performance of this trust, and the act concerning wills, letters, testamentary, and letters of administration, and the duties of Executors, Adminstrators and Guardians. Sec. 4, Duval's Comp., pages 169, 170 provides, "that all Executors taking out letters testamentary on the estate of their Testator, and all Administrators with the will annexed, shall make oath, or affirm, before the Court or Judge, that they will well and truly perform the last will and testament of the Testator and pay all just and lawful debts, so far as his goods and chattels, rights and credits, will extend, and that they will make a *true* and correct inventory of the same, and render a true account of their administration when required." And every Administrator is required by the same Act to "swear, or affirm, that he will *well* and truly administer all and singular the goods and chattels, rights and credits, of said deceased, make a just inventory of the same, *pay his debts as* far as the *assets of the estate shall extend* and the law direct, and make a fair distribution according to law, and render a true account of the adminstration of the estate when thereto required." The bond required by the 9th section of the same Act, Duval's Comp., page 170, also imposes upon an administrator an obligation *"well and truly* to administer all and singular the goods, chattels, rights and credits, of the deceased, at the time of the death of said deceased, or which at any time after shall come to his hands or possession, or into the hands or possession of any other person or persons for him, according to law; and, further, to make, or cause to be made, a true and just account of his administration when required, and to deliver and pay *all* the *rest and residue* of said goods and chattels, which shall be
340 found remaining upon said Administrator's acount, the same being first examined and allowed by the County Court of the county where the said administration was granted, to such person or persons respectively at the same Court by their order or decree, (pursuant to the true intent and meaning of this act), shall appoint and direct." And if we resort to the principles of the common law on the subject, we shall find the *trust and confidence* reposed in Executors and Administrators is in effect the same. Now how can it be said that an Executor or Adminstrator has *faithfully and honestly* discharged the trust and confidence reposed in him until all these requirements have been fulfilled—until the Executor has *well and truly* performed the last will and testament of the Testator, and paid all just and lawful debts so far as his goods and chattels, rights and credits, would extend, &c.; or the Administrator has *well and truly* administered all and singular the goods and chattels, rights and credits of the deceased, made a just inventory of the same, paid his debts so far as assets extended and the law directs, and made a fair distribution according to law, &c.? We think it cannot, and that it was the duty of the Judge of the County Court, before granting the *discharge* set up as a defence in this case, to see that these defendants had well and truly administered, paid the debts so far as the assets extended, made a fair distribution of all the *rest and residue* of the estate, according to law; because without this they cannot be said to have *faithfully and honestly* discharged the trust and confidence reposed to them. The word *discharged* here means *performed, executed, freed from obligation.* Before the Court can bear the application of an Executor or Administrator under the provisions of this act, before it can even take jurisdiction of the case at all, *"six months' notice,"* (as we have seen), "of such intended application must be given in one or more of the gazettes nearest the place where the letters were granted."

Does a discharge, obtained pursuant to these provisions, operate as a bar to suits instituted against *the person* who has been thus discharged in the character of Executor or Administrator, treating him and charging him *as such* in the same manner as though no such discharge had been granted? This question depends upon the proper construction of the fifth section of the act of 15th Feb., 1834, before cited. One of the primary rules laid down by the sages of the law for the construction of Statutes is, that "there are three facts to be considered in the construction of all remedial statutes; the old law, the 341
mischief, and the remedy,"—that is, how the common law stood at the time of making the act, what the mischief was for which the case did not provide, and the remedy the Parliament hath provided to cure the mischief. 3 Reps. 7, Co. Litt. 11, 42. 6 Bac. Abr. Title Statutes, 383. 2 Inst. 301. Now what was the old law? By the common law, as it stood at the time of the passage of this act, an Executor or Administrator, although he may have fully adminstered, although he may, (in the words of the act), have faithfully and honestly discharged the trust and confidence reposed in him, he could not obtain a discharge. The mischief was that he still remained liable to be sued by creditors, legatees and persons entitled to distribution: and to defend every such suit, was obliged to employ counsel, put in his plea of plene administravit, go into an investigation of his accounts, and shew that he had fully administered; by which, even if he succeeded in his defence, he was put to great vexation, trouble and expense; but by sickness, loss of vouchers, or other casualty, both himself and counsel might be prevented from making the necessary defence, and a judgment would in such case be obtained against him without any proof of assets, which would render him liable to pay the debt out of his own estate, (if he had any), and would render his sureties liable, wherever surety had been given, (and it must be given in all cases by Administrators, and in some cases by Executors also); and where the defendant should be unable to satisfy the judgment, his sureties would of course be compelled to pay it for him, unless indeed they could shew, (as the statute would permit them to do), that he had fully administered; to do which, would subject them to the same vexation, trouble and expense, which would be a great hardship on them, thus placing a party in a situation most inconceivably distressing to an honest and ingenuous mind. Another evil resulting from this state of things was its tendency to prevent persons the most suitable for the discharge of such duties from incurring such interminable liabilities. The remedy *intended* by the Legislature was, we think, a speedy "release from the duties of Executor or Executrix, Adminstrator or Administratrix," after a faithful and honest discharge of the trust. And another rule of construction requires that in construing a statute, the *intention* of the makers is to govern, although such construction may seem to be contrary to
the letter of the statute. Bac. Abr., Title Statutes, 383. Jackson 342
vs. Collins, 3 Cowen, 89. Reddick vs. Governor, 1 Miss., 147. Beall vs. Howard, 2 Harr. & John., 167. Wilkinson vs. Leland, 2 Peters, 662. People vs. Utica In. Co., 15 John. 338. Minor vs. Mechanic's Bank of Alexander, 1 Peters, 64. Dwarris on Statutes.

We are not obliged in this case, in order to sustain our view of the proper construction of this Statute, to carry the intention of the Legislature beyond the *literal words* of the 5th section of the Act, or to put a construction upon them that may *seem* even to be contrary to the letter. Until we arrive at the provision in the Statute now under consideration, Executors and Administrators are always spoken of *as such*, but here the phraseology of the Act changes. They are no longer spoken of as Executors and Administrators: no longer considered as such, and certainly they *no longer represent the estate.*— To this the case of Skinner vs. Frierson & Crow, 8 Alabama Rep. N. S. 915, which arose under a Statute of that State, authorizing Executors and Adminstrators to resign their authority by writing, delivered into the Clerk's Office, Aikin's Digest, 127, is in point. The words of the provision we are discussing, are, "and the discharge so obtained shall be taken to operate as a *release from the duties* of Executor of Executrix, Adminstrator or Administratrix; and shall furthermore operate as a bar to any suit against *the person* so having acted as Executor or Executrix, Administrator or Administratrix, unless the same be commenced within five years from the date of said discharge." The discharge is not a bar to any suit brought against the *person* so having *acted*, if brought within five years from the date of such discharge. This change of phraseology, we think, has a meaning too clear to be disregarded.

The distinction between suits against Executors and Administrators "as such," and suits to charge them *personally*, runs through all the books, is familiar to every lawyer, and must be supposed to have been known to the Legislature who passed this Act; and having provided for a discharge, which should operate as a release from all the duties of Executor or Executrix, Administrator or Administratrix, they took care, (in authorizing suits to be brought against them after such discharge), to use a term which only authorizes suits to charge them *personally*. "Any suit against *the person* so having acted," is

clear and definite, and would seem to admit of no misapprehension. "A Statute ought, upon the whole, to be so construed that if it can be prevented, no clause, sentence or word, shall be superfluous, *void*, or *insignificant*." I Shower, 108. Bac. Abr., Title Statutes, 384. One part of the Statute, too, should be so construed by another, that the whole may, if possible, stand. *Ut res magis valeat quam pereat*. 1 Reps. 48. 1 Blk. Comm. 89. The words, *"the person so having acted,"* are very significant. Suits may be brought against the person so having acted; but when they are so brought, the burder of proof is changed. The onus probandi rests on the plaintiff; and he must, to enable him to recover, shew by his pleadings and his proof, that at the time when the discharge was granted, the defendant had *not* faithfully and honestly discharged the trust and confidence reposed in him or her. This is the remedy intended by the law-makers for one of the evils above suggested, and it is a remedy of which the plaintiff has no cause to complain. The application for such discharge is a proceeding in which *all* the persons interested in the estate are to be brought before the Court by advertisement for *six months*, the Statute seeming to suppose what in most cases is true, that an Executor or Administrator cannot know the names of *all* creditors, and persons entitled to distribution. The Statute does not say in terms, what effect this notice is to have; but if it can have a sensible meaning, it should not be disregarded; and when we see the next proviso, to wit, that if it shall appear that said applicant has faithfully and honestly discharged the trust and confidence reposed in him or her, we are led to the conclusion, that the six months' notice was designed by the Legislature to give all creditors and distributees, ample time and opportunity to appear and contest the question whether the Executor or Adminstrator had in fact "faithfully and honestly discharged the trust and confidence reposed in him or her." If they fail to appear, the discharge, of course, is granted upon the applicant's own showing, if he satisfies the Judge of the faithfulness and honesty of his transactions. If they appear and contest, and the decision is against them, they have a remedy by appeal under the provisions of the Statute; and in either case, they still have a further remedy by suit against the *person*, as before stated. No such discharge can be granted until the expiration of two years from the grant of letters testamentary or of administration; because that time is given by the 18th section of the Act of 20th Nov., 1828, above mentioned, within which to present claims against the estate, unles it be where the assets have been entirely exhausted by the payment of privileged debts, under the provisions of the 29th section of that Act, or of the Act of 12th February, 1841, amendatory thereto. See Acts of 1841, page 186. And due notice is required by law to be given for the presentation of all claims against the estate by the 20th sec. of the Act of 20th Nov., 1828.

This is not a solitary instance where our Legislature has evinced a laudable disposition to save the honest and praiseworthy from the grasp of a rapacious creditor, while it has taken care, at the same time, to leave an open way whereby to reach dishonesty and fraud. The Supreme Court of Alabama, in the case of Thompson vs. Haynes' Executors, 5 Stewart & Porter, 181, held that an Executor cannot, by resignation of his authority as such, avoid the rendition of a judgment against him as may be in regular process for assets unadministered at the time of his resignation; but remarked, "What would have been the consequence of a resignation at an earlier stage of the administration, it is not now necessary for us to enquire."

This proceeding, however, is essentially different from the one we have been considering. There, no notice is given, no account required, no shewing made or required to be made of a full and faithful adminstration, no action of the Court is had. Here, was a full accounting, and a judgment of a Court of competent jurisdiction, which we are not at liberty to disregard, rendered in a proceeding governed entirely by the provisions of a Statute highly remedial; a proceeding to which the ordinary rules relating to the rights of creditors to the Ecclesiastical Courts and Courts of Probate have no application. But a judgment to which the general principles of law relating to the conclusiveness of judgments, do not fully apply; for by those principles, a judgment of a Court of competent jurisdiction is conclusive upon the parties as long as it remains in force. Wallace vs. Usher, 4 Bibb, 508. Hayden vs. Booth, 2 A. K. Marsh, 353. So a judgment or decree of a Probate Court, is conclusive between the parties, until legally disaffirmed, and cannot be enquired into collaterally. Judges of Probate vs. Filmore, 1 Chipman, 423. Bush vs. Sheldon, 1 Day. 170. This judgment, however, owing to the peculiar provisions of the Statute, is not so far conclusive as to bar suits against the person to whom letters testamentary or of administration have been granted, and who have been duly and legally discharged, if brought within five years after the date of such discharge, for any personal liability incurred in the management of the assets; and why should a suit be brought for any other purpose?

This discharge is "to operate as a *release* from the duties of Executor or Executrix, Administrator or Administratrix." This language is in *"presenti,"* but a release from these duties would not (it is apprehended) operate as a bar to a suit brought against the *person* who had thus acted as such Executor or Executrix, Administrator or Administratrix, for any liabiliay incurred for an unfaithful or dishonest act in regard to the assets with which such person had been entrusted, and for which, if a suit were instituted, it would charge him personally. As, however, the discharge might operate as a bar to such a suit, the Legislature having declared the effect of the discharge as to the duties, went on to declare that such discharge shall furthermore operate as a bar to any suit against the *person* so having acted, &c., unless the same be brought within five years from the date of such discharge; which is equivalent to saying that it shall not bar such a suit if brought within five years from the date of the discharge. This is in *"futuro,"* and shews, we think, most clearly, when taken in connection with the provision as to the duties as above stated, the "intent of the law-makers," that the discharge should be an immediate and effectual bar to suits instituted against such parties in their fiduciary character.

Again, if a suit were brought against such party in that character, it would of course be for the *non* discharge of some duty as Executor or Executrix, Administrator or Administratrix; and to say such discharge shall operate as a release from those duties, and yet that the person thus released may be sued for a *non* discharge of any of those duties, would be a solecism; and, besides, if the party has faithfully and honestly discharged the trust and confidence reposed in him, what reason is there why he should be harrassed with such suits? We think there is none, and that it was the intention of the Legislature that he should not, and that it has in effect so said.

If the view that we have taken of this matter be correct, (and we entertain no doubt on the subject), then the Court below did not err in overruling the plaintiff's demurrer to the fourth plea of the defendants.

We have gone more fully into the questions presented in this case than we otherwise would have done, because they are new and important, and there is some diversity of opinion in relation to them; and because we desire if possible, in putting a construction upon this singularly framed Statute, to give effect to every part of it, and to carry out what we believe to have been the intention of the Legislature in passing it, without endangering the rights and interests of any person or persons whose cases may be brought within any of its provisions. Whether we have accomplished these objects or not, time must determine.

The Judgment of the Court below is affirmed with costs.

BALTZELL, J., delivered the following dissenting opinion:

This case depends upon the effect to be given to a discharge by the Judge of the County Court to an Administrator, under the 5th section of the act "in addition to an act concerning wills, &c., approved 15 Feb., 1834," by which it is provided, "that it shall be competent for an Executor or Administrator to receive a discharge upon application to the judge of the County Court, provided six months' notice of the application be given, &c.; and provided, also, that it shall also appear that the said applicant has faithfully and honestly discharged the trust and confidence reposed in him, and the discharge so obtained shall be taken to operate as a release from the duties of Administrator, &c.; and shall *furthermore operate as a bar to any suit against the person* so having acted as Executor or Administrator, *unless the same be commenced within five years from the date of said discharge;* saving to all persons infants, non compos, &c., who may have an interest in said estate, two years from the time of the removal of any disabilities herein enumerated." Duval, 188, sec. 5.

The majority of the Court in the opinion delivered, affirm the doctrine that a discharge obtained under this act is a bar, and although in the case under consideration it was obtained on the very day the suit of plaintiff was instituted, yet they hold a plea setting up the discharge to be conclusive and fatal to it. I cannot concur in this judgment of the Court, nor in the reasoning contained in the opinion delivered; and conceiving that important principles are involved far beyond the mere amount in controversy, have felt it a duty to record the grounds of my dissent.

The Statute under discussion, has been a subject of anxious

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study and reflection with me, especially since reading the opinion of the Court, and yet I cannot agree with the meaning given to its terms. It is perhaps my misfortune not to perceive room for construction. I find neither ambiguity nor obscurity in any part of the act. The terms are of common use, and as well understood as any in the language; nor do I discover from the opinion delivered, either word or sentence which is asserted to be susceptible of diversity of meaning. If this be the case, construction is inadmissible; interpretation which seeks to attain the meaning of the words, and thereby find out the design of the Legislature, is the true and only guide. Lieber, in his work on Hermeneutics, takes the distinction between the two terms not sufficiently regarded in the law-books, "construction differing from interpretation seeks to discover a design beyond that expressed by the Legislature," and is obviously a most delicate and oftentimes a dangerous task. To declare that the Legislature meant differently to what they have expressed, and either more or less than they have expressed by the language used, would seem to be the making, not the exposition of a law, a repeal of the old, and enactment and substitution of a new law,—this, most clearly, is legislation, and not the exercise of judicial power. Is it not better and safer, by far more wise and accordant with our institutions, based as they are upon a system of laws, for the Courts to decline the exercise of power so questionable, and say at once the law is too ambiguous or obscure to be enforced? The English Courts of the present day are taking the right course and placing their decisions, in cases of construction, on grounds of the clearest propriety and most indisputable truth. "When the legislature has used words of definite and plain import, it would be very dangerous to put upon them a construction which would amount to holding that the legislature did not mean what it had expressed. The fittest course in all cases where the intention of the legislature is brought into question, is to adhere to the words of the statute, construing them according to their nature and import. The most enlightened and experienced Judges have some times lamented the too frequent departure from the plain and obvious meaning of the words of the law by which a case is governed, and themselves hold it the much safer course to adhere to the words of the statute construed in their ordinary import, than to enter into any inquiry as to the supposed intentions of the parties who framed the act." Dwarris on Stat. 703. 6 B. & C. 712. 10 ditto. 527

348 "The Judges are not to *presume* the intentions of the Legislature, but to *collect* them from the words of the law, and *they have nothing to do with the policy* of the law." Dwarris, 703.

"Recently, all the Judges, and particularly the late and present Lord Chief Justice, have manifested the strongest inclination to adhere more closely in the construction of Statutes to the words of the Act of Parliament. I have often lamented, says Lord Tenterden, that in so many instances the Courts have departed from the plain and literal construction of the Statutes relative to the settlement of the poor. Where the authorities are silent, I shall hold myself forced to construe these Acts of Parliament according to the plain and popular meaning of the words." 2 B. & A., 522. Dwarris.

In another case, the same distinguished Judge says, "the words may probably go beyond the intention; but if they do, it rests *with the Legislature to make an alteration,* the duty of the Court is only to give effect to the provision." "It is safer," said Mr. Jus. Ashurst, "to adopt what the Legislature has actually said, than to suppose what they meant to say." Dwarris, 707—8. 1 T. R., 52.

If these Courts, in the fullness of a career distinguished by singular wisdom, ability and virtue, gained each day upon the confidence and affections of their people, have thus so clearly and evidently disavowed this doctrine in its past extent, may it not well become a Court just entering upon its weighty and responsible duties to pause before they affirm doctrines thus condemned as improper, and which may certainly be questionable in reason and good sense?

If resort is to be had to construction, however, let us examine the rules appealed to by the majority of the Court. The first is, that "a Statute is to be construed that no clause, sentence or word, shall be superfluous, void or insignificant." This rule supports the views we entertain; for, according to our conception, the decision of the Court can only be sustained by the disregard of all the words after, "Executors or Administrators," and by treating the words, "unless the same be commenced within five years from the date of said discharge," and also the saving of infants, &c., as wholly "superfluous, void and insignificant." These words stricken out, the decision of the Court is well supported.

The second rule relied upon, is that "the intention of the makers is to govern, although such construction may seem to be contrary to the letter of the Statute." Dwarris, who has written most extensively on this subject and whose work is quoted with approbation in the English and American Courts, says of this rule, "it appears that the letter of a Statute may be *enlarged* or *restrained* by an equitable construction, and there are also certain cases which *are of necessity* by construction excepted out of Statutes. Such are cases out of the meaning of the law, and therefore held not to be within its operation, though included in the terms of it. It is principally in reference to such cases that it is said a remedial Statute shall be expounded *contrary to the words—contrary to the text, &c.; in all its shapes a questionable doctrine, in its stricter sense quite inconsistent with the sounder principles of judicial interpretation,* and requiring, it is apprehended, to be *greatly modified* before it can be *at all admitted as a rule of construction.*" Dwarris, 725. 349

He continues, "the determination of the Judges in Edrick's case, is very deserving of attention. And the Judges said they ought not to make any construction against the express letter of the Statute, for nothing can so express the meaning of the makers of the Act as their own direct words—*'index animi sermo.'*" Dwarris on Stat., 725.

"All Acts are to be taken by reasonable construction, and in doubtful cases Judges may enlarge or restrain the construction of Acts of Parliament, according to the sense of the law-makers." "Beneficial Statutes have always been taken and expounded by equity *ultra* the strict letter, *but* not, it is *well and wisely* said, *contra* the letter."—Dwarris, 726. But admitting the rule to its fullest extent, where is its application to the case under consideration?

Still a third rule is referred to, "that the old law, the mischief and the remedy, are to be considered, and we are to give such construction to the new law as will suppress the mischief of the old and advance the remedy under the new one."

It is first important to ascertain with accuracy and correctness the state of the old law; and here, we apprehend, the Court is in error in supposing that a discharge of the Executor by the Court of Probate was not allowed previously to this Statute. In the earliest period of legal proceedings, we find it thus described: "The effect which arises of a just and true account is this—the Executor having well and faithfully performed his office, and made his account accordingly, ought to be acquitted and *discharged from further molestation and suits as one that has fully administered and finished his office;* neither is he 350 to be called by the ordinary to any further account." Swinburne on Wills, 379.

And "thus the ordinary, finding the account to be true and perfect, may pronounce for the validity thereof, and so acquit the Executor so far forth as appertaineth to the Ecclesiastical Court. But this is perpetually to be observed, that the creditors to whom the testator did owe anything, and the legatees, and all others having interest, are to be cited to be present at the making of the said account, otherwise the account made in their absence, (and they never called), is not prejudicial to them." Swinburne, p. 39. And this has been the law of Florida, also; for, at the earliest period of the Territorial Government, the common and statute laws of England of a general and not of a local nature, down to the 4th of July 1776, were declared to be of force. The law prevailing in the Ecclesiastical Courts on the subject of Wills, Executors and Administrators, was by various English Statutes, and by recognition in the English Courts, part of the law of England, and consequently thus embraced by our statute. Preface to Swinburne on Wills. Duval, 357. Whilst the Executor was thus discharged by the court of ordinary, he was yet liable in the common law courts and in the courts of chancery: in the former to shew that he had fully administered at the suit of a creditor, and in the latter his account was allowed to be falsified at the instance of any party interested by shewing error, mistake, &c. 2 Williams on Exors., 1213, 1239—40. 1 Story's Equity, 509, 512. The reason for deviation in these cases from the rule as to the conclusiveness of the ordinary action of judicial tribunals, was that a creditor of the estate could not falsify the account in the court of ordinary, his remedy being held to be at common law—he could not contest the payments of the Executor or Administrator, but as to him the oath of the party was conclusive. 2 Will. on Exors., 645—8, 1265. 1 Story's Eq., 509.

This was the state of the former law. The mischief pertaining to it is stated at large in the opinion of the Court, and made to consist of a "continuance of liability to suit by the Administrator; objection to reinvestigation of his accounts, expense of counsel, and trouble and vexation of defence of suit, embarrassment, &c., from sickness, loss of vouchers," &c.

351 Language so variant from that of all the authorities ancient and modern, announcing without exception, so far as I have been able to discover, the sound and salutary principle that Executors and Administrators are trustees to be held to a strict responsibility, and giving no encouragement to remissness or neglect in their accounts, has greatly surprised me. The earliest authorities agreeing with those of recent date are to the following effect:

"Surely if it stand with reason that stewards, receivers, bailiffs, tutors, fathers, and such as have to deal for other persons, should be accountable for their stewardship, &c., with greater reason may it be maintained that an Executor should be subject to account rather than they; for they for the most part have to deal for such as be living, who may have an eye to their doings; but an Executor hath to deal for a dead person, who can neither see nor hear if his Executor deal unjustly. Again, if the Executor have well and faithfully executed his office and discharged the trust reposed in him, what should move him that he should not willingly make a due account thereof, &c. On the contrary, if he have played the unjust steward, much rather in that case ought he to be urged and compelled to make an account, that his fraud and deceit being detected he may be justly punished, and others by his punishment premonished." Swinburne. 376.

"The account is to be made to the Ordinary, who, therefore, not unaptly may be termed the Executor of Executors, because he examines the account of every Executor, and the father of the fatherless, for that to poor orphans he is instead of a father." Swinburne. 377.

To close the door against enquiry, to prevent investigation and a suit to obtain their rights by creditors, legatees or distributees, are views as to the intention of the Legislature we conceive not lightly to be entertained. The excuse made, if a good one, would equally prevail against all investigation, and a settlement of accounts even before the Judge of Probate; for an Administrator may there, also, "be put to great trouble, vexation and expense, and be prevented from settling his accounts by sickness, loss of vouchers or other casualty." If he "has faithfully and honestly discharged the trust, and be in fact of an honest and ingenuous mind," what reason has he to fear trouble or investigation; would he not rather invite the latter and reject, as an imputation upon his good name, a statutory provision which
352 would screen him from it? Can there be a question but that investigation and scrutiny, free, open, full and fair, as under the old law, are the true and best security of the officer, whilst mischief and injury are the sure and certain result of presenting to his weakness, negligence or cupidity, the temptation of an Act of the Legislature to stifle and exclude enquiry into his accounts and prevent a just responsibility for his official action?

But let us look at the remedy which finds such favor with the Court, and which it is said is so greatly preferable to the old rule. The discharge is thus obtained: "It shall be competent for the Administrator to receive the same on an application to be made after six months' notice in one of the gazettes nearest the place where the letters were granted; and provided *it shall appear* that the applicant has faithfully and honestly discharged the trust and confidence reposed in him." The proceeding is not entirely exparte, but as nearly so as it could well have been made, if any notice were to be given. It is not directed to be addressed to any one, nor is a time or place fixed for the hearing, but the discharge is to be after six months' publication. But a more material omission and objection is that there is no provision for the making and issue by any of the parties as to any distant fact, as to payment of debts, amount of assets, or contestation of the items of the account in any respect. Nor is there provision for the trial of any such issue, and yet upon the rightful solution of all these questions depends the result whether "the Administrator has faithfully and honestly discharged the trust and confidence reposed in him." This material and important matter is disposed of by the lame and unsatisfactory provision—"provided it *shall appear* that the applicant has faithfully discharged the trust." If a legatee desire to contest the receipt of his legacy—a creditor the satisfaction of his demand—a distributee the alleged amount of the assets—the expenditures and disbursements—how are all these to be disposed of? The Judge of Probate is not skilled to decide intricate questions of law. According to our Constitution, the jury are judges of the fact, and there is no power given to summon one. Even his power to subpoena witnesses is questionable; and yet rights of property to any the greatest extent are put in jeopardy and determined by a proceeding before unheard of; without any time or place fixed for the hearing; without any issues; without witnesses, without jury, and without judge.

353 And this proceeding, so derogatory to principles of the common law the most venerated, and hitherto most sacred, is to be extended and carried beyond the provisions of the Act by construction. The Court says, "the Legislature took care to use a term which only *authorizes suits to charge them personally.*" With due deference, the design of the Legislature was different from what is here stated. The statute was to relieve Executors and Administrators from responsibility in their official capacity, and did not concern with their individual or personal relations. There is no such expression in it as authorizing suits to "charge them personally." It speaks not of the *institution* of, but of the *defence* to a suit. But it is said that the words, *"against the person so having acted as Executor,"&c.*, are clear and definite, and support this idea of a charge personally. The Legislature, it seems to me, used these words as appropriate to the granting a discharge to a person who was no longer Executor or Administrator, and who yet might be liable to suit for past conduct. They could not with propriety say the discharge shall operate as a bar against such Executor, for he was out of office; but appropriately might say, as they have said, that it should operate *against the person so having acted as such Executor, &c.*

It is supposed to be incongruous, and a solecism, to discharge these officers and release them from their duties whilst their responsibility continues; but why is it so? Sheriffs, clerks, and other officers, are discharged from office and released from duty, and yet continue to be liable on their bonds for years afterwards. This has always been the case with Executors and Administrators, whose duties cease long before their responsibility. "Familiar as the distinction between suits against Executors and Administrators as such, and suits to charge them personally, may be to every lawyer," yet I confess myself wholly at a loss for the meaning of the Court in this position. Was it the design to say that they should be charged in the declaration individually, or personally, and not as Executors? This would seem to be the rational inference. If this be true, actions then under this statute can only be brought for "transactions arising subsequent to the death of the testator; for these are contracts of the Executor or Administrator, which charge him personally and in his individual character," and not officially. 1 T. R. 487, 691. 4 T. R. 104. 8 Mass., 213. 3 do. 318, 190. 6 Hals., 163.

354 It cannot apply to the ordinary case of a suit against an Executor, because its primary object is to make the money from the estate; and it is only on proof of misappropriation of assets by an executor, that he is made liable personally.

It is suggested that the action for a devastavit is alluded to. This can hardly be the case; for it is said, in case of a suit to charge the Administrator personally, "the burden of proof is changed, the onus rests on plaintiff, and he must shew by his pleadings and proof, that at the time the discharge was granted, the defendant had not faithfully and honestly discharged his duty." Now, in case of devastavit, the proof always lay on plaintiff as it does in all other actions. What change then is made? 3 Chitty Pl., 254. 1 Saund. 219, N. 8.

What then are the actions that may be maintained, and how are they to be preferred under this new rule of action?

If the discharge by the Statute operates only as a bar personally, or to a personal action, it would seem to me that actions against the Administrator in his official character, not being embraced by its provisions, would not be barred; they remain as at common law. It is said that "the discharge is a judgment, to which the general principles of law relating to the conclusiveness of judgments do not apply." This, it seems to me, surrenders the whole ground; for, if not conclusive, it cannot be a bar; if not a judgment, and having the effect of one, there is no other position to occupy with it. How otherwise is it made to conclude the action of plaintiff and prevent recovery? After the lapse of five years, we consider that the discharge has the full effect of a judgment, and prevents all contestation as to the Administration. The Statute, in my view creates a new remedy, providing a prospective bar to operate unless suit be commenced within five years—allows suits by persons generally against the person having acted as Executor or Administrator within five years after his discharge; and infants, persons beyond seas, and others, five years and two years after their disabilities are removed, to bring suit.

Whilst the decision of the Court makes the discharge an absolute bar, the opinion makes it an immediate bar and not a bar—"a judgment of a Court of competent jurisdiction," and yet "not a judgment so that the general principles of law apply to it"—conclusive and not conclusive—a proceeding of a Court of Probate, yet to which

355 "the rules of such Courts have no application;" for the most part, a defence to the action, and then to authorize suits against a defendant to charge him personally, and discriminating as to the person and object of the suit,—again, a proceeding which is "to change the burden of proof." All this is produced by construction of a Statute which is declared highly remedial, though innovating most seriously upon common law principles. A construction, too, asserting that the intention is to govern against the letter, yet maintaining the letter against the intention; and declaring a mischief under the old law, whilst it creates a greater mischief under the new remedy.

A decision supported by such a contrariety of positions, leaving the subject in such uncertainty and obscurity, being so clearly in opposition to the manifest and unequivocal expressions of the Statute, can scarcely prevail as a permanent rule of action.

By the Constitution of the State, the Judges of Probate are confined to the duties usually pertaining to courts of ordinary, subject to the direction and supervision of the courts of chancery. It is to be hoped that this provision may correct, at least so far as action under the State Government is concerned, the evils which I apprehend may flow from this decision of the Court.

356 ISAAC W. MITCHELL *vs.* HENRY DOGGETT.

The 1 & 2 sec. of the Act of 1833, "regulating the rate of interest," were repealed by the Act of 1844; but prior to the repeal, a contract was made whereby a greater rate of interest than that thereby allowed was reserved and taken: held that the repeal of the Act of 1833, was no bar to the plea of usury under that Act; and that the rights of the parties must be governed by the law in force at the time of the making of the contract, and that they were not affected by the subsequent repeal of the said Act.

When a contract is, by force of a Statute, illegal at the time of its inception, no action can be maintained upon it, although the Statute declaring it illegal be repealed.

The law of 1833, which declared that the interest on any usurious contract shall be void and the obligor forever exonerated from the payment of the same, vested in the obligor a right which could not be divested by posterior legislation repealing such law.

When illegal interest is taken or contracted for, the whole interest becomes void from the time of the taking of the usurious interest.

To establish usury, it is not necessary to show that the Plaintiff actually took or received more for interest than the law declared lawful, but it is sufficient to show that it is promised to be paid; and it is immaterial whether the usurious interest is secured by a distinct instrument, or is included in the instrument which secured the principal.

In order to render the offence complete, so as to subject the lender to the penalty under the Statute, there must be an actual receipt of the usurious interest; but the contract may be rendered void without such receipt.

A contract to pay more than legal interest for past forbearance is illegal.

When the original contract is lawful no subsequent taking of, or contract to take, illegal interest, will invalidate it; and if sued on, Plaintiff may recover the principle and interest of such original valid contract; but when suit is brought on a new note, tainted with usury, which had been substituted for the original valid one, plaintiff can only recover the original and valid principal with interest thereon up to the time of the taking of illegal interest.

ERROR from Leon Circuit Court.

This case was tried at the Spring Term, 1846, his Honor Judge MACRAE, presiding.

Assumpsit on a Promissory Note.

Plea: *Non assumpsit,* and a notice setting up *usury.*

The Plaintiff insisted that so much of the law of 1833, "regulating the rate of interest," as prohibited the taking or reserving of a greater than a certain rate of interest therein expressed, having been repealed by the Act of 1844, there was no law *in force*, applicable to his case, against the taking of usury. 357

The facts of the case will be found in the opinion of the Court.

A. E. Maxwell, for Plaintiff in Error:

Contended it was the effect of the repeal by the Act of 1844, of the 1st and 2d sections of the Act of 1833, relating to interest, that except as to transactions past and closed, they are to be considered as if they had never existed; and, therefore, defendant cannot now sustain the defence of usury as to any contract made while these sections of the Act of '33 were in force. Statutes of usury are penal statutes, and the consequences which attach to penal statutes generally, also attach to those on the subject of usury. It is a well settled rule of law, that the repeal of a penal statute operates as a release to all who have incurred the penalty, unless there is a saving in the repealing clause to the contrary. Why shall not the same effect follow the repeal of a usury law? To avoid the force of this general principle in this case, it must be shown that statutes of usury form an exception to penal statutes generally. If it be said that the 3d section of the Act of 1833, which was not repealed, is the one relied upon here, it is a sufficient reply that that section does not declare what usury is; and to have any meaning or force, must be connected with the 1st and 2d sections. But these sections are repealed, and all connection between them and the 3d cut off; for they are to be considered as if they "never had existed." Dwarris on Stat., 676. 2 Cond. R. S. C. U. S., 256.

This doctrine, though, is not confined to penal statutes. In some cases, civil rights are affected in the same way by a repealing Act. 1 Hills. R., 324.

It may be contended, as was done below, that this view of the law will have the effect to render lawful and valid any contract which, at the time it was made, was unlawful. But this same objection would equally apply to the case of penal statutes; for their repeal has the effect of legalizing acts which, when committed, were unlawful. The objection is too sweeping. Our law is merely prohibitory. It does not declare the contract, or any part of it, void. The words in the 3d section, "and the interest on the same shall be void," are without meaning. It would be the same thing to say, that the money promised in a note shall be void. These words not making void the 358
contract or any part of it, the whole of said section, fairly construed, amounts to giving a privilege to the "obligor or obligors" to get exonerated from the payment of the interest; so that any law which affects this privilege, affects only the *remedy,* and not the contract itself.

He contended, also, that the Act of 1833, operated only upon the usury which it prohibited, and did not forbid the recovery of the principal with legal interest. The 1st section of the Act of '33 declares, that all "bonds, contracts, &c., on which a higher rate of interest is received or taken than is hereby allowed, shall forfeit the amount of said interest." "Said interest," evidently refers to "higher rate of interest," for its antecedent; and "higher rate" must mean a rate above the legal rate; and therefore so much as is legal is not to be forfeited. This section declares what usury is, and the 2d and 3d, must be construed in connection, and not inconsistently, with it.

Third. There can be no usury under the Act of 1833, until the party has actually *taken* or *received* more than lawful interest. In that act there is nothing said about "reserving" interest, and in this respect it is different from other usury laws. The 1st section of the Act, which declares what usury is, and which imposes a forfeiture, &c., is penal, and must be construed strictly. That section nowhere says that to reserve, or contract for, more than ten per cent. interest, is usury; but to *take, accept,* or *receive* more, is prohibited by it. The 3d section is a nullity without the 1st; for it cannot be ascertained when a contract is usurious without reference to the 1st; and, consequently, only that is usury within the meaning of the 3d section, which is declared to be by the section upon which it depends for its construction. This proposition is fortified by reference to decisions under the statute of Anne. Under that Statute the clause which *avoids the contract* contains the words, "whereby there shall be *reserved* or taken above," &c.; but the clause making usury a penal offence, only contains the words, "take, accept and receive," &c. It has been repeatedly decided, that under this Statute, there must be an actual taking of excessive interest before the *offence* of usury is complete; whereas, the *contract* itself, and the note or other evidence of it, are voided from the time of the making thereof. Why this difference, unless the word *reserve* makes it. See Fisher, *qui tam. vs.*

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Beasly, Douglas' R. 235. Maddock vs. Hammet, 7 Term. R., 184. 359
in 10 Eng. Com. Law, R. 91. This last case holds that the taking of a note for usury is not a sufficient taking to constitute the offence. Now, the Act of 1833, has nothing about *reserving* interest, but only of "taking," &c. Must we not give to this the same construction which has been given to the corresponding clause in the Statute of Ann. The same language is used—the same meaning should be given to both. The criterion of usury in England is different as affecting the *contract* and as affecting the *penalty*. In the former case the criterion being "the reserving or taking," &c., in the latter, the criterion being the "taking, accepting or receiving," &c. Here the criterion is the same with reference to both contract and penalty —it being the same which in England tests the usury with reference to the *penalty*. It should receive the same construction with reference to both contract and penalty, which is there given with reference to the penalty alone.

The reason to sustain this point becomes stronger under the principle that this Statute must be construed strictly. Unless this rule of law be departed from, the Court cannot make the words, "take, accept or receive," mean, "reserve or stipulate for," or any thing else, other than that imparted by their strict letter. "The Court must not, in order to give effect to what they may suppose to be the intention of the Legislature, put upon the provisions of a statute a construc- not supported by the words, though the consequence be to defeat the object of the act." Dwarris, 702—3.

But, the most conclusive point in the case is this—where a contract is originally legal and valid, it will not become tainted by a subsequent taking of, or contract to take, usury. The authorities upon this point are numerous, and they all sustain the proposition here laid down—not one to the contrary. It will be enough to cite merely a few of them. See Blydenburg on Usury, 97—102. 3 Camp., 119. 3 Barn. & Cres., 257. 8 Mass., 256. 19 John., 294. 5 Wend. 295. One, or more, of these cases shows that where there has been a renewal of a good note, and upon renewal there is usury, this shall not prevent a recovery of the old debt upon the money counts, though the new note be valid. Under this law, if usury is proved in the note here sued upon, we are, notwithstanding this, entitled to recover, under the money counts, upon the contract of 1839, which it is not pre- 360
tended was usurious. Unless all these cases be founded in error, and are not law, the judgment of the Court below must be reversed.

J. & L. Branch, for Appellee:

Did the Court err in admitting the documentary evidence? The hand-writing of Mitchell was sufficiently proven. 2 Starkie, 651 And the most overwhelming *circumstantial* evidence proved that the figures related to the subject matter of this suit. These circumstances and the original papers, were commented on at large.

2. The Counsel for Appellant, contends that inasmuch as the usury law of 1833 was repealed prior to the commencement of this suit, though subsequent to the making of the contract, the act of 1833 cannot be pleaded to defeat this suit.

It is worthy of remark, that the act of 1844 did not indicate any change of policy by the State, but only reduced the legal rate of interest from ten to eight per cent.; and this contract is a greater violation of the act of '44 by two per cent., than the act of '33. But we contend that even if this contract would be legal under the act of '44, it is to be governed by the act of '33, which was in force at the time it was made.

The cases cited by the Counsel for Appellant, do not bear upon the case. 5 Chanch, 281; 1 N. Hamp., 61; and 11 Pick., 350; are all criminal prosecutions. 1 Hill, 320, was a case in which a right to redeem land within two years after a sale under execution, was claimed, after the law granting the privilege was repealed. Dwarris, 676, says, "a repealed statute is to be considered, as to all transactions not *past and closed,* as if it had never existed." We say this transaction—this contract—was *"past and closed,"* before the repeal of the act of '33. From these cases, we may gather that—1. Criminal, or quasi criminal, (as *qui tam*), penalties cannot be inflicted after the repeal of the statute inflicting them. 2. Gratuitous favors granted by a law, which the State is under no obligation to grant or continue, are withdrawn by the repeal of the law and the adoption of a different policy. Not a single one of them involves a question of civil right between individuals. We admit that according to those authorities, the usurer in this case cannot be prosecuted and punished under the 2d sec. of the act of '33; nor can he be sued in a *qui tam* action by an informer under that section. The State will forego punishing him for an act which has ceased to be against its policy;

for it is no longer desirable to deter him, or others, from a repetition 361
of the act. But there is an obvious difference between refraining from punishing a man for an act which has ceased to be unlawful, and permitting him to recover the fruits of his iniquity. The doctrine contended for by the Appellant, would be most startling in a country where laws are so short-lived. In a country where a contract is rarely executed before the law under which it was made is repealed, the books would abound in cases in which it has been asserted.

Even in England, where the Parliament is considered omnipotent and knows no control, except the tacit and inherent right of revolution, the Courts have uniformly refused to give to laws a retrospective operation, "unless the legislature in the language used show a clear intention to vary the relation of such parties;" because it would be contrary to reason and subversive of natural rights. Camden, et al., vs. Anderson, 6 D. & E., 723. Jacques vs. Witley, 1 H. Blacks. 65. Chitty on Cont., 5 Am. from 3 Lond. ed., 698. Hitchcock vs. Way, 2 Nev. & P., 72. 6 Ad. & E., 943.

In the United States, the prohibition against interfering with vested rights, or impairing the obligation of contracts, has been so often repeated in the Federal and State Constitutions, that it may be considered as *the* characteristic of our forms of government. We consequently find the decisions of our Courts uniform against retrospective laws. Ogden vs. Blackledge, 2 Cranch., 272. Lewis vs. Brackenridge, 1 Blackf., 220. Day's Digest, 433. Story on Confl. of Laws, 205. Hannay vs. Eve., 3 Chanch, 242. Springfield Bank vs. Merrick, 14 Mass., 322. Russel vs. Degrand, 15 Mass., 36. 1 Kent, 455. Brunswick vs. Litchfield, 2 Greenl., 28. Ib. 275. King vs. Dedham Bank, 15 Mass., 477. McMahon vs. The Mayor, 2 Harr. & J., 41. In most of these cases, the Legislature undertook, in express terms, to make the law retrospective, and the Courts declared the laws unconstitutional and void. How much less will Courts make them retrospective by mere construction and implication! The law existing at the time the contract is made enters into and forms a part of the contract; and to alter the rights given to *either* party by that law, is to impair the obligation of the contract. On this point we might, if they were not already so familiar to the Court, cite the decisions of the Supreme Court of U. S., and the Courts of almost all the States of the Union, against the validity of 362
relief and *stay* laws—the numerous devices that have been unsuccessfully resorted to to delay the collection of debts, and the strictness with which the Courts have confined the Legislature to *bona fide* legislation on *the remedy*. But admitting that the cases cited for Appellant are applicable, our case is untouched. The act of '44, only repeals the 1st. and 2d. secs. of the act of '33, leaving the 3d. in force. That sec. (the 3d.) declares, "that if any note," &c, &c., "shall be given on a usurious contract, the interest on the same shall be void, and the obligor forever exonerated from the payment of the same." But, says the Counsel, what is *"usury"* after the 1st. and 2d. secs. are repealed? We reply, we can certainly refer to the 1st, and 2d. secs., to assist us in interpreting the 3d., and to enable us to ascertain what the Legislature meant by a technical word used in the 3d.

3. Appellant contends that money must be taken before the usury is consummated, and relies on Douglas' Rep., 235—6; and Maddock, *qui tam.* vs. Hammett, 7 D. & E., 183. These cases only prove that the *offence* is not committed until money is taken. The policy of the law is to prevent the money from being taken—to prevent the offence from being committed; and, therefore, it avoids the contract to pay it. He now asks this Court to enable him to take the money —to enable him to commit an offence for which he would be indictable under the 6th sec. of the act of '33. Would not this Court be *particeps criminis* if it were to do so? Counsel also relies on the phraseology of Stat. of Anne, to show that money must pass. The words of that Stat. are—"all notes by which usury is reserved or taken, shall be void," &c., showing that usury may be *taken* by note. Vide, Chitty on Cont., 548.

4. Appellant contends that he is entitled to his original claim with legal interest thereon.

If so, then our usury law would be a nullity. The law makes the whole interest void from the time the usury commenced; yet, Appellant insists on his right to recover interest on the same debt during the same time, by the simple expedient of falling back on a different evidence of the contract.

5. To what extent does the usury affect the contract? The 1st sec. of the act says, "shall forfeit the amount of said interest." The 3d. sec. says, "the interest on the same shall be void." Under these

two secs., we contend that the whole interest on the *usurious contract* 363
is void—that is, that the interest on the debt ceased from the moment that usury commenced.

Long & Walker, also for Defendant:

This judgment is sought to be reversed on four distinct grounds: 1. That since the act of 1844, repealing the 1st and 2d sections of the usury act of 1833, it has become lawful to collect the interest contracted for on the note now sued on, although the same was void at the time the note was made.

The authorities cited to this point are not applicable. The case from Dwarris on Stat., 676, declares that the repeal of a Bankrupt law, without any reservation in favor of pending cases, deprives the Court of any further jurisdiction in such pending cases. The case from 5th Cranch, 281, declares that the repeal of a law under which a vessel and cargo are condemned, while the cause is pending in the Appellate Court, operates as an abatement of the suit. The case in 1st Hills. Rep., 324, simply declares that where a statute allows a person whose land is sold under decree of Chancery to redeem the same on certain terms, within a given time, and the statute is repealed after the sale and before the redemption, there remains no right to redeem —the same being a mere gratuitous privilege, which may be withdrawn at any time. The case in 1 N. Hamp. Rep., 61, declares that a *qui tam* action for a *penalty,* cannot be maintained after the repeal of the law imposing the penalty; and the case in 11 Pick., 350, only reiterates the familiar doctrine, that a man cannot be indicted after the repeal of the law which he is alleged to have violated.

The obvious reason why these cases, which are believed to be good law, do not apply to the case at bar, is this: Mitchell is neither indicted criminally for usury, nor is this a *qui tam* action against him to recover the penalty inflicted by the first and second sections of the usury act of 1833. On the contrary, *he* is seeking to enforce that part of a contract which was unlawful and void when made. I am unable to perceive any resemblance in principle between the two cases. But this is put beyond all question by the authorities, *in point,* cited by my colleague.

2. The second ground relied on for reversal, is—that the Court below erred in holding that by the act of 1833, a person who contracts for more than lawful interest, shall not be permitted to collect
364 any interest whatever. The verbal criticism of the act, by which this conclusion is arrived at, seems rather deficient in force. The first clause of the third section declares, "That when any note, notes, bond or bonds, shall or may be upon, or on account of, any usurious contract, the *interest* on the same shall be void, and the obligor, of obligors, forever exonerated from the payment of the same."—This is too plain for comment.

3. The third ground assumed on the other side, is—that under our statute, in order to constitute *usury,* more than lawful interest must be actually *received,* not merely contracted for or reserved. If this be so, it follows, that a defendant can never successfully resist the payment of the interest arising upon a "note or notes, bond or bonds," "upon or on account of any usurious contract," although the third section of the act expressly declares the same to be *void,* and forever exonerates the obligor, or obligors, "from the payment of the same." It may be true that nothing short of actual *payment* of usury will justify a *qui tam* action for the penalty inflicted by the second section, or an indictment prescribed by the 6th section. But it is little less than absurd to say that a defendant must pay the usury before he can resist its payment, which he is expressly exonerated from ever doing This distinction is clearly laid down in *Blydenburg on Usury,* so much quoted on the other side, at page 129, viz: "The difference in the effect of the stat. in the avoiding of the contract, and the accruing of the penalty, is therefore manifest. As soon as an usurious contract is made, it is *ipso facto ab initio* void. But the penalty does not arise upon the making of the contract. That is only incurred by the execution of the contract; or by the receipt of excessive interest without any previous usurious agreement." *Quere*—Whether Mitchell will not be subject to the penalty prescribed by the 2d section of the act of 1844, and indictable under the 6th sec. of the act of 1833, if he shall now recover and collect this interest? The contract is not *executed* until payment; and it is the execution of the lawful contract, which is penal and criminal, says the authority above quoted. It amounts to this: Mitchell is desirous to commit a crime and incur a penalty; and finding it difficult to accomplish this object, invokes the aid of the Court. It will scarcely be contended, we imagine.

4. But the fourth point seems to be relied upon with most confidence, viz: That the debt sued on, and evidenced by the note in 365
question, may be recovered with legal interest, as the same was not originally tainted by usury, under the money counts in the declaration, although the interest secured by the note may be void, &c. The authorities read to this point, from England, Massachusetts and Maryland, do establish the principle that where a note is made wholly void on account of usury, the original debt for which the note was given remains, and may be recovered, if sued for in the proper manner and at the proper time. But that is not the case here. This note is not void, or ever was. Therefore, its execution and continued existence as a valid security for the debt, was a perfect extinguishment of the demand for which it was given. If the usurious note had been void, its execution would not, of course, have extinguished the claim. Therefore, it follows, that as the Flake notes were delivered up and cancelled, in consideration of the note sued on, the effect of the transaction was to give up a note bearing interest for one bearing no interest. This Mitchell had a right to do if he chose; and it may be presumed that he is willing to risk the chances of getting no interest at all, for the sake of the chances of realizing a greater sum than legal interest.

Our statute expressly declares that the *interest* shall be *void*—that is, the interest shall never be paid; "the obligor shall be forever exonorated from the payment of the same." Now, interest is the rent or hire money—a price agreed to be paid for forbearance in its collection. The money due upon the Flake notes was agreed to be forborne at an unlawful price; and when that occurs, the statute declares that *no* price for the forbearance shall be collected. Plaintiff has a judgment for his original debt; to ask interest also, is to ask to nullify the statute.

L. A. Thompson, for Plaintiff in Error.

HAWKINS, Justice, delivered the following opinion:

This was an action of assumpsit brought originally against the defendant Doggett and J. W. Cotten. Cotten dying before the trial, the suit abated as to him, but continued as to Doggett.

The declaration contained a special count on the note, and the usual money counts. The note declared on was in the following words and figures, to-wit:

"On or before the first day of January next, we or either of us 366
promise to pay Isaac W. Mitchell or order, fifteen thousand nine hundred and fifty-five dollars, with ten per cent. interest from date, for value received this the 2d day of January, 1841."

"H. DOGGETT.
"J. W. COTTEN."

(Endorsed),

"Received the interest on the within note up to the first day of January, eighteen hundred and forty-four, this the 5th January, 1844."

To the declaration the defendant pleaded the general issue and notice of usury. The notice sets up, that the defendants being indebted to the plaintiff in the sum of $14,504 65, on the second day of January, 1840, it was agreed by and between them, that in consideration of forbearance by the plaintiff for the space of one year, to wit, from the second day of January, 1840, until the first day of January, 1841, the defendants would agree to give and allow to the plaintiff the sum of $1,813 01, by way of interest for said forbearance. The notice then avers that this interest was at a greater rate than at the rate of ten per cent. per annum, to wit, at the rate of twelve and a half per cent.; and that in pursuance of such corrupt and usurious agreement, the defendants executed and delivered, and the plaintiff accepted, his further note for the (amount) of $362 61. That the defendant will insist, that the said note is void as to so much as is for interest on $14,504 65; that is to say, for the said sum of $1813 01. And the notice further avers that on the 2d day of January, 1841, the defendant being indebted to the plaintiff in the sum of $13,186 05, with the interest thereon, at the rate of ten per cent. per annum, from the 1st day of January, 1839, it was corruptly and usuriously agreed by and between them, that said plaintiff would forbear and give day of payment for the further space of one year, until the first day of January, 1842, in consideration that the defendant would give and allow to said plaintiff for interest on said sum of $13,186 05, for three years from the first day of January, 1839, to 1st January, 1842, the sum of $5125 98, being more than at the rate of ten per cent., but at the rate of twelve 95-100ths, for the forbearance of one hundred dollars for one year; and that in pursuance of such usurious agreement, the defendant did on the second day of January, 1841, execute and deliver to said plaintiff the note in the declaration men-

367 tioned: and the said defendant, Doggett, did on the same day and year execute and deliver his further note for $362 61, payable on the first day of January, eighteen hundred and forty-two, and his note for $398 87, payable on the first day of January, 1842, all which were accepted by plaintiff; and that it will be insisted that the sum of $5125 98, being for interest from the first day of January, 1839, when usurious interest was first taken, was and is void.

On Monday, the 25th day of May, 1846, the cause came to trial, and the plaintiff gave in evidence the note as before set forth.

On the part of the defendant witnesses were introduced, who swear that the following papers were in handwriting of Mitchell:

1. "On or before the first day of January next, we jointly and severally, promise to pay Isaac W. Mitchell, or order, thirteen thousand one hundred and eighty-six dollars, for value received, with ten per cent. interest from date, this the 1st January, 1839."

(Endorsed on face, "Paid—H. Doggett.")

2. "On or before the first day of January next, I promise to pay Isaac W. Mitchell or order, three hundred and sixty-two dollars sixty-one cents, for value received, this the 2d day of January, 1841.

"H. DOGGETT."

3. "On or before the first day of January next, I promise to pay Isaac W. Mitchell, or order, three hundred and ninety-eight dollars and eighty-seven cents, for value received, this the 2d January, 1841.

"H. DOGGETT."

"One day after date, I promise to pay Isaac W. Mitchell, or bearer, at Tallahassee, six thousand, six hundred and seventy-six dollars, and sixty-four cents, for value received, with ten per cent. interest from the first day of the present month, this the fifth day of January, 1844.

J. H. T. Lorimer was introduced as a witness, who proved that the following notes were in the handwriting of one William Flake:

5. "One day after date, we jointly and severally promise to pay William Flake, or bearer, five thousand and sixteen dollars, for value received.

"Jan'y 1, 1838."

(Endorsed),

"Jan'y 1, 1838. Received of the within note, four hundred and thirteen dollars and fifty cents. Received on the within note, one
368 thousand three hundred and sixty-nine dollars and 11-100, January 1st, 1838."

6. "On or before the first of January, eighteen hundred and thirty-nine, we jointly and severally phomise to pay William Flake, or bearer, eight thousand three hundred and thirty-three dollars, with interest from the 13th December, eighteen hundred and thirty-six, for value received.

"H. DOGGETT,
"J. W. COTTEN."

"January 1st, 1838."

Besides these notes, certain papers were introduced by the defendant Doggett. Upon them were figures and calculations, sworn to be those of Mitchell. They appear to have been so clearly made in connection with the note sued on, and the other notes before set forth, and so clearly to have reference to them and the transactions between the parties, and carry upon their face so strong evidence of the true nature of the whole affair, that we think the Court below was right in submitting them as testimony to the jury, for their consideration.

Upon this evidence the case went to the jury, and a verdict was found for the plaintiff for fourteen thousand one hundred and forty-one dollars and nine-nine cents.

From the notes as produced in evidence for deefndant, and the exhibits containing the figures and calculations of Mitchell, the following may be stated as the facts of the case:

Originally there was two notes given by Doggett and Cotten to William Flake,

One dated 1 Jan'y, 1838,	$ 5,016 00
Credited by payments to,	1,782 16
Which deducted leave,	$ 3,233 34
Interest to first January, 1839,	258 66
Making,	$ 3,492 00
The other note from the same date, with interest from 13th December, 1836,	8,333 00
Interest to 1st January, 1839,	1,361 05
Two notes added together,	$13,186 05

On the first day of January, 1839, a new note was given for this 369 amount, by Dogett and Cotten, and payable to Mitchell, (see, 1). who would seem to have obtained the two notes from Flake. The following statement may illustrate the true situation of the whole affair:

	$13,186 05	
10 pr. ct. int. to 1st Jan'y, 1840,	1,318 60	
	$14,504 65	
(Inter't on this amt. 2 1-2, to 1840, is $362 61, for which note marked 2 was given.)		
Int. to 1 January, 1841,	1,450 40	
For this amt. note sued on was given,	$15,955 05	
10 pr. ct. interest to January, 1842, is	1,595 50	
		1,595 50
2 1-2 pr. ct. to Jan., 1842, is $398 87, which with compound interest at 12 1-2, to 1 Jan., 1844, is (Note 3)		507 06
	$17,550 55	
Interest to Jan'y, 1845	1,755.05	
		1,755 05
2 1-2 pr. ct. to Jan'y, 1843, is		438 75
	$19,305 60	
10 pr. ct. to 1 Jan'y, 1844,	1,930 56	
		1,930 56
2 1-2 to 1 Jan'y, 1844		449 73
	$21,236 16	$6,676 65

The aggregate of these amounts carried out, would seem to constitute the note of 1844, marked 4.

The errors assigned by the plaintiff are as follows:

1. The Court erred in admitting as evidence the papers marked C. D. E. F. G. & H., and A. & B.

2. The Court erred in refusing the 1st, 2d and 3d instructions asked for by the plaintiff, and in substituting the instruction it gave for the 3d above named.

3d. The Court erred in allowing the 1st, 2d, 3d, 4th and 5th in- 370 structions asked for by defendant.

4th. The Court erred in giving instructions 1st and 2d, named in the bill of exceptions, and given after allowing instructions for defendant.

The first question for the consideration of the Court, is the effect of the repeal of the statute of usury of 1833, by the act of 1844. The first section of the act of 1833, is to this effect: That no person shall upon any contract take, directly or indirectly, for the loan of any money, &c., above the date of ten dollars for the loan of one hundred dollars for one year; and all bonds, &c., for payment or delivery of any money, goods or merchandise, to be lent, on which a higher rate of interest is received or taken, shall forfeit the amount of said interest. Section 2d, is to the effect, that any person taking, accepting or receiving, above the rate of ten dollars for the forbearance of one hundred dollars for one year, shall forfeit and lose for every such offence the whole amount of interest due; one half to be paid into the treasury of the county where the offence is committed, and the other half to him or them who will inform and sue for the same, to be removed in an action of debt in any competent court. Section 3d declares, that when any note or notes, &c., shall be upon, or on account of, any usurious contract, the interest on the same shall be void, and the obligor, or obligors, forever exonerated from the payment of the same, &c.

On the 15th day of March, 1844, the two first sections of the foregoing act of 1833, were repealed, and new sections substituted.

There can be no truth of the truth or validity of the assertion, that where there is a repeal of a penal statute, no penalty can be enforced, nor punishment inflicted, for violations of the law while in force, unless some special provisions were made for the purpose.—This principle is too well settled to admit of controversy. Nor can it be denied that the Legislature can alter or modify the *remedy* as to the enforcement of contracts, unless carried to the extent to take away virtually, or substantially, the remedy.

If this were the case for the enforcement of the penalty, as prescribed under the second section of the act, the conclusion of the Court would be at once in accordance with the views of the counsel for appellant; but the Court think there is a broad distinction between a

law *affecting the remedy,* or *creating a penalty,* and a law in *relation to the contract itself.* The authorities, as cited for the plaintiff in error, are mainly directed to one or the other of the two first cases, viz., the law affecting the remedy, or in regard to the enforcement of a penalty, where the law creating it has been repealed. The case at bar must stand upon the law in relation to the contract itself, and we can find no authority that declares, that a contract rendered void by statute, can, upon a repeal of that statute, acquire a vitality which it did not before possess. Sound policy, justice and morality, unite in stern opposition to such a principle.

On the other hand there are authorities entitled to the highest possible respect, which can be cited in support of the principle, we are prepared to assert, viz., where a contract is illegal, *at the time of its inception,* by force of a statute, no action can be maintained upon it although the statute is reepaled, which declared it illegal *"ex nudo pacto, non oritur actio."* Judge Story remarks, "where a contract was made in France to smuggle goods into our own country in violation of our laws, the contract will be treated by our Courts as utterly void, as an intended fraud upon our laws. And in such a case, brought into controversy in our Courts, it will be wholly immaterial whether the parties are citizens or foreigners. So, if a collusive capture and condemnation are procured in our Courts by fraud of our laws by foreigners, who are even enemies at the time, their contract for the distribution of the prize proceeds will be held utterly void by our Courts; and it will make no difference that the laws have since been *repealed,* or that the war has since ceased, for the contract being clearly in fraud of the laws *existing* at the time, the execution of it ought not to be enforced by the Courts of the country, whose laws it was intended to evade." Story's Conflict of Laws, 205.

In Hannay vs. Eve, 3 Cranch, 242, we find the same doctrine as laid down by Judge Story, and the opinion of the Court pronounced by Chief Justice Marshall.

So in Jacques vs. Withy & Reid, 1 H. Black. R., 65. This case would appear analagous to that at bar. There was a statute of 19th George the 3d, in relation to the purchase and insuring of lottery tickets, with a penalty for an infringement of its provisions. It was repealed by a statute of 22d of George 3d. The decision in this
372 case goes to the effect to declare that a contract *declared* by statute to be illegal, is not made good by a *subsequent repeal of the statute.*

The same principle is enforced in the case of the President, Directors & Co., of the Springfield Bank vs. Samuel Merrick, et al., 14 Mass., 322. In Massachusetts there was a law that the bills and notes of Banks not incorporated by law, should not be received or negotiated by the banking corporations of that State, under a heavy penalty. It was holden, that a promissory note payable in such bills to a banking corporation, made while the statute was in force, was void; and that no action could be maintained upon it, by the promisees after the statute was repealed. Chief Justice Parker remarks, that "the subsequent repeal of a statute could have no effect upon a contract made while it was in force. As well might a contract made for the purpose of trade with an enemy, during a war, be purged of its illegality by the return of peace." In the argument of the cause, the case of Camden vs. Anderson, 1 Bos. & Pul., 277, was cited by the counsel for the plaintiff in support of his side of the question.—Judge Parker says in relation to it: "The case of Camden vs. Anderson does not prove the point it was cited to support. It would seem rather, from the provisions of the statute commented upon in that case, that when a penal statute was repealed, it might still be pleaded against any contract made in contravention of it, unless in the repeal act provision was made to the contrary." We have examined the authorities cited for the plaintiff in error with attention; but we cannot think they are in point as to this case; and even if they were, they must be borne down by the decisions cited, sanctioned as they are by the names of the great and illustrious jurists we have quoted. The plaintiff in error has cited the following from Dwarris on Statutes: "When an act of Parliament is repealed, it must be considered (except as to those transactions past and closed) as if it never had existed." Without intending to controvert this as a general proposition, we must remark that except as to the law in relation to remedies and penalties, it seems rather broadly and unqualifiedly declared. Without stopping to ask if a contract consummated (though we think there is force in the suggestion) is not embraced by the terms "transactions past and closed," so as to bring it within the exception of this dictum, we find this principle met by another, which is not only the doctrine of the English law, but is founded on principles of general jurisprudence, and it is this, "that 373
no statute shall be construed to have a retrospective operation without express words to that effect." 7 Bacon Abr. Statute C., 439. "A retrospective statute would partake in its character of the mischief of an *ex post facto* law as to all cases of crimes and penalties, and in *measures relating to contracts or property, would violate* every sound principle." Dwarris on Sta., 680, 681. Would we not, by applying the principle asserted to the case at bar, give the repealing law of 1844, an *ex post facto* operation, and really impair the obligation of contracts? The relative rights of the parties would certainly be changed by granting to one a privilege not before enjoyed, and imposing upon the other an obligation which previously did not exist under the law as it stood, at the time the contract was made. The law of 1833, declares that all interest over the rate of ten per cent. shall be void, and the *obligor forever exonerated from the payment of the same.* Is not this exoneration by virtue of the law governing the contract at the time it was entered into, a right—a right vested by the law of the land, (that it is a mere *negative* right can create no difference in principle), and can it now be divested by posterior legislation?

To admit all this, and to say that a contract declared a nullity by a statute, a contract that never had an existence, can, by the galvanic process of repeal of that statute, have infused into it a new life and being, so as to be enforced in a court of justice, we must admit, is at variance with all our notions of sound policy, morality and law. Having decided that the repeal of the statute of 1833, does not affect contracts entered into before its repeal, the case before us must therefore be governed by that statute, as though no repeal had ever taken place.

We are clearly of the opinion, that by the letter and spirit of the statute, whenever illegal interest is taken or contracted for, the *whole* interest is void. The legal interest, when agreed for in conjunction with usurious interest, receives the taint of usury, and is extinguished and becomes at once *nudum pactum.* Nor is it necessary to establish usury as contended for by plaintiff in error, that the plaintiff actully *took* or *received* more for interest than the law declared lawful; and it is enough that it is *only promised* to be paid. Hammond vs. Hoppin, 13 Wendall, 505. So, if at the time of a loan, a note be taken as a security for principal and usurious interest, it will be inferred that the money was lent on usurious terms. Scott vs. Mitch- 374
ell, 4 Doug., 318. And "if parties enter into usurious agreement, any *remote security* for any part of the illegal interest, or to enforce the tainted contract with a distinct and valid debt, cannot be enforced." 7 Pickering, 40. Chitty on Con., 706. 1 Greenleaf, 167. Moncure vs. Dermott, 13th Peters, 345.

In Jackson vs. Packard, 6 Wendell, 415, we see that a mortgage taken on a loan of money including the taint of usury, destroys the whole security.

The point as to the necessity of proof of the *receiving* the interest, is clearly laid down in Clark vs. Badgley, 3 Halstead, 234. It is there decided, that if the *contract* be for usurious interest, although no usurious (interest) is taken, the contract is usurious; and it is immaterial whether the usurious interest is secured by a *distinct instrument,* or is included in the instrument which secures the principal.

So, in Warren vs. Crabtree, 1 Greenlf., 171, we find, "if the principal and interest are secured by distinct notes, or the usury by a parol promise only, and both are executed at the same time, all are void; because such promise to pay such interest, constituted a *part of the contract for the loan,* and the statute declares the whole contract void. If such a device could protect the lender from the penalties of the statute, it would always be evaded with impunity."

In order to render the *offence* complete, so as to subject the lender to the penalty under the statute, there must be an actual *receipt* of the usurious interest; but though the penalty of the statute be not incurred till the usurious interest be received, still the *contract* may be void, without such receipt. Chitty on Contracts, 712. And this law seems in compliance with our statute, (second section), which contains the words, "take, accept or receive." Blydenbr. on Usury, 129.

We come now to the discussion of the last point assumed by plaintiff in error, "that where the original contract is lawful, no subsequent taking of, or contract to take, illegal interest, will invalidate it; and, therefore, that plaintiff may recover principal and interest of the original valid contract." The authorities are full and decided upon this point, and the doctrine cannot be denied. 8 Mass. 256. 5 Wendell, 595. Blydenburgh on Usury, 97, 102. Authorities cited by counsel for plaintiff in error. So also, 3 T. R., 539. 1 Saund. 294.

375 The notes given by Doggett and Cotten to Flake, were extinguished by the new and substituted note given by them to Mitchell on the 1st Jan'y., 1839.

The note of 1839, was clearly upon a good and valid consideration, and if that note had been sued on, we are not prepared to say but that it would have remained unaffected by any subsequent usurious contract, and all the legal interest upon it, have been enforced. It would seem by circumstances of the case, the inference is clear. (and usury may be inferred from circumstances.—Fulmer vs. Hays, 3 McCord, 256), that illegal interest was bargained for from 1 January, 1840 to 1841, as evidenced by the small note for $362 61, and dated 1 Jan'y., 1841, and clearly given for the excess over and above legal interest on $14,504 65, for the period above set forth, to-wit, from 1st January, 1840, to 1st January, 1841. This small note and the note sued upon, were given at one and at the same time, the legal portion of the interest from 1840 to 1841, being secured in the note in suit, the illegal interest in the note marked 2, or small note.

The note of 1839, was extinguished by the substituted note of 1841, and the question now arises, *was the latter note based upon or on account of any usurious contract?*

If the amount contained in the small note had been embraced in the note in suit, clearly the contract would have been usurious. The fact that the notes were separate, we see, creates no difference.—Their separation was a mere device, a shift, a shallow artifice. The true question is, what was the *contract?* and we are indifferent as to the mode or manner of its enforcement. If the contract was usurious, the means resorted to to enforce its execution become impotent. These two notes, therefore, must be considered as constituting one entire transaction—as an (entirety), and embracing the same subject-matter.

It appears, that thees notes, the small note altogether, and the note in suit in part, were given to secure the interest or premium for *past forbearance* on the note of 1839, from 1840 to 1841. Is a contract to pay illegal interest for *past forbearance* illegal? Clearly so; and we refer to the case of Joseph L. Willie vs. Ezra Green, 2 New Hamp., 333. Here it was decided that a contract to pay more than legal interest for past forbearance is illegal. With these views, there can be no doubt but that the note sued on, intending to secure the
376 payment of illegal interest from 1840 to 1841, became an usurious contract. The interest contained in the small note being usurious, and being as it were a portion of the note in suit, it taints the legal in that, corresponding in time, for which it was given, to-wit, from 1 Jan'y., 1840, to Jan'y., 1841, for the law says that when usurious interest is taken, the interest shall be void.

We are therefore of opinion, that as much of the interest on $14,504 65, from 1 Jan'y., 1840, to 1 Jan'y., 1841, as is embraced in the note sued is void, and was properly deducted by the jury in their verdict.

The facts further shew, that at the time the note in suit was given, another small note for $398 87 (3) was given, embracing the illegal interest on the note sued up to 1842, and that the amount of this note with compound interest at twelve and a half per cent. to Jan'y., 1844, and all the accruing interest upon the note in suit, legal and illegal, were embraced in a separate note given on 1 Jan'y., 1844, marked 4. Here is another distinct note intended, beyond doubt, to evade the statute of usury. We think we have said enough in relation to this point, to declare that no interest is payable on the note declared on from the day it was given, it being clearly based on usurious consideration and therefore void.

It is contended that the original consideration being valid, a new note substituted, though tainted with usury, would be valid, inasmuch as it was a subsequent agreement. We have already said, perhaps sufficient upon this subject; but we have authority strongly in point to show the reverse. Here it must be recollected there is a *new* note substituted and given in lieu of the old one. How much soever the principle contended for might have applied to the former note, it has no reference to the *new contract.* The case of Swartout vs. Payne, 19 John. Rep., 296, is directly in point, and we set it out at some length.

The plaintiff in this case received from the defendant a note for four hundred dollars, drawn by Titus Goodman and endorsed by Vissher and Goodman, in payment for lands sold and conveyed by plaintiff and wife to defendant. The note was received as part of the consideration money, upon defendant's assurance that it was good as the bank, and would be punctually paid.

Judge Spencer, who delivered the opinion of the Court, remarks: "If it shall appear that the note was void for usury, and that the de- 377
fendant knew it to be so, there can be no doubt of the plaintiff's right to recover:" that is, on the original consideration of the contract, viz., the value of the land sold.

"It appeared by the evidence, that the defendant received this note which he passed to the plaintiff, in renewal of a former note, and that on giving up the *first* note, and taking the note in question, the defendant exacted and took from T. Goodman, jun., an *additional note* for a premium for *renewing the first note.*

Judge Spencer further goes on to say: "The first note is not shewn to be usurious, and we must therefore consider that as a *bona fide* security, and a *bone fide* debt from the parties on it to the defendant. The amount of the argument on the part of the defendant is, that the subsequent usury in taking the new note did not affect or destroy the antecedent debt, which was free from usuary. This is undoubtedly true, and Gray vs. Fowler, 1 H. Black., 462, and 1 Saund., 295, A, and the authorities here cited, fully maintain the position. *But is is equally certain, that if in receiving the new security, a rate of interest above seven per cent. was received for forbearance, the new securities are void by the statute; and in this view, it is immaterial whether the illegal interest was reserved and made payable by a distinct note, or was incorporated into one note. They are considered as one assurance and all are void, into whose hands soever they may come. The note being a nullity, according to the case of Markle vs. Hatfield,* (B *John. R.,* 455), *the plaintiff had a right to sue on the original contract.*" Judgment for plaintiff.

With our view thus expressed, we think the verdict of the jury in the Court below was in compliance with law, and should not be disturbed. In the decision of the question we have, of course, regarded the the subject in a point of view purely legal. Whether the law governing interest is founded upon true policy or political expediency, is not for us to enquire, nor for us to ask whether the taking usury is an act immoral in itself, or only rendered immoral by arbitrary enactment. We cannot draw distinctions in our decisions between *malum prohibitum* and *malum in se,* but must declare the law as we ind it.

Per Curiam. The judgment of the Court below is affirmed.

DENISON B. WOOD and NATHANIEL J. DEBLOIS, trading, &c., as 377
D. B. WOOD & CO., *vs.* BANK OF THE STATE OF GEORGIA.

In cases of judgment by default, the plaintiff is bound to see the regularity of his judgment, and that his declaration and pleadings are correct at law, so as to entitle him to such judgment upon an inspection of the record.

Where a writ of summons ad respondeudum was dated 18th December, and made returnable "on the first Monday in December next," but which, by the return of the officer thereon, appeared to have been received in his office on 18th November, and to have been served on defendant on the 19th November: held, that after an appearance by the defendant, and a judgment without objection, this Court will not reverse the judgment for such defect or irregularity; and that if defendant wished to avail himself of such defect in the writ, he should have taken exception in the Court below by motion to quash, or otherwise, before final judgment.

Apart from radical errors apparent o frecord, the proper office of this Court is not to repair mere omissions and irregularities of the parties of their Counsel in the Court below; but errors committed by the latter in decisions made upon points submitted to it, or refusals to decide questions so submitted.

The case of *Dorman vs. Bigelow,* decided at this term, referred to.

The entry of an Attorney's name by the Clerk on a docket regularly kept for that purpose, is, under the Statute of this State, a plea entered of record to show that the defendant appears and contests the action, and that he claims an imparlance at least for the purpose of further preparation or reflection as to the mode of such defence.

ERROR from Franklin County.

His Honor Judge DOUGLAS, presided at the trial of this case, at the Fall Term, 1845, of Franklin Circuit Court.

Assumpsit on a Bill of Exchange, of which the following is a copy:

"APALACHICOLA, 6 Feb., 1844.

"Exchange for $8,500.

Ninety days after sight of this first of Exchange second unpaid, pay to the order of ourselves, eight thousand five hundred dollars, value received, and charge the same to account as advised.

"Your obedient servants,

"D. B. WOOD & CO.

"To Messrs. Buck & Co., New York."

Endorsed on face: "Feb. 21, 1844—Buck & Co."

379 Endorsed:

"D. B. Wood & Co., pay to the order of J. Henry, Cashier.

"H. T. HALL & J. A. DEBLOIS.

"Pay to F. W. Edwards, Esq., Cashier, or order.

"J. HENRY, Cashier."

The writ of summons was dated 18th December, 1844, and made returnable "on the first Monday in December next." By the return of the Marshal, the writ came to his hands on 18th November, 1844, and was served on defendant on 19th November, 1844. The declaration was filed on 23d December, 1844, and contained a special and the money counts.

Thereupon an appearance was entered for defendants, by the entry of the names of their counsel on the Clerk's docket. On the 4th August, 1845, plaintiff's counsel filed an affidavit in the Clerk's office of a default by the defendants to file a plea for seventy days, as required by the rules of Court; and at the Fall Term, 1845, a judgment by default was taken for want of a plea.

There was no bill of exceptions, but the following assignment of errors, will show the grounds on which plaintiff in error relied:

1. Because the said writ of summons is illegal and void, not being returnable to the Term of the Court next succeeding the date of the issuing of the writ. The writ is dated 18 Dec., 1844, and is returnable on the 1st Monday of December next.

2d. Because a default is entered against the said defendants below on the 4th August, 1845, before the return day of the process.

3d. Because the plaintiff below has not in his declaration averred any demand of payment of the bill sued upon to have been made upon the acceptor.

4th. Because the said plaintiff below has not, in his said declaration, averred any refusal of payment by the acceptor; in default of which, if liable, still the defendants were liable.

5th. Because the said plaintiff below has not in his said declaration alleged the non-payment of the second of said sett of Exchange.

6th. Because the said plaintiff below has not in his said declaration alleged the precise time of the protest for non-payment.

7th. Because it appears from the bill of exchange filed in the cause, that the title thereto was not in the plaintiffs, but in one F. W. Edwards, Cashier, to whom it had been specially endorsed.

380 *W. G. M. Davis* and *L. A. Thompson*, for Plaintiffs in Error.

Carmack & Baker, for Defendants.

MACRAE, *J.*, delivered the following opinion:

This case has come up by writ of error, from the judgment of the Circuit Court of Franklin County, rendered in an action of assumpsit brought by the Bank of the State of Georgia against D. B. Wood & Co., merchants, &c., to recover the amount of a bill of exchange drawn by the defendants and endorsed to the plaintiffs.

The declaration contains a special count on a bill of exchange for $8,500 drawn by defendants, and the usual money counts. Judgment by default and damages were duly assessed by a jury under a writ of enquiry.

There is no bill of exceptions returned in this case, but it has been brought up to this Court by writ of error, under which various ground of error have been ssigned, the principal of which, however, as disclosed by the record, is that the writ under which the action proceeded, "is illegal and void, not being returnable to the Term of the Court next succeeding the date of the issuing of the writ."

There is no question that in cases of judgment by default, the plaintiff is bound to see to the regularity of his judgment, and that his declaration and pleading are correct at law, so as to entitle him to such judgment upon an inspection of the record.

Let us then, examine the situation of this case in the Court below, and enquire whether the law has been complied with so far as to entitle the plaintiff to judgment upon the pleadings of record. In making this enquiry, it is necessary, upon the question which has been raised, to look at the writ in its connection with the other proceedings of the case; and it is insisted for the defendant in error, that we shall also, in the same connection take notice of the docket of the Court below, a transcript of which has been sent here under a writ of *certiorari*, in order to avoid the objection thus set up.

It appears that on the 15th day of November, 1844, the plaintiff's attorney filed his praecipe agreeably to our statute, with the Clerk of the Circuit Court of Franklin county, on which the latter issued the writ of summons and respondendum in question, bearing date the 18th of December, 1844, and made returnable "on the first Monday of December next." On this writ the folowing return was endorsed by the Marshal who served it: "Received in office, 18th Nov'r.,

1844, and served personally by copy on D. B. Wood, and by copy 381
for N. J. Debleis left at his office with a white person over fifteen years of age. R. MYERS, Marshal,

Nov. 19th, 184. Pr. H. R. TAYLOR, D. M.

On the 23d day of December, 1844, the plaintiff, by his attorney, filed his declaration, immediately after which on the amended record is the following entry:

"And thereupon the said defendants by Davis and Brockenbrough their attorneys, entered their appearance in this cause."

The record next sets forth an affidavit of the plaintiffs' attorney made on the 4th August, 1845, pursuant to law, to the effect that defandant had failed to file any plea in this cause for seventy days in accordance with the rules of Court, and praying judgment. Next appears the entry of judgment by default for the want of a plea, entered 19th of Dec., 1845, and then follows the award of a writ of enquiry, which was executed the same day, and final judgment entered up against the defendant accordingly.

This is a summary of the whole of the proceedings appearing of record.

We deem it pertinent here to suggest, that a course different from that which has been pursued in the Court below in this case, might, and perhaps ought to have been taken by one or other of the parties, by the plaintiff, in correcting any mistake that may have existed in the process, if any such appeared, by amendment or a new proceeding; or by the defendant in taking exception to the writ, by motion to quash or otherwise, before final judgment was rendered. Be this as it may, the ground of error here assumed gives us occasion to repeat what has been declared in other opinions of this Court, pronounced during the present term, that apart from radical errors apparent record, the proper office of this Court is not to repair mere omissions and irregularities of the parties, or their counsel in the Court below; but errors committed by the latter, in decisions made upon points submitted to it, or refusals to decide any questions so submitted. In this instance, neither of the parties appear to have taken any notice of what seems to have been a mere blunder in the inception of the suit, much less to have brought it to the consideration of the Court; whereas, had it been noticed it might have been rectified without inconvenience or expense.

We are, however, of the opinion that, in the aspect in which the 382
case presents itself, the entry of the attorney's names by the Clerk on the docket regularly kept for that purpose according to law, cured the irregularity occasioned by the erroneous date of the writ, in virtue of the 22d section of the act of this State, concerning judicial proceedings, (Duval's Comp., page 95), which provides, "that when the name of any attorney of the Court is placed upon the appearance docket as counsel for the defendant, it shall be considered as so far equivalent to filing the general issue, as to prevent a judgment by default, though no plea or answer be in fact filed in said cause."

This Court will take judicial notice of the law in this respect, and in view of the necessary connection of this entry of appearance with the other proceedings in the case, will, to that extent, regard such entry on the docket as matter of record, so as to save the judgment, if there be no other objection.

All pleas are matter of record, and although the entry in question, may not be in fact a plea filed in the cause, it is a plea entered of record, to the extent and intendment contemplated by the statute, to wit, to shew that the defendant appears and contests the action, and that he claims an imparlance, at least, for the purpose of further preparation or reflection as to the mode or means of such defence, if he shall think proper to continue it in the regular forms of pleading. All such proceedings are vital steps in the progress of the cause and should therefore be considered inseparable from the record of the case. As the mere act of spreading a subject matter upon the record book of the Court, does not therefore constitute it a matter of record in law, so the mere failure to insert on the minutes a matter of fact essential to the record, and properly a part of it, does not divest it of its character and vitality as such, but it may be brought to the view of the Appellate Court when so omitted by the means adopted in this case. This point having been sufficiently considered and determined in another case decided at the present term, we deem it unnecessary to illustrate it by authorities or further to discuss it.

But independently of this view, we see no good reason to disturb the verdict and judgment on the ground that the writ was void; on the contrary, we think that a sensible view of all the facts and circumstances, obviates the difficulty growing out of the erroneous date of the writ. It was made returnable to "December next," and not-

withstanding it bears date, in writing on its face, the 18th December, 383
1844, it was evidently in fact issued as early as the 18th day of November, 1844, for on that day it was served on the defendants as appears in the officer's return dated the following day. This furnishes an historical date to the process, that precludes the idea that it issued on a day subsequent to the date of its service, or the supposition that the defendants were misled as to the appearance day to which they were summoned. It being an impossible date, it may be regarded as if no date had been expressed; and when we consider that this must have been such by the actual service of the process on the shown to have been such by the actual service of the process on the 18th of November 1844, we hardly think that the defendants could have been misled or surprised by it.

It may, perhaps, have been well to have amended the writ in the Court below, or to have quashed it; but, under all the circumstances, we do not think that after judgment without objection, this ground of error commends itself in any respect to the favorable consideration of this Court.

As to the remaining errors assigned, the defendants are not properly *recti in curia*. Their objections not having been presented and determined in the Court below, they cannot be noticed here, unless they were staring us in the face on the record. As has been already decided by this Court, the note assumed to have been the ground of the verdict, is not a part of the record, not having been made so by bill of exceptions. In this view, there is nothing to combat the inference that there was legal evidence presented before the jury and Court sufficient to sustain the verdict of damages in response to the declaration. The only question then is, is the latter sufficient to support the verdict and judgment? In view of the various counts in the declaration, we do not think it necessary to discuss the objections taken to the first one in order to determine that the declaration is sufficient, with adequate proof to sustain it, which proof, as before tated, it is presumable, was presented on the trial below. We are therefore of opinion that there is no error in the judgment below, that appears from a careful inspection of the record, wherefore it is affirmed with costs.

WYLIE BLUETT, ADMINISTRATOR OF ARABELLA BLUETT, *vs.* JAMES NICHOLSON & WILLIAM N. AVERITT, EXECUTORS OF MALCOM NICHOLSON, AND THE MINOR HEIRS OF MALCOM NICHOLSON. 384

This Court will only decide such questions as are presented by the cases before it.

The Administrator of a deceased wife is entitled to receive her distributive share of her father's estate; and a bill filed by him for that purpose against the Executors of the last will and testament of her father, will be sustained.

This case, decided at Fall Term, 1846, of Gadsden Circuit Court, Judge Hawkins presiding, was brought up by consent of parties.

A Bil of Chancery was filed by Complainant as Administrator of his wife, Arabella Bluett, which alleged: That Malcom Nicholson, the father of said Arabella, died, leaving a last will and testament, which was regularly admitted to probate; and that James Nicholson and William N. Averitt, were appointed the Executors thereof: That the said Nicholson and Averitt were duly qualified as Executors, and took possession of the assets of the said estate: That on the 6th day of February, 184, Complainant, a citizen of Georgia, intermarried, with the said Arabella, who had removed to the said State, after the death of her father; and that the marriage was solemnized in the said State of Georgia, where the said Complainant and Arabella resided up to the time of her death, which occurred on 14th December, 1844; That on 8th January, 1845, letters of Administration on the estate of the said Arabella weer regularly granted to Complainant, by the County Court of Gadsden County. The Bill further alleged that Mary Hinson, the widow of the said Malcom Nicholson, together with the said Arabella, Archibald, Mary Ann and Angus, the children of the said Malcom, were the devisees under the said will, and entitled to an equal share of the real and personal estate remaining in the hands of the said Executors, after the payment of the specific legacies; and that their portions, with the exception of such amounts as had been handed over to the said Mary, still remained in the hands of the Executors. The Bill then averred a demand by Complainant upon his marriage with said Arabella, and since her death and after his appointment as Administrator, upon

the said Executors for her share or portion of the said estate under 385
the said will; and prayed that the portion of the said Arabella be set apart and divided accordingly to the provisions of the said will; and that the said Executors, James Nicholson and William N. Averitt, be ordered and decreed by the Court to deliver the same to your orator as Admiinstrator of the said Arabella, and for such other and further relief. &c

Defendants demurred to the Bill.

At Fall Term, 1846, the following agreement was entered of record:

"By agreement of parties, by their Solicitors, it is ordered that the demurrer filed herein be sustained, for the purpose of taking the cause to the Court of Appeals, and that the said judgment shall be without prejudice to either party, and that security for costs shall not be required."

Carmack & Baker for Complainants.

L. A. Thompson and C. H. Dupont, for Defendants.

BALTZELL, J., delivered the following opinion:

This is a suit in Chancery, filed by appellant as Administrator of his wife, who was one of the legatees of the late Malcom Nicholson, deceased, to recover the personal property to which she was entitled by virtue of the will of her father. Defendants filed a demurrer to the bill, which, by consent of parties, was sustained, thereby dismissing the bill, so as to take the case to the Appellate Court.

Whilst the right of Complainant to relief has not been very seriously questioned, the Court has been earnestly desired by both parties to decide the question as to the distribution of the property, in the event of a recovery, whether it shall be held by complainant as husband, without distribution, or whether it shall be distributed agreeably to the law of the State regulating descents

Desirable as it may be to prevent litigation by an early adjudication of matters in dispute between parties, the Court is constrained by a sense of propriety, as well as the superior injunction of the Constitution of the State, not to determine questions unless they are presented by the cases before them. Such resolutions partake not of the character of decisions and impose no obligations; if indeed they might obtain the respect sometimes accorded to an opinion of the judges informally delivered. The parties are not concluded by them 386
and so far from ending a controversy, their tendency may be to prolong and embitter it, involving, it is to be feared, the tribunals of justice in the consequences attendant upon a false and erroneous position. A Court should not, we think, especially one of the last resort, so place itself as to pronounce a decision which may not be rightfully carried into execution. We therefore decline the exercise of jurisdiction until a proper case is made and presented.

This question disposed of, the enquiry remains, whether the Court erred in giving a decree for defendants. Theer is no reason, that we have been able to discover, for refusing the relief asked for.—Complainant, as Administrator, is entitled to the estate of his intestate, let the distribution be as it may. The object of the bill was to obtain this, and no objection has been presented to it either in form or in substance.

The only point of objection raised, is that the grant of letters of Administration was void; but there is nothing in the record to justify such a conclusion, nor do the pleadings raise the question. The demurrer is a general one to the equity set forth in the bill, and if it does not admit plaintiff's right in this respect, certainly does not contest nor put it in issue. The fact of non-residence at the date of the grant, upon which this exception has been presented, is not even made out by the record.

We are of opinion, therefore, that the demurrer should have been overruled in the Court below, and the defendants ordered to answer.

It is therefore decreed and ordered that the decree of the Superior Court be, and the same is hereby reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

387 ARCHBALD T. BENNETT *vs.* THOMAS H. HERRING.

The Statute of Limitations begins to run from the day the cause of action accrued; and the Endorsee of a note cannot bring himself within its saving by alleging that at the time the cause accrued *to him*, he was beyond the seas, &c.

ERROR to Franklin County.

This cause was tried at Spring Term, 1846, of Franklin Circuit Court, Judge Douglas presiding.

Assumpsit by Plaintiff, as endorsee of the following promissory note:

$981 97. "NEW-YORK, August 15, 1836.

"Fifteen months after date, I promise to pay to the order of Messrs Young & Van Eps, at the Commercial Bank at Apalachicola, nine hundred and eighty-one 97-100 dollars, value received. Due Nov 15, 1837. (Signed), A. T. BENNETT."

(Endorsed), "Edward Young & Van Eps."

Plea—Statute of Limitations.

Replication—That at the time the said several causes of action in said declaration mentioned accrued to the Plaintiff, the said Plaintiff was in fact beyond seas, to wit, at New-York, &c.

To this replication there was a rejoinder and surrejoinder, which, upon demurrer, were ruled out in the Court below. The question in this Court was upon the efficiency of the above replication.

W. G. M. Davis, for Plaintiff in Error.

Carmack & Baker, for Defendant.

BALTZELL, J., delivered the following opinion:

This was a suit instituted by Herring against Bennett as endorsee of a promissory note in the following words:

"NEW-YORK, August 15, 1836.

"Fifteen months after date, I promise to pay to the order of Messrs. Young & Van Eps, at the Commercial Bank at Apalachicola, $981-97, valued received. A. T. BENNETT."

(Endorsed), "Edward Young & Van Eps."

There were various pleas in the Court below, but the defence principally relied upon was the statute of limitations, the questions
388 arising upon which, for the principal subject for the consideration of this Court.

Without noticing the great variety of pleas filed and the changes of the pleas in the record, it is sufficient to state that defendant plead that "the action did not accrue within five years," to which there was a replication by plaintiff, and a rejoinder by defendant, and a surrejoinder by plaintiff, Defendant then demurred to the surrejoinder, and the Court being of opinion that the rejoinder of defendant was bad, overruled this plea, of defendant and ordered him to answer further. He then offered additional pleas which the Court rejected. The propriety of the last decision has not been called in question. It was the rule of the late Court of Appeals of the Territory, agreeing with the practice of the Supreme Court of the United States, not to interfere with or disturb the discretion of the Courts below in refusing and granting amendments, nor has any effort been made before us to establish a different rule. These rejected pleas, are, then, not to be regarded in deciding the case.

The demurrer of defendant raises the same questions in this Court which were presented in the Court below. When filed by either party it lays open to the Court, not only the pleading demurred to, but the entire record for their judgment upon it as to the matter of law; and if two or more of the pleadings be bad in substance, the Court will give judgment against the party who committed the first fault. Arch. Pl. & Ev., 315.

No objection has been made to the declaration nor to the plea of the statute of limitations.

The replication, which is the next in order, has been excepted to, and we are called upon to decide as to its sufficiency. Statutes of limitations have presented questions of all others most embarrassing to the Courts, both in England and in this country, as well as in the various aspects of the cases presented as in the conflicting decisions upon it. Within a very short period after its passage, it was decided "not to be necessary for the defendant to plead the statute, all the Court holding, that if it appear by the plaintiff's own showing, that the action is not brought within the time limited by the statute, he cannot maintain his action." Brown vs. Hancock, Cro. Car., 115. 2 Saund., 63, n. 6.

"Afterwards it was adjudged that the defendants must plead the statute, and the reason assigned was because the plaintiff might be 389
within the exceptions in the statute, and the action therefore well brought although the cause of action appeared on the face of the declaration to have accrued out of the limited time." Cro. Car., 381 2 Saund., 63, n. 6. "There is no contrariety of opinion that the statute begins to run from the day the cause of action accrued." 1 Arch. N. P., 130.

When the statute once begins to run, no subsequent disability will prevent it from running. 4 Taunt., 826. 1 Wils., 134. 1 Arch. N. P. 131.

The statute provides that "all actions of trespass, debt, &c., shall be commenced within the time and limitation hereinafter expressed, that is to say, within five years and not after." Duval, 155. The same statute provides that "if *any person*, or persons, *that is* or shall be entitled *to such action be*, or shall be *at the time of any such cause of action* given or *accrued*, beyond the seas, or out of the country, such person or persons, shall be at liberty to bring the same action, so as they take the same within such times as are before limited, after their coming from beyond seas, &c., as by other persons having no such impediment should be done." Duval, 156.

A personal privilege is by the latter clause provided in favor of *persons entitled to an action who shall be at the time of such cause of action accrued, beyond seas or out of the country*, and in its original design was probably intended to favor those who, away from home at the time a claim became due, were prevented by absence from asserting it.

If the suit now pending, were instituted by the payee of the note, or original promisee, we should feel no hesitancy in declaring the replication good, the precedents in the different books of reports and the forms being fitted to such a case. But this is the suit of an endorsee, and the question is whether the same averments and proof will avail him as are admitted to be valid in the case of the payee. Has the plaintiff in this case, by the allegations in his replication, brought himself within the statute, so as to enable him to recover. No authority has been brought to bear directly upon the point, nor have we been able in our researches to find one, though the question would seem to have been of such frequent occurrence as to have been repeatedly decided by the Courts.

The rules of pleading, especially those applicable to cases of rights 390
and privileges granted by statute, however, will furnish, we trust, a safe guard in ariving at a true and just conclusion.

Referring to these, we find it laid down that "the rules of pleading in a case of declarations and pleas in bar, are applicable also to replications." As a plea is either a denial or a confession and avoidance of the complaint stated in the declaration, so a replication is either a denial or a confession and avoidance of the defence stated in the plea. Arch., pl. and ev., 242.

A replication requires more certainty than a declaration. Arch., 257. "If matter of the defence be true, so that the plaintiff cannot safely traverse it, he *may admit it* by his replication and *avoid it* by a statement of new matter in the same manner, as a defendant may do by his plea with reference to the declarationa." Arch., 251, 199, 203.

"The declaration must shew plainly and certainly all circumstances material to the maintenance of the action, for if there be two intendments, it shall be taken most strongly against the plaintiff."—Arch., 108.

"A plaintiff should state *every fact necessary to inform the Court that his case is within the statute.* If a man entitle himself by a lease which by a proviso in a statute will be good, if the ancient rent be reserved, he must shew that a rent is reserved, and aver it to be the ancient rent." R. Pl. Com., 105, b. Arch., pl. and ev., 94.

The matter of a plea in bar must consist of such facts and circumstances as amount to a complete defence to the action or to such part of the declaration as it purports to answer, and whether the matter of defence be founded on a public or private statute, the plea must state all the facts and circumstances necessary to bring it within the statute. Arch., 171. The replication in this case is, "That plaintiff ought not to be barred from his action against defendant, because he says that before and at the time said *causes of action accrued to said plaintiff*, the said plaintiff was in fact beyond seas, to wit, at New-York," &c. Now, may not this be literally true, and yet not bring the case of plaintiff within the saving of the statute, nor be an answer to or in avoidance of the plea? A party's pleading is to be taken most strongly against himself and most favorable for his adversary, and when anything is omitted which is necessary to give

391 certainty to the statement, it shall be taken most strongly against him. Co. Litt., 303, b. In this replication there is an omission of the facts we have deemed material to relieve plaintiff from the bar. He does not allege that he was beyond seas when the action accrued, nor that, being entitled to the action when it accrued, he was beyond seas at that time, but that "when the cause of action accrued to *him, the plaintiff*, he was beyond seas." Now, if this were a sufficient reply to the plea, notes due and long since barred, might be revived by transfer, so as to evade the statute, to a person beyond seas at the time the action either accrued or at the time it was transferred. It is argued that plaintiff could not reply a different time of transfer of the note to that set forth in the declaration on account of the departure, but we think differently. If the plaintiff in his replication vary from his count in anything not material, it is no departure, as in assumpsit if the plaintiff allege a promise twenty years before, and to a plea of the statute of limitations replies assumpsit *infra sex annos*, it is no departure, for the time of promise in the declaration was not material. Arch., pl. and ev., 260.

The form of a replication given in Story on Pleadings, is that "he, the said plaintiff, at the time when *the cause of action* in said declaration mentioned *accrued*, was in foreign parts beyond seas, omitting the words *'to the plaintiff.'*" P. 71. This differs from the form in Chitty's Pleadings, which also differs from Precedents by Joseph Chitty, Jr., written some twenty years after the work of his father. The words *"to the plaintiff,"* after *"accrued,"* also omitted as by Judge Story; thus showing a change in the mode of regarding this subject by the English Courts, in accordance with, and sustaining, the view we have expressed. 1 Chitty's Precedents, 346 .

Nor do we think there is hardship imposed upon the plaintiff by this course of pleading. By the lapse of five years prescribed by the statute, his note is prima facie barred—in contemplation of law, is extinguished, and the remedy for its recovery gone. Should he not under such circumstances, be held to allege and prove affirmatively, every fact and circumstance required by statute to revive the right and to bring him within the saving?

Defences, under these statutes, are more favorably regarded and not discountenanced, in England and in this country, than they were formerly. The Supreme Courts of the United States, agreeing with
392 other enlightened Courts in the States, have, on repeated occasions, "declared them statutes of repose, as resting upon sound policy, and tending to the welfare and peace of society. The Courts do not now, unless compelled by former decisions, give a strained construction to evade their effect. By requiring those who complain of injuries, to seek redress by action within a reasonable time, a salutary vigilance is imposed and and end is put to litigation." 3 Cond. Rep., 51. 3 Peters, 270.

We are, therefore, of opinion, that the replication of plaintiff is bad, and should have been overruled. It is, therefore, considered by the Court, that the judgment of the Circuit Court, and the verdict of the jury, be, and the same is hereby reversed and set aside, and the cause remanded to that Court, with liberty to the plaintiff to reply over and for other proceedings not inconsistent with this opinion.

Philip Fraser *vs.* Felix Livingston, Solicitor, &c.

On the *ex parte* application of A., who claimed to be the owner of a writte paper filed with an indictment, an order was granted allowing him to withdraw the paper, which he accordingly did; afterwards, upon a petition filed by the Solicitor of the Circuit before the Judge of the Circuit, another order was made directing A. to show cause why the former order granting him permission to withdraw the paper, should not be rescinded, and why he should not return it to the files of the Court; and at the first Term of the Court thereafter, A. having shown cause by filing an answer to the petition, the order *nisi* was made absolute, and A. directed to return the paper in accordance with the prayer of the petition; held, that the petition and proceedings under it are not properly matters of record, and that no appeal will lie in such case either at common law or in virtue of the several acts of the Legislature of Florida, giving the right, and regulating the mode, of suing out writs of error and prosecuting appeals.

Such case properly belongs to that numerous class of rules and orders of a *summary* character which a court of record is empowered, in its discretion, to make in regard to causes therein pending or determined, or otherwise relating to the record, proceedings and files of the court, in the exercise of its inherent powers of general superintendence and control over all matters affecting its dignity and policy, or its due and rightful administration of the 393
laws; and such matters are not subject to be reviewed by writ of error or appeal in the halls of superior tribunals.

Appeal from an order granted at the Fall Term, 1846, of Duval Circuit Court, Judge Baltzell presiding.

It appears from the record, that on 13th November, 1846, Felix Livingston, the Solicitor of the Circuit, filed a petition before Judge Douglas, the Judge of the Circuit, the object of which was to have an order, made on the 15th September previous, allowing Fraser to withdraw from the files of the Court a certain written paper which had been filed with an indictment, and of which he claimed to be the owner, annulled and for a rule on the said Fraser to show cause why he should not be required to return the said written paper to the files of the Court. The petition recited at length the facts and circumstances on which the application was based and was supported by several affidavits.

Upon the filing of the petition, the Judge of the Circuit granted an order, "that the said Philip Fraser shew cause before the Circuit Court for the Eastern Circuit of the State aforesaid, on the first day of the next Term thereof, to be holden at the Court House in Jacksonville in Duval county, on the 4th Monday of the present month of November, or so soon thereafter as counsel can be heard, why the order so made on 15th day of September last, giving to the said Philip Fraser leave to withdraw the said written paper from the files of said Court shall not be revoked and rescinded, and why he, the said Philip Fraser, ought not to return the said written paper to the files of the same Court; and it is further ordered that notice of this rule be given to said Philip Fraser, &c.

At the Fall Term of the Circuit Court, to wit, on the 25th November, 1846, Philip Fraser shewed cause, under the said rule, by filing his written answer to the said petition, which set forth fully his rights in the premises.

After having heard the petition and evidence on both sides, and after argument on behalf of petition and respondent, the Court made the rule granted on 13th November absolute, and ordered as follows: "It is therefore considered by the Court, that the order entered on the 15th day of September, A. D., 1846, granting to the party the possession of the original paper, the subject of this rule, be and the same is hereby annullel. And it is further ordered, that the said 394
paper be returned by the said Philip Fraser to the files of this Court by the first day of January next."

From this decision and order of the Court, the said Fraser thereupon in open Court prayed an appeal, which was granted. On the 1st December, 1846, he filed his appeal bond, which was approved of, and is in the usual form.

On the 4th January, 1847, appellee, by Randal & Hagner, his Attorneys, moved the Court to dismiss this case from the docket of this Court, on the following grounds:

1. Because no appeal was obtained in Court from the order of 25th November, 1846, made by his Honor Judge Thomas Baltzell, and no proper appeal bond filed.

2. Because no appeal lies from said order, the same not being a final judgment, sentence or decree, within the purview of the 1st sec. of Act regulating the mode of suing out writs of error and prosecuting appeals, &c. Duval, p. 108.

3. Because the granting of said order was an exercise of the discretion of the Court below, in defence of its own proper right, and in the assertion of its own self-respect, of which the Court below is alone the rightful judge, and over which discretion, when so exercised, this Court has no jurisdiction.

4. Because the said order of 25th Nov., 1846, was a revocation of a prior order of 15th Sept., sub-granted by the same Court. That said prior order of 15th Sept., accorded to said Philip Fraser a liberty and privilege upon an *ex parte* showing then made by him, which liberty and privilege the said Court was under no obligation to grant, nor said petition any legal right to claim or require; and as the granting of the order was a matter of favor and not of right, the retracting the privilege and requiring the delivery of the paper in question, and replacing the same upon the files of the Court, is within the legitimate exercise of the peculiar privileges of the Court below, and not subject to revisal or review in this Court.

Randal & Hagner for appellee, in favor of the motion to dismiss. They moved to dismiss this appeal, upon the grounds following, viz:

1. Because no appeal was obtained in Court from the order of 25th Nov., 1846, made by his Honor Judge Baltzell, and no proper appeal bond filed.

395 An appeal cannot be sustained, unless it appears from the record that it was granted. Clark vs. Lowry, 1 Overton, 313. Moody vs Moody, 1 Fairfield, 247.

The appeal bond in this case is conditioned to pay "the debt, damage or condemnation money, and costs, in case the judgment, sentence or decree, shall be confirmed." There was no debt—there was no condemnation money to be paid—no judgment, sentence or decree; and the condition is entirely nugatory. The appellant was required to deliver up a paper formerly withdrawn from the Court, and the bond given is no manner of security that he will do it upon confirmation of that order of the Court.

2. Because no appeal lies from said order, the same not being a final judgment, sentence or decree, within the purview of the 1st sec. of the Act regulating the mode of suing out writs of errors and prosecuting appeals. Duval's Comp., 108.

The whole statute relates to controversies between parties to a litigation according to the course of the common law. A *judgment* is *the remedy* prescribed by law *for redress of injuries,* and the suit or action is the means of administering it. Tomlin's Law Dict., Title Judgment.

It is the conclusion of a suit. A *suit* is the lawful *demand of one's* right. 6 Wheaton's Reports, 264.

An action is defined thus, *"actio nihil aliud est, quam jus persequendi in judico quod sibi debetur."* Justinian, Lib. 4, Tit. 6, De Actionibus.

Thus, then, it is clear that the statute has in view the prosecution by parties in interest of their rights by action—and that *according to the course of the common law.* But an appeal is granted. Now, an appeal is a *civil* law process, and removes a cause entirely, subjecting the law and fact to a review and retrial; while the writ of error, also embraced in the same statute, is a *common* law process, and re-moves, for re-examination nothing but the naw. U. V. vs. Goodwin, 7 Cranch, 108.

The appeal being unknown at the common law, and only given by statute, is not to be extended beyond the terms of the statute. 7 Pickering Rep., 320.

Such an appeal lies only where the *cause* has been *tried,* and a sentence or judgment rendered; and a non-suit, for example, for non-
396 compliance with an interlocutory order, is not a sentence or judgment, and not within the statute. Hoyt et al. vs. Brooks, 10 Connec., 188.

The appellee's counsel then reviewed the outline of jurisdiction of the Courts, (citing 2 Chitty's Gen. Prac., 312-3. 3 Chitty's Gen. Prac., 33), and they showed that *summary applications* appertain to the peculiar jurisdiction of the Court exercising it, with which appellate jurisdiction does not interfere. Same citations weer made; also. late jurisdiction does not interfere. Same citations were made; also 1 Chitty's Archbold's Pr., 346. 2 do., 1194.

Now the original statute of 1832, before referred to, gives no ap- 1833, (Duval, p. 111), gave the appellate Court jurisdiction in *certain* applications of that suit.—Rules over their own officers, &c.—*expressio* unius alterius est exclusio."

Again, by the common law, rules of court are not *records,* only *remembrances,* not entered on the rolls of the Court. 1 Tidd's Prac., 490. 1 Wilson's Rep., 41. 2 Barn. & Ald., 61.

These rules, not being records, are *no part* of the cause, even where they occur in the progress of *a cause;* they are strictly and properly matters of practice, regulated by the power of amendment which the courts of law possess, either by the common law or the statutes of amendment. In the House of Lords. Melvish vs. Richardson, 9 Bingham, 125. Scales vs. Cheese, 12 Mees. & Welsby, 685.

But it may be contended that being set up here in the record, this rule is to be considered as part of it. Not so. The same case of 9 Bingham, 125, denies such effect. "For if the grounds of the amendment are not in themselves removable by the writ of error; and if the parties to the suit have not *ex debito justitiae,* the right to put the rules and orders for the amendments upon record, then the Superior Court would have, or would not have, authority to enquire into the propriety of the amendments according as the Inferior Court did or did not return in the particular instance the order by which the amendment is made."

Now, the order complained of is *interlocutory* only. That it is not *final,* in any sense, is too clear to require argument.

3. Because the granting of said order was an exercise of the discretion of the Court below, in the defence of its own proper right, and in the assertion of its own self-respect, of which the Court be- 397
low is alone the rightful judge, and over which discretion, when so exercised, this Court has no jurisdiction. 3 Chitty's Gen. Prac., 32. 1 Hawks' No. Ca. Rep., 93-4.

4. Because the order appealed from was a revocation of a prior order granted by the same Court; that said prior order accorded to the said Philip Fraser a liberty and privilege upon an *ex parte* showing then made by him,—which liberty and privilege, the said Court was under no obligation to grant, nor had said petitioner any legal right to claim or require. And as the granting of the order was a matter of favor and not of right, the retracting the privilege and requiring the re-delivery of the paper in question, and the replacing the same upon the files of the Court, is within the legitimate exercise of the peculiar privilege of the Court below, and not subject to revisal or review in this Court. 1 Devereux' Rep., 74-5. 2 Harris & Gill, 79. 10 Conn., 188. 1 Murphy's Law & Eq. 7 Vermant. 476—534.

Philip Fraser, for Appellant.

This appeal is well taken. It is from a final order in an original proceeding in the Court below. This is not an interlocutory order in any cause pending in the Court below, resting solely in the discretion of the Court. The Act of the Legislative Counsel, approved , provides for appeals in all cases from *any* final judgment, sentence or decree, pronounced in the Court below. It is under this Act that the appeal is taken. It is evident that the Legislature intended by this Act something further than to provide for appeals from judgments in actions at law, and decrees in suits in equity. Else, why use the word *"sentence?"*

Again, in the Act of the subsequent year, upon the same subject, the Legislature gives an interpretation of its meaning in the former Act by the words, *"final judgment, order or decree;"* clearly showing that it was the intention of the Legislature to provide for appeals in all cases where a final judgment, order or decree, had been made in the Court below.

2d. The Court below had no power to make the order from which this appeal is taken. It was not a matter resting in their discretion. See Rex vs. Cator, 2 East. Rep., 361.

The libel had been published, and, consequently, ceased to be the 398
property of the person publishing it. It was proven in the Court below, that the author of the libel posted copies of it in public places. It was also proved to be in his hand-writing; establishing clearly the fact of publication. See 2 Starkie's Ev., 454. Starkie on Slander.

The libel having come to the hands of the appellant against whom it was published, became his property; and he had a right to the possession of it. And, parting with that possession for a time, for the purposes of justice, did not determine that right; and he was entitled to a return of it in accordance with the conditions upon which he parted with it.

As to the bond, it is drawn in strict compliance with the statute under which the appeal is taken.

It is not necessary that it should appear by the record that an appeal was *granted* in the Court below. If an appeal is applied for in open Court, and an appeal bond is approved by the judge, this is a full compliance with the statute.

Macrea, J., delivered the following opinion:

This case comes before this Court upon a motion made by the counsel for the appellees to dismiss it, on the following general grounds: First, that the appeal sought to be prosecuted here from the order in this case in the Court below, was not obtained according to law: and, secondly, that no appeal lies from said order, whether by the rules of common law, or in virtue of the statutes of Florida, giving the right and regulating the mode of suing out writs of error and prosecuting appeals.

It appears from the record in this case, that a rule *nisi* was granted by the Judge of the Circuit Court for the Eastern Circuit, for the County of Duval, conformably to the prayer of a petition which had been filed by the appellee before said Judge, by which rule it was ordered that appellant show cause before said Circuit Court, at the then next ensuing term thereof for said county, or so soon thereafter as counsel could be heard, why an ex parte order formerly made by the same Judge, giving said appellant leave to withdraw a certain "written paper" from the files of said Court, should not be revoked and rescinded: and why he, the appellant, ought not to return the said "written paper" to the files of the same Court; copies of which

399 order and petition were duly served upon the appellant, who answered thereto in writing. It further appears, that the matter of said petition and answer having been fully heard and considered by said Court, at the last term thereof, it was by the same thereupon ordered, that the order above mentioned granting to the appellant the possession of the paper the subject of said rule be annulled, and that the said paper be returned by said appellant to the files of the Court by a day appointed in the order. It also appears that said appellant, having in open Court applied for an apeal from the order last mentioned, thereafter in open Court filed his bond for said appeal in the usual form, conditioned to pay the condemnation and costs in case the said order should be confirmed by the Appellate Court; which bond was endorsed, "approved of," by the Judge of said Circuit.

We deem it unnecessary, in order to a decision of this motion, to determine the points arising upon the first gound taken by the counsel for the appellee. It may, however, be proper to remark, that the acts of a Judge of a Circuit Court, in relation to any application for an appeal to which a party may be entitled in virtue of the provisions of the Acts in question, are to be regarded as simply ministerial in their character and effect.

With regard to the other ground assumed by counsel for appellee, we are of the opinion, that clearly no appeal from an order of the tenor and effect of that which has been brought in question before this Court, will lie, either at common law, or in virtue of the several Acts of the Legislature of Florida giving the right and regulating the mode of suing out writs of error and prosecuting appeals, or either of them.

That this appeal does not lie at common law, is sufficiently apparent from a consideration of the nature, form and objects, of the common law processes, by means of which the judgments of inferior tribunals may be reviewed. These are writs of error, prohibition, *certiorori* and *mandamus*. Any other mode is unknown in a Court proceeding as a Court of common law jurisdiction, unless expressly given by statute; and where the latter limits the operation of appellate power to specific subjects, or classes of cases, this Court has no power to transcend the limits so assigned. Murdock, appellant, 7 Pickering, 320. At common law, as is well expressed and held in 1 Chitty's Arch. Prac., 346, "a writ of error lies, when a person is
400 aggrieved by an error in the foundation, proceeding, judgment or execution, of a suit, provided it be an error in substance, not aided at common law, or by some of the statutes of jeofails. It can be brought only on a judgment, or an award in the nature of a judgment, given in a Court of record, acting according to the course of the common law; but when the Court acts in a summary way or in a new course different from the common law, a *certiorari*, and not a writ of error, lies.

But again, at common law, the appellate power extends to matters of record only; and here it may be remarked, that a matter of proceeding, spread upon the record or minutes of the Court, not being properly a record matter or proceeding in legal regard, does not thereby become such; nor can it be therefore made a subject upon which to exercise appellate power and jurisdiction. Are, then, rules of the legal character of that now under consideration in this case, properly matters of record in legal contemplation? We think not. In England it is held that rules are not records, but mere remembrances not entered on the rolls of the Court. 9 Bing., 125. Tidd's Prac., 490; and the cases there cited in 1 Wills., 40, and 2 Barn. & Ald., 61. In the correctness of this doctrine we fully concur, and consider it applicable to similar proceedings of the Courts of this State, embracing the case now before us. Moreover, it is held in English practice, "that if a cause be moved in Court in the presence of the counsel for both parties, and the Court shall thereupon make an order, no person shall afterwards cause the same to be moved contrary to such rule or order;" and that "a rule made in the Bail Court is not more liable to be re-opened and argued in Full Court after the term in which it was made, although the Judge who heard the case sanctioned the application to the full Court." 2 Chitty's Arch. Prac., 1194. The principles involved in this authority well apply to the case of which a review is now sought at the hands of this Court; and we deem it superfluous to add anything further in order to illustrate and sustain the opinion, that at common law, this Court has no appellate power or jurisdiction over this case.

But it is contended by the appellant, that the right of appeal in question, is conferred by statute; and he refers to the Act of the Legislative Council of the late Territory of Florida, now in force, on this subject, contained in Duval's Compilation, p. 108, sections 1 & 2, in support of his position. By sec. 1 of the first mentioned Act, it is 401
provided, "that if a party, in either of the Superior Courts of this Territory, shall be aggrieved by a final judgment, sentence or decree made, or pronounced, by any or either of said Courts, it shall and may be lawful for such party, during the session of the Court at which such judgment, sentence or decree is rendered or pronounced, or within ten days thereafter, to obtain in Court, if the appeal be made in term time, or in the Clerk's office if it be in vacation, his, her or their appeal to the Court of Appeals," &c. Section 2 provides, that the party appealing, if defendant, shall give "bond with one or more securities, in a sum sufficient to cover the amount for which judgment has been given, decree rendered, or sentence pronounced, together with costs, conditioned that the appellant shall pay the costs, if plaintiff, or if defendant, the debt, damages or condemnation, and costs in case the judgment, sentence or decree of the Superior Court shall be affirmed," &c. This section evidently refers to cases of suits, actions or causes in Court, in which there are adversary claims in a regular course of litigation. The case under consideration here is not one of those just referred to, but properly belongs to that numerous class of rules and orders of a summary character, which a Court of record is empowered in its discretion to make in regard to causes herein pending or determined, or otherwise relating to the record, proceedings and files of the Court, in the exercise of its inherent powers of general superintendence and control over all matters affecting its dignity and policy, or its due and irghtful administration of the laws. And such matters are not subject to be reviewed by writ of error or appeal, in the halls of superior tribunals. This view is fully sustained by the principles advanced in the decision of the case of Willis vs. Willis, Adr., 5 Iredell's N. C. R., 14, founded upon a statute of North Carolina similar to that above recited; and is fortified by other determinations and authorities, some of which have been already cited.

The appellant again contended that the Act just mentioned, if otherwise inapplicable to the case before us, is nevertheless made so by construction to be derived from the terms of the second section of the Act last above mentioned, passed subsequently to the former. We are unhesitatingly of a contrary opinion. The 2d section referred to provides, "that in all cases in which a rule of Court, or other summary *order* to any of the officers of Court and their securities or de- 402
puties, is in effect a judgment for the payment of money or other thing, the party aggrieved may prosecute his, her or their appeal, writ of error or certiorari," &c., as therein set forth. It is insisted that the words "rule or other summary order," used in this section, show that the Legislature construed and intended the words, "judgment, sentence or decree," contained in the first recited Act, to embrace rules and orders of the nature and effect of that from which an appeal is now sought. We consider this construction manifestly erroneous. This section, indeed, not only limits the right of appeal strictly to the cases therein provided for, but agreeably to the maxim, *"expressio unius est exclusio alterius,"* goes further to establish the construction which we have placed upon the first and second sections of the Act first above mentioned, the provisions of that Act being extended, yet limited to cases of rules and other summory orders affecting officers of the Court, and their securities or deputies, where such rules or orders do, in effect, operate as a judgment for the payment of money or other thing. This motion is therefore sustained, and the case dismissed.

Per totam Curiam.

403 ARCHIBALD T. BENNETT *vs.* OSCAR FILYAW

Where the declaration alleges that defendant followed the occupation of master or owner of a steamboat plying on a navigable river, this is a sufficient averment to fix the character which the common law attaches to masters and owners of ships, steamboats, &c., so as to charge the defendant with a breach of the duty which alone results from that character, without an express averment, *totidem verbis*, that defendant was a common carrier.

In such case the *onus probandi* is upon the defendant to show that in virtue of some special public notice, or other good legal ground, he was not chargeable and responsible as a common carrier in his capacity and occupation of master and owner of the steamboat in question.

ERROR from Franklin County.

This case was decided at the Fall Term, 1844, of the late Superior Court of the Territory of Florida for the County of Franklin.

The declaration was in trespass on the case against Bennett as owner and master of a certain steamboat called the "Louisa," and was to recover damages for the loss and non-delivery of a quantity of tobacco shipped by Filyaw in Dec., 1842, on board the same at Mount Vernon, for the city of Apalachicola.

The declaration contained two counts. The first set forth that Bennett was master and commander of a certain steamboat called the "Louisa," lying in the river Apalachicola opposite the town of Mount Vernon, and bound from thence to the city of Apalachicola; that Filyaw thereupon, and whilst she was so lying in the river Apalachicola, delivered to Bennett, then and there being master of said steamboat, and that he then and there received on board said steamboat three boxes of tobacco, to be by him conveyed in the said steamboat to the city of Apalachicola, for a certain reasonable reward, &c.: and averred the loss and non-delivery of said tobacco by reason of the negligence and bad conduct of the said Bennett, &c. The second count alleges that Bennett was *owner* of the said steamboat "Louisa," and is in other respects similar to the first count. There was no express averment in either count that Bennett, the plaintiff in error, was a common carrier.

Plea—Not guilty.

Upon the trial, the jury returned a verdict for the plaintiff.

404 Defendant prayed in the Court below the following instructions:

1st. That defendant has not been declared against in defendant's declaration as a common carrier, and that under the pleadings he is not liable as such.

2. That defendant has been declared against as a private person undertaking the carriage of goods under an express contract for hire or reward, as alleged in the declaration; and that the jury must be satisfied from the evidence, that the loss or damage which plaintiff's goods may have sustained, while in the charge of defendant, arose from acts of fraud or negligence on his part or the part of his servants, and that defendant is alone liable for one or both.

3d. That no terminus of the voyage was proven.

Which instructions the Court refused to give, and in lieu thereof instructed the jury as follows:

1. That the averment in the declaration, that the defendant "was master of the steamboat Louisa," was a sufficient allegation that the defendant was a common carrier.

2d. That proof that the defendant was master of the steamboat, was evidenced that defendant was a common carrier.

3d. That if the jury was satisfied from the evidence that the steamboat "Louisa" was bound for Apalachicola, they might infer from that fact, in the absence of an express agreement upon the subject, that plaintiff's goods were to be delivered in Apalachicola as alleged in the declaration.

To which instructions and refusal defendant excepted.

No counsel appeared for plaintiff in error.

C. H. Dupont, for defendant.

MACRAE, J., delivered the following opinion:

This is an action on the case instituted in the late Superior Court of Franklin County, by Oscar Filyaw against Archibald T. Bennett, to recover from the defendant, as master and commander and owner of a certain steamboat, damages for the non-delivery and loss of a quantity of tobacco alleged to have been shipped by the plaintiff on board the same, in December, 1842, to be carried by the defendant from the alleged place of shipment on the Apalachicola river to the city of Apalachicola, to which city said steamboat was alleged to have been bound at the time of shipment.

In the cause below, the defendant filed a plea of the general issue, 405 and upon a trial had upon the issue joined, verdict and judgment were rendered for plaintiff. Various instructions were prayed for by defendant and refused by the Court, and others in lieu thereof were given by the Court to the jury on the trial below; to which refusal of instructions, and instructions given, the defendant excepted, and thereupon sued out his writ of error to this Court, assigning for error the refusal on the one hand, and the giving on the other of the instructions in question.

The questions of error, thus presented for the decision of this Court, will be considered in the order in which they appear from the bill of exceptions, and have been stated by counsel in the argument of this case.

In the first place, then, it is contended for plaintiff in error, that he was not declared against in the Court below as a common carrier, but as a private person, and that under the pleadings he is not liable in the former character.

A common carrier in law has been defined to be one who undertakes for hire or reward to transport the goods of such as chose to employ him from place to place, as a business and not as a casual occupation *pro hac vice*. 1 Stalk., 249. 1 Pick., 50. Story on Bailments, § 495. Common carriers by water are the masters and owners of ships, and all water crafts, including steam vessels, towboats, and other steamboats, belonging to internal as well as coasting and foreign navigation; lightermen, hoymen, ferrymen, canal boatmen, and others engaged in the transportation of goods by water for persons generally, for hire. 5 T. R., 143. 1 Bell's Com., 467. 2 Steph. N. P., 961. 2 Kent, C. 597, and 2 Am. C. Law cases, 527. But if the owner of a ship employs it on his own account generally, or if he lets the tonnage with a small exception to a single person, and then for the accommodation of a particular individual, he takes goods on board for freight (not receiving them for persons generally), he will not be deemed a common carrier; for he does not hold himself out as engaged in a public business or employment.—Story on Bailments, § 501.

It is clear, then, that the steamboat in question comes under the general description of vessels, the masters or owners of which are held to be common carriers in law, and liable as such.

But it is insisted that the plaintiff below should have averred that 406 the defendant was a common carrier *in totidem verbis;* that the masters and owners of steamboats, &c., not being in all cases liable as common carriers, he should have been charged as a person generally engaged in carrying goods on board the steamboat "Louisa," for persons in general, for hire; and that in defect of these allegations, this must be regarded and pleaded to as a declaration against the defendant as a private person, on an express contract requiring corresponding proof to sustain it.

Without referring to the case of Dale vs. Hall, 1 Wils. R., 281 we are satisfied, on general principles, that the declaration contains sufficient allegations and averments to charge the defendant as a person following the occupation to which, *prima facie*, the legal character is attached, in respect whereof he was employed by the plaintiff, to wit, that of a common carrier. The exceptions to the general rule in this regard, stated by Mr. Story in his treatise on Bailments, § 501, indicate plainly that they constitute grounds of defence by way of plea, or proof, by defendant under the general issue, rather than matter to be averred and proved by the plaintiff.

The declaration is in case, and in the first count avers, that the defendant was, before and at the time of receiving the goods thereinafter mentioned, master and commander of a certain steamboat called the "Louisa," then lying in the river of Apalachicola, &c., and bound from the place of shipment to the city of Apalachicola; that the plaintiff thereupon, on a certain day, delivered to the defendant, being then and there the master of said steamboat, three boxes of tobacco, which defendant, as such master, received, to be carried in said steamboat to said city, for a certain reasonable reward, &c., and that the defendant, not regarding his duty as such master, did not, nor would, take care of, or safely or securely carry or convey, said boxes of tobacco, in or on board the said steamboat, or otherwise, to said city, but wholly neglected and failed so to do, whereby they were lost, &c.; pursuing, substantially, the usual form of declarations in such cases. The second count is to the same effect, charging the defendant as owner of the steamboat "Louisa."

A formal inducement does not in any case appear to be necessary in pleading. It appears to be sufficient, if the subject matter of the inducement were alleged in any part of the declaration, but it is use-

ful in composition, for the purposes of perspicuity, and to avoid misconception and dispute, to use such formality. In a declaration against an attorney for negligence, or a coach proprietor, a wharfinger, a captain of a ship, or an inn-keeper, for the loss of goods, &c., it is usual and proper to show, by way of inducement, or at least by other averment in the declaration, that the defendant followed the occupation in respect of which the plaintiff employed him. If no such allegation be contained in the declaration, the defendant cannot be charged thereon for the breach of a duty which results only from the particular character which he held, and in reference to which he was retained or employed. 1 Chitty's Pl., 290, 291. The declaration here shows that the defendant followed the occupation of master or owner of a steamboat, lying in a navigable river, at a designated place, and bound thence to another designated place as a terminus. Is not this averment sufficient to fix the character which the common law attaches to the masters and owners of ships, steamboats, &c., so as to charge the defendant with a breach of the duty which alone results from that character, without an express averment to that effect? Let us see. In the omission to charge the defendant as a common carrier, *in totidem verbis*, &c., as insisted on, this declaration does not appear to vary in that respect from the forms of declarations against masters and owners of ships, &c., in their character of common carriers, as framed by Mr. Chitty, and contained in the second volume of his work on pleading. It would seem quite clear, then, that this distinguished pleader did not consider an express averment of the character, &c., as necessary by way of inducement in the cases which he illustrates, but that the averment of the occupation of master or owner of a ship, &c., was in such cases, *prima facie*, sufficient to fix the character of the defendant as a common carrier. 2 Chitty's Pl., 365, 656, 665. But we are not left to the negative authority furnished by the forms to which we have referred; for, although it seems that in England it was usual formerly to declare in cases of this kind, setting out the custom of the realm—yet, it has been since better held that this custom being the common law it need not be stated. 1 Wils. R., 281. 3 do., 429. Bac. Ab., Carriers, A. Mr. Chitty says, "In case the carrier must be sued, as if his liability was founded on such custom or law, and not on a contract," and to fix his character, "it does not appear to be necessary to commence
408 with an inducement of the defendants being a common carrier, but the declaration will suffice if it merely state the delivery to the defendant of the goods, &c., to be carried from, &c., &c., and his undertaking to carry accordingly." 2 Chitty's Pl., 356, note a.

We therefore consider that the declaration in this case is sufficient to charge the plaintiff in error as a common carrier in law, and that under the pleadings he is *prima facie* liable as such, if the plaintiff's allegations be supported by the evidence, the *onus probandi* being upon the defendant to show that in virtue of some special public notice, or other good legal ground, he was not chargeable and responsible as a common carrier, in his capacity and occupation of master or owner of the steamboat in question.

The remaining objection set up by the plaintiff in error is, that no terminus of the voyage in question was proved, and that the Court below erred in overruling the instruction asked by him to that effect, and in lieu thereof, instructing the jury that if they were satisfied from the evidence that the steamboat "Louisa" was bound for Apalachicola, they might infer from that fact, in the absence of an express agreement upon the subject, that the plaintiff's goods were to be delivered in Apalachicola, as alleged in the declaration.

It was clearly proved on the trial below, as appears from the testimony brought up by the bill of exceptions that the plaintiff in error was the master of the steamboat in question, plying to and from the city of Apalachicola, on the Apalachicola river, in the year 1842, in answer to an interrogatory to that effect to which no exception was taken. It was further testified by one of the witnesses, that certain boxes of tobacco, of the crop of 1842, belonging to Filyaw, were taken by the latter, the same year, to his lower place for the purpose of being shipped to Apalachicola, and these boxes were spoken of by the same witness as having been sent off to Apalachicola at the time before mentioned. It is fully proved, too, that these boxes were shipped on board said steamboat as alleged in the declaration. Whether this, with other evidence adduced, was sufficient to satisfy the jury that these boxes of tobacco were shipped for Apalachicola as the terminus of the voyage as alleged, was clearly a matter of fact which it was their province to determine, and not one as to which the Court should charge them. If they erred in regard to this question of fact the remedy of the defendant below was by motion for a new trial on that ground. We therefore think that the Court below did not err 409
in overruling this instruction, nor do we consider that it erred in giving the last excepted to.

The instruction last mentioned, would seem to be to the effect, that if it appeared that the steamboat "Louisa" was bound for Apalachicola, and there was no evidence that the same was bound also for some intermediate point, so as to contradict that conclusion, then the jury might infer, in the absence of an express agreement to the contrary, that Apalachicola must have been the terminus of the voyage and the place of delivery. This appears to be a self-evident proposition, and therefore furnishes no ground for exception, if it were otherwise objectionable, and we are satisfied that it is not.

Upon the whole case we are of opinion, that the Court below did not err in refusing, on the one hand, and giving, on the other, the instructions, the subject of the bill of exceptions returned in this case to this Court.

The judgment of the Court below is therefore affirmed with costs.

THOMAS RANDALL *vs.* REDDING W. PARRAMORE & SIMEON ALEXANDER SMITH.

Where a debtor indebted on several accounts makes a payment, he may apply it to either account; if he does not, the creditor may do so. If neither does, the law will appropriate it according to the justice of the case, provided there are no other parties interested.

Where a party has sustained no injury from the rejection of admissible testimony, he cannot avail himself of the mistake to reverse the judgment.

The identity of the answer and party who made it being shown, an answer of a party to a Bill in Chancery, which is depending and before the Court, may be read in evidence in a Court of Law to the jury, without the reading of the Bill: and if the name and description of the defendant in law agree with the name and description of the party answering in Equity, it is *prima facie* 410
evidence of identity.

The Bill, as a general rule, is not read; but an exception to the rule is, that where the answer is an answer to articular interrogatories in the Bill, it also must be read; so, if the answer is obscure and needs any portion of the Bill to be read to explain it, then it may be read.

If a verdict be conformable to the law and evidence, it will not be set aside merely because the Court refused to give instructions which might have been properly given.

The refusal of the Court to give an instruction which would not benefit the party asking it, is not error; nor is an erroneous instruction upon an abstract question of law, which is not involved in the decision of the Court, a ground for reversing the judgment.

After a verdict in favor of either party, he has a right to demand of a Court of Errors that it look to the evidence for only one purpose and with a single eye, to ascertain whether it was competent in law to authorize the jury to find the facts which make out the rights of the party on a part or the whole of his case. If in his judgment, the Appellate Court shall hold the evidence was competent, then they must found their judgment on all such facts as were legally inferable therefrom in such manner and with the same legal results as if they had been found and definitely set out in a special verdict. So, on the other hand, the finding of a jury on the whole evidence in a cause, must be taken as negativing all facts which the party against whom their verdict is given has attempted to infer from or establish by evidence.

ERROR from Jefferson County.

Judge Hawkins, before whom this case was tried at Fall Term, 1846, of Jefferson Circuit Court, did not sit at the hearing in this Court.

The facts of the case are recited in the opinion of the Court.

The following instructions, asked for by defendant, were given the jury by the Court:

1st. That when a debtor, indebted on several amounts, makes payment, it is his legal right to direct their application; and that such application is considered as made when such payment is made, and is to be determined by the facts and circumstances attending the payment.

2d. That the mere giving of the debtor's individual check or order on a Bank, is not a payment and discharge of a mortgage lien, but that an actual payment and receipt of the money is necessary to constitute such discharge.

5th. That when an answer in Chancery is given in evidence in a

411 Court of Law, the whole answer is to be taken as *prima facie* evidence of the truth of the facts stated in it; and that the party who reads it, makes *the whole* of it evidence, and that it is not competent for the petitioners here to take such parts of the answer of the defendant as suits their purposes and reject such parts as make against them.

6th. That a debtor owing money secured by mortgage and money due on simple contract not secured by mortgage, has the legal right to direct any payment he may make to the satisfaction exclusively of mortgage debt; and that if the jury believe that Thomas Randall the defendant in this case, made payment to the petitioners on account of mortgage debt, and to be applied to the extinguishment of the mortgage lien which petitioners then held, of a sum of money adequate to the satisfaction of all the debt then due by him on said mortgage to petitioners, and the said sum of money was received by petitioners as pavement, then that the defendant did, in contemplation of law, pay and satisfy the notes embraced in the mortgage, no matter what notes the said defendant, through error or mistake, took up and cancelled.

7th. That if the jury believe that the defendant, accounting with said petitioners, paid them in satisfaction of mortgage debt, a sum of money adequate to discharge the lien held by such mortgage, and if the jury further believe that the petitioners yet permitted defendant to take up notes not embraced in the mortgage, although said petitioners were aware of his error in so doing, yet that in law the application of the money to mortgage debt is full and complete, and the covenants in the mortgage are satisfied and fulfilled.

8th. That a subsequent mortgagee advancing and paying money to a prior mortgagee, with the purpose of discharging such prior mortgage, has a right to direct the application of such payment to the satisfaction and extinguishment of the mortgage lien.

12th. That a person owing money on several accounts, some secured by mortgage and some not, has undoubtedly a right to apply his payments to whichever debt he may choose; and that even though no express direction of the application of his payment at the time of their being made had been given, yet the power may be completely exercised without any express direction given at the time; that such direction may be evidenced by circumstances as well as by words,
412 and a payment may be attended by circumstances which demonstrate its application as completely as words could demonstrate it.

13th. That if the jury believe from the evidence that Thomas Randall, the defendant, being indebted to the petitioners upon the mortgage sued on, and upon simple contract not secured by mortgage, he, the said defendant, did, on the 12th December, 1838, direct the payment of a sum adequate to the purpose to be applied in extinguishment of the mortgage debt, and the said sum was afterwards paid to petitioners, then that these circumstances demonstrate the application of the money to the satisfaction of the whole mortgage debt.

To which instructions so given, petitioners, by their counsel, except, &c.

Defendant, by his counsel, further moved the following instructions to be given by the Court to the jury, which the Court refused to give:

3d. That if the jury believe from the evidence, that on the 12th December, 1838, defendant Randall did direct the application of a sum adequate to that purpose, to the payment of the mortgage debt now sued on, both principal and interest, and such sum was actually paid by his agent to the petitioners, and by them received, then such payment enured to the satisfaction and extinguishment of said mortgage debt and lien, although one of the notes secured by said mortgage may, by mistake of said defendant, have been left outstanding in petitioner's possession, and other debts not secured by mortgage taken up in its stead.

4th. That in this proceeding the cause is tried on principles of equity, and that if the intention of the defendant to apply the money paid to mortgage securities is proved to the satisfaction of the jury, and the jury further believe petitioners well knew such to be defendant's intention, and thereupon received a sum sufficient to discharge the mortgage sued on, then that the same is fully paid, satisfied and discharged, notwithstanding any mistake, error, or misapprehension under which defendant acted by taking up notes not secured by the said mortgage.

9th. That if the jury believe from the evidence that the sum of $11,866 09-100, or the check of defendant Randall, was paid by the Union Bank of Florida to petitioners, and when paid was intended by said Bank to be applied to the payment and discharge of the whole amount secured by the prior mortgage of said petitioners, then the 413
receipt of such sum by petitioners enured to discharge and extinguish such mortgage lien, and this whether or not such intended application of the money was made by said petitioners, and in such last case, it is not competent for the petitioners, or defendant Randall, to make any other application.

10th. That if the jury believe from the evidence that when the petitioners presented to the Union Bank of Florida the check of defendant Randall, and received payment of the same, if such payment was designed by defendant Randall and by said Union Bank to be applied to the discharge of their prior mortgage lien, and was paid with such design, then the receipt of such payment *in itself* constituted a discharge of such mortgage lien.

11th. That the verdict of the jury and the judgment of the Court, if in favor of the defendant in the present action, will not prevent or bar the petitioners from recovering from defendant in another and suitable action, any amount actually due them by defendant as a simple contract debt.

To which last ruling of the Court and refusal to grant the instructions prayed, the defendant, by his counsel, excepted, &c.

Petitioners then offered the following instructions, which they prayed the Court to give to the jury, defendant objecting thereto, but the Court overruled the objection, and did give the instructions as prayed for by petitioners:

Petitioners, by counsel, moved the Court to instruct the jury that if they believe the defendant appropriated the payment by calculation of the amount due on the notes then due and by receiving the same from the petitioners, that it was a valid appropriation, and the petitioners had no right to appropriate the payment to a note not then due, whether a mistake was made by defendant or not in so doing.

2d. That the Union Bank had no right to appropriate the payment of the check to any different note, and especially a note not due, than the notes to which Randall had appropriated it, whether by mistake or not.

To which last ruling of the Court and granting the said last mentioned instructions, the defendant by his counsel, excepted, &c.

And his Honor the Judge further instructed the jury—That the mortgage was an incident to the note—if the note was paid, the mort- 414
gage was discharged, and if the money was applied to the mortgage, the note was discharged; and that while the debt on the note was subsisting, the mortgage was not discharged.

That the application of payment must have been either by the act or agent of parties, or by the act of law—that the party paying had a right to direct the application of payment, and if he did not, the law would apply it—that circumstances may indicate appropriation of payment as well as words themselves, and when thus a mortgage, application would be made to it, as most beneficial to the party paying; and when a payment is made generally, without application of it, the law would apply it to a subsisting debt or note due, if there were other demands—That any transactions between the defendant and the Union Bank and will not be regarded by the jury unless a knowledge of them is directly brought home to the petitioners.

T. H. Hagner, (with whom was *L. A. Thompson*), for Plaintiff, said:

This was a petition for the foreclosure of mortgage. The controversy turned upon the appropriation of payments. It was clearly shown, that while defendant had appropriated moneys more than adequate "to the extinguishment of the mortgage lien," distinctly so termed, that other notes than mortgage notes had been taken up and cancelled.

For the defendant it was contended, that the appropriation was made by him to the mortgage debt; and that the character and description of payment, as upon "mortgage lien," was the distinctive and determining feature, while the mistake or misapprehension in taking up one note for the other, might be corrected, and the payment considered as made in extinguishment of mortgage lien, as had been the declared purpose.

The principles of construction and of the application of the statute approved 11 Dec., 1824, entitled, "An act to regulate the foreclosure of mortgages by the courts of the common law," come under discussion.

The petitioners insisted on the strict rules of the common law, and the Court concurred with them.

The defendant urged that he was to be debarred of no equitable defence in this proceeding.

415 Upon the admissibility of the answer in Chancery of defendant to the Bill of the Union Bank against him and said petitioners, without the production of the Bill, a question arose.

Upon the application and appropriation of payments, defendant's counsel will cite: Clayton's case, in 1 Merivale, 604, 607. Brett vs. March, 1 Vernon, 468. Sutton the Marshal's case, 12 Modern, 559. Chase vs. Box, 2 Freeman, 261. Croke Elizabeth, 68. Taylor vs. Sandeford, 7 Wheaton, 13. Cremer vs. Higginson, 1 Mason, 323. Guinn vs. Whitaker's Admr., 1 Har. & John., 754. Patterson vs. Hull, 9 Cowan R., 747, 773. Gass vs. Stinson, 3 Sumner's Ct. Ct. R., 110. Harker vs. Conrad, 12 Sergt. & Rawle, 305. Dorsey vs. Gassaway, 2 Har. & John, 402. Shaw vs. Pitton, 4 Barn. & Cress., 715. Hall vs. Wood, 14 East, R., 243-4. Marratt vs. White, 2 Starkie, 101. Hicks vs. Bingham, 11 Mass., 301. Reed vs. Boardman, 12 Pickg., 441.

As to the construction and principles of application of the statute of 1824, regulating foreclosure of mortgages, we cite: Decision of Robt. Raymond Reid, Judge of the Teritorial Court of Appeals of Fla., 1833, Hunter vs. Shelton. Parkhill's Adms. vs. Union Bank, Florida 1st Rep., 129.

Upon the admissibility of the answer of defendant to the Bill of Complaint of the U. Bank, exhibited against him and petitioners, without the production of the Bill itself, we cite to the Court the following authorities: Chitty's Archbold's Practice, 219. 1 Starkie on Evid., 293. 1 Gilbert on Evid., 58. 3 Bac. Ab., 558. Roscoe on Evid., 57. 3 Philips on Evid., 929.

Also the following English cases ruling this point: Lady Dartmouth vs. Roberts, 16 East. Rep., 336. Hodgkinson vs. Willis, 3 Camp. R., 401. Henzell vs. Lyons, Admr., 1 aBrn. & Ald., 182. Howitt vs. Pigott, 5 Car. & Payne, 75.

Also the following American cases, to same effect: Doughton vs. 4 Blackford's Rep., 433. Hunter vs. Jones, 6 Rand. Rep., 543. Cort vs. Tracy, 8 Cowan, 268. McGowan vs. Young, 2 Stewart, 296.

Upon the specific instructions given and refused by the Court, we shall also offer argument.

1st. The instructions given at the instance of defendant below, if not opposed or taken back by other instructions subsequently refused
416 or given, would have been exceptionable and some favorable to defendant. But the refusal of others asked by defendant, operated by way of negative pregnant, to deefat and nullify those first granted.

This refusal gives rise to a contradiction on the part of the Court. 1st. Instruction 3, asked by defendant, results as a corrollary, or necessary inference from 12, granted; and its refusal is in opposition to 6 and 7. No. 3 merely applies the facts proved or admitted—facts undeniable—to the principles laid down in Nos. 6, 7 and 12; yet this was refused.

No. 9, refused, also contains an undeniable fact and an inference fairly deducible therefrom, a conclusion of law which it was competent for the Court, and the Court only, to apply; and is directly contradicted by No. 8, granted.

No. 10 is subject to all these remarks and principles.

The refusing these additional instructions, deprived the defendant of all benefit of those before given, and precluded the jury from finding in his favor, although they may have fully believed all the facts on which they were founded.

The refusal of Instruction No. 4, is clearly error. The first part has been sustained by argument and prior adjudication in Florida, as a settled rule of construction of the act in question. The second part, founded on *intention* of *petitioners,* and on facts properly indicative of that intention, should have been left to the jury as prayed for. It was carefully worded, and was fully within the principles previously laid down by the Court in 7th, 8th, 12th and 13th. Its refusal by the Court must have destroyed, in the minds of the jury, all the favorable effect of the prior instructions. This refusal is error. 3 Cranch Rep., 298. 3 Blackford, 433.

Instruction 9, refused. The first part of this instruction is subject to the same remarks as apply to the 4th, down to the two last lines in the printed record. It merely applies to the facts referred to the jury, and on the supposition of their being by them believed, to the principles already laid down by Instructions No. 7, 8, 12 and 13, granted. The concluding part of it, that it was not competent for the petitioners or defendant Randall to make any other application, results necessarily from the principle of No. 8, granted by the Court. The refusing this last, was in direct contradiction to and subversive in the minds of the jury, of said 8th instruction.

No. 10, refused, should have been granted. 417

There were facts enough proved or admitted, from which the jury might have inferred the design of the payment made on the part of Randall and the Bank, and the legal conclusion necessarily resulted from the principles already laid down by the Court.

11th Instruction. This should have been granted. The debt of defendant on the note outstanding, more especially, after defendant's assumpsit written on it as proved by Seward, constituted, *per se,* a debt independent of the mortgage, or even of the original note.

The question before the jury was not a mere question of debt, but of *mortgage debt*—the last issue might be found for defendant, without barring the debt. Plowder, 173. 5 Coke, 114. Co. Litt, 209. 7 Bacon's Abridg., 60.

Defendant in his answer in Chancery, admitted *a debt,* and in his plea only desired *a mortgage lien* for that debt. The two questions are separable, and should have been separated. 1 Caine's cases, 60. 5 Wendell, 572. 18 Johnson, 110. 5 New Hamp., 252. 14 Mass., 101. 5 Maddock's Rep., 351.

Nothing prejudiced so much the cause of defendant as refusing this instruction. Then compare this instruction asked with the first paragraph of his Honor's general instruction, and its importance is manifest. The last clause of that general charge, "that while the debt on the note was subsisting the mortgage was not discharged," of itself prevented the possibility of the jury finding for defendant, although they may have been ready to find every other issue in every other instruction favorably for defendant. It covered the whole of the petitioner's case with an impenetrable shield, and left no opening for the facts and legal inferences favorable to defendant. It repudiated and nullified every favorable instruction and *construction* applicable to his side of the case.

The two instructions given at the instance of petitioners, are humbly submitted to be manifestly wrong. They, in a word, prostrated the whole defense of defendant, and left him nothing to stand on.

And 1st. Both instructions make Randall's *alleged calculation* (exhibited in his answer) of the amount due on the notes *"then due."* and his receiving the same (*notes given*) from petitioners as a valid appropriation, &c., in *spite of mistake,* &c. Now, there is no proof that Randall made *any calculation* whatever. He admits in his answer a conjectural caluculation, the supposed basis of the then settle 418
ment; but by whom made, does not appear.

2d. It assumes as a fact what is contradicted by all the proofs on both sides—that such "calculations" was based on notes *"then due,"* whereas, it is undeniable, that one of the notes taken up, was not *"then due,"* but was paid *before due* and interest *abated.* This false fact assumed in the instruction would alone, if there was no other error in the cause, justify a reversal.

The fact was all-important in itself, as going to show the primary intention of all the parties. For if *one note "not due"* was paid, why not another? And yet the second instruction on this point precluded the Bank the "second mortgagee" from applying the payment to the note in question because *"not due,"* in contravention of their legal right as established in instruction No. 8, granted.

3d. It contradicts the 8th instruction given; for while that instruction admits the right of the Bank as second mortgagee, to make the appropriation of its own funds in extinguishment of the mortgage lien, (a duty which law also enjoined), that right is, by the last instruction in question, by anticipation precluded and barred.

4th. While the 8th instruction admits the right of the second mortgagee to make the appropriation, the instruction given at instance of petitioners gives the right to defendant Randall. On the whole, the charge of the Court is so contradictory, that the jury could not know what the law was. For this, the case ought to be reversed. Selim vs. Snyder, 11 Serg. & Rawle., 319.

A. E. Maxwell, for defendant.

The first error assigned relates to the refusal of the Court to admit in evidence papers marked B. & C. The correctness of this refusal depends upon the relevancy of said papers to the issue before the jury. What were those issues? The action was brought to foreclose the mortgage given by defendant to the plaintiffs to secure the payment of three notes. Two of the notes had ben paid and taken up. The third was outstanding, and its alleged non-payment was the cause of the action. The defendant pleaded payment, and thereby the satisfaction and extinguishment of the mortgage. The testimony of H. L. Rutgers was taken to prove that defendant, with the knowledge of plaintiffs, had mortgaged his lands to the U. Bank, which

419 under its charter, he could not have done, except upon condition that he would appropriate the first moneys drawn on the faith of his stock to the extinguishment of the prior mortgage; and also that he made a payment sufficient to cover his mortgage indebtedness, with circumstances intended to show an appropriation for that purpose. Th papers B. & C., which were exhibits annexed to his deposition, were a statement by Randall and a certificate of the Clerk of Jefferson County, showing, as was required by the charter, before any one could mortgage lands to the Bank, the extent and nature of the liens upon his lands. It is evident that such papers were not pertinent to the issues. On their face there is nothing which could have been used as evidence. The circumstances that they were presented to the Bank only proves that one of the necessary steps towards making a mortgage to the Bank was taken; but this cannot affect the mortgage in this suit. Nothing that the Bank and defendant did will be permitted to destroy plaintiff's rights. Nothing but the acts of the parties themselves can affect these rights. If the papers were designed to show that a mortgage had been made to the Bank, they were inadmissible because better evidence of that fact could have been had. They were mere private papers relating to transactions between defendant and the Bank, and there is no evidence to show any privity of plaintiffs, or that they had knowledge of the existence of the papers. They were therefore properly excluded as being *res inter alios acta*. To allow such papers to go to the jury would be to permit a party to make evidence for himself.

But if they were admissible, the error of the Court in rejecting them was of such slight consequence, that it is not good ground for reversal. "Where a party has sustained no injury by the rejection of admissible testimony, he cannot avail himself of the mistake to reverse the judgment." Smith vs. Ruecastle, 2 Halst., 357. 3 J. J. Marsh., 717. These papers are unimportant for any purpose. They supply no link in a chain of evidence, and tend to prove no fact which there was not better evidence to prove. Their rejection, then, could cause no prejudice to the defendant.

The next error to be considered, is the refusal of the Court to admit the bill with the answer. A bill cannot be used as evidence. 7 Durn. & East., 2. The bill in this case certainly cannot, for it is the bill of a third party. The authorities which hold that the bill
420 should be admitted, give as the reason, that otherwise it will not appear that there was a suit in which the answer was filed. In other words, that the bill is necessary to prove the answer. This reason though it may have been good in England, where the Chancery and common law Courts are separate and distinct, will not apply here, where they are blended in one court. Courts take judicial notice of their own records. 2 Bac. Abr. Ev., 642-3. There could be no occasion to introduce the bill to establish the fact of the existence of the Chancery suit. The Court knew it judicially, and could so instruct the jury. The reason ceasing, the authorities no longer apply. The answer was used to show the admissions of defendant, and was sufficiently proved by the certificate of the judge before whom it was sworn. There could be no higher proof that it was what it purported to be.

Here, also, the remark may be repeated which was made in reference to papers B. & C. No injury can result from the rejection of the bill. It contained no evidence internally, and could prove nothing which could possibly affect the merits of the case. Its admision could not have had the slightest influence upon the jury. 2 Halst., 357. 3 Marsh, 717.

The 3d instruction asked for by defendant, was properly refused. It supposes a state of facts which there was no evidence to support, the evidence being directly the reverse and uncontradicted. 2 Peters, 625. Besides, this instruction was but a repetition of the 5th which was granted, and which the Court might have given in preference to the other, because its phraseology better suited its view. 6 Peters, 628. One or the other of these grounds must prevail to sustain the Court.

The 4th instruction, like the 3d, supposed a state of facts not warranted by the evidence.

The 9th instruction could not have been given upon any principle of law or justice. The *intention* of the Bank cannot be so controlling as is implied in that instruction. It had no right to make the appropriation of payment. In all the conflict of doctrine on the subject of appropriation of payments, I imagine that no author or judge will be found holding that a third party, other than the debtor or creditor, has, under any circumstances, a right to direct the appropriation. Yet the instruction claims that right for the Bank.

The 10th instruction was also properly refused. The mere *design* 421
of defendant and the Bank, could not affect the appropriation. The debt to which it was contended the appropriation was made not being due at the time, the appropriation to it cannot be established without showing a positive direction to the creditor, indicated either expressly or by conclusive circumstances, and his action in conformity thereto. How easy would it be for parties to allege such *design* as an afterthought, when they found it to their interest to do so. This consideration is enough to show the evil and error embodied in this instruction.

The 11th instruction is but an abstract proposition, and as such, properly refused. 1 Scammon, 407.

The 8th and 9th errors are badly taken. The instructions to which they refer asserted nothing more than the right of the debtor to make appropriation of his payment, and that his mistake in making the appropriation shall not enure to the disadvantage of the plaintiffs, they not having done anything to cause the mistake and being ignorant of it. The defendant can derive no aid from the law relating to the appropriation of payments. His answer shows that he made the appropriation to another debt than the one sued on. Can he get rid of the consequences of that appropriation by saying it was made under a mistake? Even if this proceeding were in a Court of Equity, which is not the case, I cannot see the slightest ground for the relief which those Courts sometimes give on account of mistakes. So far as the mistake affects the defendant himself, there is certainly nothing entitling him to relief. He has sustained no injury, nor lost any valuable right. He has paid no debt which he did not owe. The Court would not interfere, except upon condition that defendant should do equity, by paying or tendering in Court what he acknowledged to be due. The mistake of *one* party, unless caused by the misconduct of the other, is not a good ground for relief. 1 Story's Eq., 160. There is no pretence here that plaintiffs did anything to cause the alleged mistake. Another reason why this mistake should not avail is, that it does appear that defendant would have been better off if no mistake had been made. If plaintiffs had been asked to accept the money in payment of the mortgage lien, (though one note was not due by twelve months), probably they would not have done so. The presumption is, that they would not; for it would have
been giving up their best security without any consideration. It 422
would be a most summary way of setting aside a creditor's rights to allow the debtor's mistake to destroy the highest security for the debt.

Courts will no relieve against mistakes, where they might have been avoided by due diligence, nor unless the macts are material. 1 Story's Eq., 159-60; 163-4. The mistake here set up might have been a ground of relief for the Bank from its contract with defendant, but certainly cannot affect the contracts between the parties to this suit.

The instructions given by the Court of its own motion, which are assigned for the 10th error, were correct. They embody the plainest principles of the law applicable to this case, and nothing more. If there can be anything wrong in them it is favorable to defendant, and he cannot object to it. 15 Wendell, 24. 1 Story's Com. Eq., 159, 163-4.

Douglas, Ch. J., delivered the following opinion:

This case was brought up by writ of error from the Jefferson Circuit Court.

The suit was commenced by petitioner to foreclose a mortgage under the Act of Decr. 11th, 1824, "To regulate the foreclosure of mortgages at Common Law," &c. Duval's Comp., page 38.

The record shews that the mortgage was given on the 19th day of Decr., 1836, by the said Thomas Randall to the said Smith & Parramore, the petitioners in the Court below, upon certain lands in the mortgage described, to secure the payment of three certain promissory note of the same date, amounting in the whole to nine thousand seven hundred and fifty-four dollars and ninety-two cents, one of which said notes was payable one year after the date thereof for the sum of $3027 39; one other of said notes was payable two years after the date thereof for the sum of $3251 64, and the other was payable three years after the date thereof for the sum of $3475 89. The two notes first mentioned were paid before the institution of this suit. The foreclosure is sought, therefore, for the alleged non-payment of the last mentioned note. To this petition the defendant Randall put in three pleas. The first and second are pleas of payment. In the third plea, the defendant alleged that after the execution of the said deed of mortgage, he did by deed of mortgage duly

423 executed, of which the said Randall and Parramore had notice, mortgage and pledge the lands and property in the mortgage first referred to contained, and conveyed to the Union Bank of Florida, to secure a certain amount of stock of said Bank, then subscribed in the name and behalf of said Thomas; and by the terms of the charter of said Bank it was provided and conditioned, that all money to be borrowed on the pledge of the stock of said Bank, where the property so secured was subject to a former mortgage, was first to be applied to the payment and extinguishment of said prior lien, of which provision and condition in said charter and law aforesaid the said Smith and Parramore had notice; and further, that on the 12th day of December, 1838, he being then indebted to the said Smith and Parramore as well on the three notes in the first recited mortgage, and in the said petition referred to, as also other promissory notes not secured and provided for in said mortgage, did then by check on the Union Bank of Florida to said Smith and Parramore delivered, order and direct the payment of the sum of eleven thousand eight hundred and sixty-six 9-100 dollars to said Smith and Parramore, in full payment and satisfaction of said three notes in the said petition referred to, and in extinguishment of the lien in said mortgage, and that the said Smith and Parramore did then and there accept the same on said terms, and did on the 14th day of December, 1838, present the said check at the said Union Bank, and did then and there receive payment in full of the same. To each of these pleas a general replication was filed by the petitioners, upon which issue was joined. The payment relied upon by the plaintiff in error was the check for $11,866 09 upon the said Bank, given by him to Smith and Parramore on the 12th day of December, 1838. It appears from the testimony of Hy. L. Rutgers, Cashier, set out in the bill of exceptions which constitutes part of the record in this case, that the plaintiff in error was at that time a stockholder in that Bank to the amount of 581 shares, which he had procured at different times by mortgages upon slaves and land; and that he was entitled to draw two thirds of the amount of his shares, say $38,733 34-100, and that he had drawn at various times before the 14th of December, 1838, $18,450 76-100, leaving a balance at the time when the above mentioned check of $11,866 09 was drawn, of $26,282 58 against which he could drawn, being $8,619 49 over and above the amount of the check,
424 and $5,140 60 more than sufficient to pay the note on which this suit was brought. At the time when the check was drawn, viz., the 12th December, 1838, upon his complying with the requisitions of the charter, the lands mortgaged by the plaintiff in error to the Union Bank, as appears by other evidence in the case, included certain tracts which he had purchased of Smith and Parramore, and one Jesse H. Willis, which he (Randall) called his Ocilla lands, and also other land which he had bought of the United States. His indebtedness to Smith and Parramore was for the purchase money of the lands which he had purchased of them and of said Willis, who had transferred to them some of Randall's notes. This check of Randall for $11,866 09, Rutgers, the witness before mentioned, says was presented to him by Reddin W. Parramore, one of the parties, on the 14th of December, 1838, and *paid;* and that Reddin W. Parramore, at the time when he presented the check for payment, delivered to John Parkhill, Esq., who was then Cashier of the Union Bank, (Rutgers being at that time Teller), a letter bearing date on the same day that the check was drawn, in which the plaintiff in error said to Parkhill, "I have this day drawn a check in favor of Smith and Parramore for the sum of 11,866 9-100 dollars, to be paid at your Bank, as a loan on my stock, the whole of this amount goes to extinguish so far the *sum due to them on my Ocilla lands pledged to the Bank.*" It does not appear from the proofs in the cause, that Parramore was expressly informed of the contents of the letter, or whether it was opened or sealed. The plaintiff in error, however, in his answer to a bill in Chancery, which it appears had been filed by said Bank against himself and others, and which was offered in evidence by the defendants in error and permitted to be read to the jury, states that from the nature of the transaction and the perfectly frank and open manner of dealing between the parties, he is fully satisfied that the contents of the letter must have been communicated to Parramore. It further appears by the bill of exceptions, that the said Jesse H. Willis, and Smith and Parramore, were appraisers of the lands so mortgaged by the plaintiff in error to the Union Bank; and the plaintiff in error in his said answer in the Chancery suit says that "as well from the fact of said appraisement so by them made as also from personal communications made to them by him and Jesse H. Willis, in his presence, he fully believes that said Smith and Parramore were advised and well knew that his said lands *were proposed* 425
to be placed in said Bank by him, and also that from the proceeds of the loan to be made on the stock so secured on their pledge, defendants (Smith and Parramore) were to be paid the amount of their lien on said land. Randall, in his letter to Parkhill before mentioned, says, "I left with you a power of attorney to sign my stock notes for me in my absence, under which you can still act for the purpose of making a stock note to cover the amount, and also the further sum of 3,000 dollars, for which I have given them a check on your Bank of this date. To avoid trouble, however, I have signed my name on the opposite page to a note in blank, to be filled up as a stock note, if needful;" said Rutgers, in his testimony, says the notes in the mortgage of Smith and Parramore amounted to $9,704 on the 12th of December, 1838, and that the sum of $11,866 9-100 was paid to Smith and Parramore, as directed by letter of Thomas Randall, to extinguish the *sum due to them on the Ocilla lands.* There was, he says, no actual cancellation that he is aware of. It also further appears from Randall's answer in the Chancery suit that he, with his proposals to the Bank for stock, exhibited an abstract of title to the lands proposed to be mortgaged to secure it, which contain 1,175 acres, including the lands purchased by him of Smith and Parramore and said Willis, and that he (Randall) stated to the Bank that Smith and Parramore had a mortgage on part of it purchased from them and Willis to secure the sum of 12,695 9-100 dollars, which he proposed to pay off from the money first to be loaned on the stock. This sum, it also appears from another part of the answer, included a note for $2,940 18, which he (Randall) calls a cash note by him as part consideration of land. This note, it seems, was included in the settlement of the 12th July, 1838, hereafter referred to, together with the first note included in the mortgage to Smith and Parramore, both of which, including interest, amounted to the sum of $6,350 16, for which Randall gave a check of that date which was returned at the time of the settlement which took place between himself and Smith and Parramore on the 12th of December, 1838, and constituted part of the amount of $11,866 09, for which the check of that date was given, which check it was understood by and between the parties, was (it is stated by Randall in his answer in the Chancery suit) to cover the following ,viz: "This check, dated 12th July, 1838, payable 1st of August, 1838, $6,356 76, add interest four months $169 35; 426
not to Smith and Parramore payable 19th December, 1838, $3,251 64—Jesse H. Willis' note payable same date, $2,094 34;" which several sums added together make the precise amount of $11,866 09, for which the check of that date was given. This cash note of $2,940 18, and the Jesse H. Willis' note of $2,094 34, making together the sum of $5,034 52, were not included in the mortgage; both of them, however, appear to have been given as part of the price of the lands purchased by Randall, either of Willis or Smith and Parramore. The note of $2,094 34, given by Randall to Willis, was transferred by him, together with other notes, to Smith and Parramore. It appears, too, that Willis at one period held a mortgage on some of these lands, given by Randall to secure the payment of these notes, which as an act of kindness and accommodation to Randall, he (Willis) had given up to Randall, to be cancelled before the notes were transferred to Smith and Parramore; and that Smith and Parramore were aware of this fact when they took them. Randall, however, insists that when he made his statement to the Bank as to the amount of the mortgage to Smith and Parramore, and when he made the settlement above stated, he acted under the belief that the note of $2,940 18, was included in the mortgage of Smith and Parramore; and we are now asked to correct this mistake of his by applying the amount paid on it to the note now sued upon. But with every disposition to render to the appellant the most ample justice, we find ourselves upon this subject, in this case, without authority to comply with such request. If this alleged mistake *can be corrected at all,* a Court of Chancery, where all the parties interested can be brought in and have an opportunity to be heard, and where the respective rights and interests of each and all can be adjusted and protected, is the proper forum. We can only decide the case upon the issues before us. It has been urged that this action is in the nature of a suit in Chancery, and that the equitable rights and interests of the parties can be taken into consideration, but it is to be remarked that this is a proceeding under a statute regulating the foreclosure of mortgages by the courts of common law. It is true, as suggested by the counsel for the plaintiff in error that in the case of Manly and Moseley, Adms., &c., against the Union Bank of Florida, decided at the last term of this Court, held. "that a defendant to a petition for

427 foreclosure under this act, was not in making his defence, required to conform to all the strict technical rules of special pleading, but that if he sets out his objections or defence substantially, so that the petitioner can readily see and understand the grounds of his objections; or, in other words, if he sets them out as specifically as he would be obliged to do the matter of his defence in an answer in Chancery, or in a notice of special matter under the general issue in a suit at law, verified by oath agreeably to the provisions of the statute relating to that subject, it is sufficient." Reps. S. C. of Florida, p. 182. but this decision was founded upon the peculiar structure and provisions of the act, and we still entertain the same view of the matter. It was not however intended to be understood by that decision, nor is it inferrable from the language used, that he could put in such a defence as would enable the Court to go into an enquiry as to all the equitable matters connected with the transaction. The question, whether he could do so or not, did not arise in that case; and what equitable powers the Court might exercise in such a case upon an issue properly preesnting such equitable matters to the consideration of the Court, it is not necessary now to decide; because such an issue in this case has not been made. The issue here, is payment; and if the defendant in a suit in Chancery were to put his defence solely on the ground of payment, it is apprehended that he would fail, unless by his proofs he established that defence. And besides, before the plaintiff in error could have a right to invoke the aid of any Court to correct this alleged mistake, it would be incumbent on him to put (or at least to offer to place) all the parties to the transaction in "statu quo" in relation to it; for "he that will have equity done to him must do it to the same person." Francis' Maxims, p. 1. 2 Chan. Cases, 194-5. And when a party goes into a Court of Equity for relief he will be compelled to do equity to others. Read vs. Long, 4 Yerger's Reps., 68-9. Thomas vs. Bush, Admr., 1 Bibb, 506. McDonald vs. Neilson, 2 Cowen, 139. Lipscomb vs. Littlepage, 1 Hen. and Mumf., 454. This Court, upon the issues here presented, is incapable of enforcing this principle, and there is no voluntary offer to comply with it. And were the Court to undertake to correct the alleged mistake by applying the amount paid on the note for $2,940 18 to the note now sued upon, we should leave the defendants in error with a claim on the plaintiff in error for the
428 amount of the sum of $2,940 18, with all the interest that has accrued thereon, without any evidence of the debt, and with this debt barred by the statute of limitations. And, moreover, if the Court had the power to correct such a mistake in such a case, there is nothing in this record to show that if Randall was laboring under such a misapprehension as is alleged, Smith and Parramore, or either of them, did anything to cause it, or that either of them was aware of the fact when the check for $11,866 09 was given, or when it was paid by the Union Bank.

Whether the note for $3,475 89, included in the mortgage now sought to be foreclosed, has been paid or not, depends upon the manner in which the proceeds of that check were appropriated. The general rule as to the appropriation of payments, was correctly laid down by the counsel for the plaintiffs in error, and was not understood to have been controverted by the counsel on the other side.—Indeed, it is too well settled for controversy, that where a debtor indebted on several accounts, makes a payment, he may apply it to either account. If he does not, the creditor may do so. If neither does, the law will appropriate it according to the justice of the case, provided there are no other parties interested. The United States vs. Kirkpatrick, 9 Wheat., Reps., 720. 5 Cond. Reps., S. C., 740. Gass vs. Stinson, 3 Mason, C. C. R., 110. Postmaster General vs. Novell, Gilpin's C. C. R., 134. Cremer vs. Higginson and others, 1 Mason, C. C. R., 337; and Devaynes vs. Noble, Baring vs. Noble, 1 Merivale R., 605-6.

It was contended, in the argument of this cause, by the counsel for the plaintiff in error, that this case comes within the exception above stated, viz., that there are other parties interested, and that the law applied the funds of Randall in the Union Bank to the payment of the note secured by the mortgage now sought to be foreclosed, and that he had no right to make a different application of them and leave this note unpaid. To sustain this proposition they referred to and relied upon the 8th section of the charter of that Bank. By the 1st section of that charter, (Duval's Comp., 442), it was provided, that a Bank should be established in the city of Tallahassee under the title of "The Union Bank of Florida," with a capital of one million of dollars, and with the privilege of increasing it to three millions of dollars, which capital was to be raised by means of a loan on the
429 faith of the Territory, by the Directors of the Bank; and by the 8th section, (ibid, 444), it was enacted, that to secure the payment of the principal and interest of bonds to be issued by the Territory for the purpose of raising the capital of the Bank, the subscribers should give a bond and mortgage to the satisfaction of the Directors, on property to be in all cases equal to the amount of their respective stock, &c.; and it is also provided, that property already mortgaged may be received as a guarantee. "Provided," that there be first *deducted* from the whole appraised value of the property, at least twice the amount of said mortgages and stock to be given only to the amount of the surplus after such deduction. "Provided, however, that such existing mortgage on said property shall not prevent the Board of Directors or Commissioners from receiving it, at its full value, if the subscriber shall actually employ the money to be borrowed from the Bank in the extinguishment of the said mortgage, and its extinguishment shall take place in the presence of the officers of the Bank or their appointed agents." Duval's Comp., 445.

Under this provision of the charter, there is no doubt but that the Union Bank might, if *such deduction were not made*, have applied so much of the money loaned to the plaintiff in error on his stock, as would have extinguished the lien of his mortgage to Smith anr Parramore, or that it was its duty to have done so. But the parties injured by the misapplication of the funds, if indeed any injury has been sustained, or any misapplication has taken place, are not before the Court; and for the reasons above stated, we have no power, as this case is situated, to bring them here. No one is here complaining of this matter, but the plaintiff in error himself; and it will appear, we think, for reasons hereafter to be stated, that he cannot avail himself in this case of that provision of the charter. But has any injury been sustained by any one, in consequence of the non-application of any portion of the proceeds of the check of $11,866 09 to the payment of the note which is the foundation of this suit? Was there any imperative rule of law requiring such application? It is to be recollected that the whole amount of the loan of the Bank to the plaintiff in error, was $38,733 34. This was raised, as appears by the testimony of Rutgers, the Cashier of the Bank, upon the mortgage of land and negroes. Considerably less than one half of the sum of $38,733 34, it would appear from the testimony before us, was raised on the lands mortgaged to Smith and Parramore. Even 430
if the deduction provided for in the charter were not made, (and we are unable to determine from the record whether it was made or not), those lands having been mixed up with other lands and with negroes in the transactions of Randall with the Union Bank, it is impossible to say from an inspection of the record in this case, whether the note now sued on should have been paid out of the $18,450 66, which Rutgers says Randall had drawn from the Bank before the 12th of December, 1838, or out of the proceeds of the check, or whether it should have been paid out of the sum of $6,584 76 which remained to his credit after the check was paid. We cannot say, therefore, even if the *deduction* above mentioned were not made, that the law (as the case is now presented to us)) could have made an application of any portion of the proceeds of the check to the payment of this note.

It was insisted in argument that the charter of the Union Bank is a public act, and that consequently Smith and Parramore were bound to take notice of it; and that, they having appraised the lands which Randall proposed to mortgage to the Union Bank, under an appointment from that institution for that purpose, they were apprised of the intention of Randall to mortgage to the Bank the same lands on which they had this mortgage, and were therefore bound to see that their mortgage was paid out of the first money loaned to Randall on his stock. Without stopping to determine whether the position in relation to the charter is well assumed or not, it is deemed sufficient to say that if it be, Smith and Parramore had the same right to notice the provision in the 8th section in relation to the *deduction* above mentioned, and also the provision in the 29th section of the charter, "that each and every stockholder shall be entitled to a credit or loan equal to two-thirds of the total amount of his shares, (Duval's Comp., 451), by which they would have seen that Randall would be entitled to draw from the Bank on the lands they had appraised, a sum more than equal to the amount of their mortgage and the check together. So that there seems to be nothing in the provision of the 8th section of the charter relied upon, to affect them in this matter so far as now appears.

It is alleged, further, on behalf of the plaintiff in error, and in support of the issue in this case, that he appropriated so much of the

431 proceeds of the check to the payment of this note as was sufficient to satisfy it and extinguish the mortgage given to secure its payment; and reliance is placed upon the letter of Randall to Parkhill of the 12th Decr., 1838, and the statement respecting it in Randall's answer in Chancery, to sustain this position. In the letter, however, he did not say that the proceeds of the check were to extinguish so far the mortgage to Smith and Parramore, but that it was to extinguish *so far the sum due to Smith and Parramore* on his *Ocilla lands*, mortgaged to the Bank. It does not clearly appear whether all of the four notes taken up by Randall in his settlements with Smith and Parramore of 12th July and 12th December, 1838, all of which were included in the amount for which the check of the latter date, were given in part consideration of the Ocilla lands or not. It is pretty evident that three of them were, and if the fourth (which was given as part consideration of land) was also, then the whole amount of the proceeds of the check, did go to extinguish so far the debt due them (Smith and Parramore) on his Ocilla lands, and the terms of the letter to Parkhill, were literally satisfied. But whether this be so or not, it does not satisfactorily appear that Smith and Parramore knew the contents of that letter, or whether the above mentioned deduction had been made from the appraisement of the lands mortgaged to them, and afterwards mortgaged to the Bank, or not. And if they even knew that this deduction had not been made, and were also aware of the contents of the letter, the facts, that its contents were not specific as to the mortgage, that it spoke of extinguishing so far he debt due them, instead of the mortgage which was less than the amount of the check; that they had just given up to Randall the four notes above mentioned, which amounted, wkith the interest agreed, to just the sum for which the check was given, and that it did not amount to a sum sufficient to cover the three notes exclusive of the note of $2,940 18, and the note now in controversy, and the silence of the officers of the Bank respecting this note and mortgage, were calculated to induce them to believe that it was intended both by Randall and the Bank, that this note which was *not then due*, should run to maturity. And the renewal of this note by Randall, on the 20th of December, 1844, as shewn by the proof, is pretty conclusive evidence that up to that period neither party had considered it paid. It is true that Randall in his answer in Chancery, alleges that in mak-
432 ing the settlement of 12th July, 1838, he acted under his original error to which he had before adverted, that the item of $2,940 18 was included in the mortgage to Smith and Parramor; but there is nothing in the proofs of the case to lead one to suppose that they had any knowledge of this misapprehension. But if it were otherwise, it is difficult to perceive how it could affect them. It was further argued that the request of Smith and Parramore for a renewal of this note, from a fear that it was liable to be defeated by a lapse of five years, tends of itself to exclude the idea of its being still secured by a deed of mortgage. But we do not see how such a conclusion necessarily follows. It is true that a deed of mortgage would not be barred by such lapse of time. Suppose, however, that the mortgaged premises, upon a sale under a decree of foreclosure, were not to bring the amount of the debt. Then their remedy would be upon the note for the residue, and it is not reasonable to suppose, that while they were indulging the plaintiff in error with further time, they might wish to guard against the contingency of the note being barred by the statute of limitations? It would seem so. Seward, the witness, who acted as agent of Smith and Parramore in procuring that renewal, however, says that he made the application for it *of his own mere motion*. He also further said that he told said Randall that he had a mortgage; but he did not shew it. He said it was a correct debt. Being cross-examined, he said Judge Randall looked at the note, said it was a just debt, meant to pay it. This conversation took place on the day of the endorsement. Taking, then, all these circumstances into consideration with *the lights we now have before us*, we cannot resist the conclusion that in the settlement made on the 12th day of December, 1838, between Smith and Parramore and the plaintiff in error, he specifically appropriated the amount of the check of $11,866 09 of that date to the payment of the notes which he then took up, and left the note now in suit unpaid.

From the view we have taken of this case we might, perhaps with propriety, spare ourselves the trouble of examining the several errors assigned; but as some of them seemed so strongly relied upon by the counsel for the plaintiff in error, we proceed briefly to consider such of them as appear to be deserving of special attention. The first is, that the Court erred in refusing to let exhibits B. and C. to the deposition of H. L. Rutgers, offered in evidence in the Court below, to be read in evidence. By reference to the bill of exceptions, 433
it appears that exhibit B. was a list, or statement, made out by the plaintiff in error and handed to the Union Bank, of the lands which he proposed to mortgage to that institution, to which was annexed the following remark by him: "Smith and Parramore have a mortgage on part of it, purchased from them and Willis, to secure the sum of $12,695 09, which I propose to pay off from the first money loaned on the stock. There is nothing, however, to shew that Smith & Parramore had any knowledge of this paper, and it appears to have no bearing upon the issue in this case. The same remark too, is applicable to exhibit (C.) If they were admissible we can see no injury that the party has sustained by their rejection; and where the party has sustained no injury from the rejection of admissible testimony, he cannot avail himself of the mistake to reverse the judgment. Smith & Ruecastle, 2 Halstead, 357. But we do not consider them admissible. To allow such papers to go to the jury would be to permit a party to make evidence for himself. We think therefore, that they were properly rejected.

The second error assigned is, that the Court erred in allowing the answer of Thomas Randall to the bill of complaint of the Union Bank, exhibited against said Randall and Smith & Parramore, to be read in evidence to the jury without the bill of complaint, to which the same was an answer.

In order to a correct determination of the question here presented, it becomes important to ascertain the purpose for which a bill should be before the Court, when the answer is offered in evidence. It is not as proof, because a bill cannot be used as evidence. Doe on the demise—Bowerman vs. Sybourn, 7 Durnf. and East, 2. The bill, in this case, most certainly could not; for it was the bill of a third party. The reason given in the books why an answer cannot be given in evidence without the bill, is, "because without the bill there does not appear to be a cause depending." 3 Bac. ab. Title Ev. 559, Archd. Pr. 219. An answer is proved by shewing the allegations in the Court, by shewing the bill which is the charge, and the answer which is, as it were, the defence of the bill. 1 Starkie Ev. 287, 288. An answer in Chancery is proved by the production of the bill and answer, or of examined copies of them; but no proof of the proper officer that the bill has been searched for in the office and cannot be found, the answer may be read without the bill. Roscoe 434
on Ev. 57—Gilb. Ev. 55. From these authorities it would appear that the object of having the bill before the Court is, to show a cause is depending and to identify the answer. There is much force in the suggestion made, arguendo, by counsel for the defendants in error upon this point, that "this reason, although it may have been good in England where the Chancery and Common Law Courts are separate and distinct, will not apply here, where they are blended in one and the same Court; and especially when applied to a case like the present, where the Chancery and Common Law suits were pending in the same Court, and the record of both suits were kept in the same office by the same clerk. It is a well established principle that Courts take judicial notice of their own records. 2 Bac. ab. Title Evidence, 643, 644. But in this case the objection is not that the answer was permitted to be read without that proof of identity. There is no complaint that the bill was not before the Court, but that the answer was permitted to be read to the jury, without the bill. The entry in the record of the Court below is, "And petitioners further offered to read in evidence to the jury, the answer of said defendant to the bill of complaint of the Union Bank of Florida, now pending in this Jefferson Circuit Court, to which evidence defendant, by his counsel, objects, unless the bill of complaint to which it is an answer, be also read to the jury." Here the pendency of the Chancery suit is distinctly shown, and we have in this entry record evidence that the bill was before the Court, and that the answer read to the jury was the answer to that bill. It is said in the books that some proof of identity of the parties is requisite. Roscoe on Ev. 57—Gilbert Ev. 55. Darbuall vs. Howard, R. and M., 169. No objection appears to have been taken for want of such proof in this case, and could not well be, for the answer contains intrinsic proof of identity. If the name and description of the defendant at law, agreed with the name and description of the party answering in equity, it is prima facie evidence of identity. Hennell vs. Lyon, 1 B. and A., 182. cited in Roscoe on Ev. 57. That is the case here; and, the answer relating to the same subject matter embraced in this suit, the proof of identity would seem to be complete. The pendency of the suit being shewn, the bill being before the Court, the identity of the answer and the party who made it being shown, there was no valid ob-

435 jection to allowing the answer to be read to the jury, without the bill's being also read to the jury. The bill, as a general rule, is not read; but an exception to the rule is, that where an answer is an answer to particular interrogatories in the bill, that also must be read. 3 Phil. Ev., 929, per Bailey, Justice, in Rowe vs. Brenton, 3 Mann and Rye, 271, 273, and Lord Tenterden, Chief Justice, ibid. So, if the answer is obscure, and needs any portion of the bill to be read to explain it, then it may be read—ibid. It does not appear that the Court below refused to permit the defendant to read the bill. If the answer was obscure, or was to particular interrogatories, so that without reading the bill it could not be understood, the proper course, we think, would have been (if he deemed it essential to his interest,) to have moved the reading of it, or such parts of it as were necessary to his case; and if the Court then refused to permit it to be read, he should have excepted, and brought up such part of the bill as he had offered to read, that this Court might be able to judge of its materiality. In the absence of interrogatories, (said Bailey, Justice, in Rowe vs. Brenton, 3 Mann. and Rye, 271,) we shall see from the document itself, whether it be, or be not fairly and distinctly intelligible; and as no part of this bill is brought up, this duty would seem now to devolve on us, in relation to the answer in question. No principle of law appears to have been violated in allowing this answer to be read to the jury, without the bill having been at the *same time* read to the jury.

We do not deem it necessary to remark upon the other errors assigned, all of which are founded either upon instructions given, or asked and refused to be given to the jury, further than to say that we have examined them all, and do not find that the Court below erred either in the one or the other.

But if it had, the verdict in this case is conformable to the law and the evidence, and should not be set aside, merely because the Court refused to give instructions which might have been properly given. Thomas et us, 6 Monroe's Rep. 61—Breckenridge vs. Anderson—such as the facts authorized, will the judgment be disturbed, merely because the opinion of the Court (in his instructions to the jury,) was given in an improper form, or was founded on a misconception of the law. Lee vs. Chambers, 3 J. J. Marshall, 508. So the refusal of

a Court to give instructions which would not benefit the party asking it, is not error—4 J. J. Marshall, 398—or an erroneous instruction upon an abstract question of law, which is not involved in the decision of the Court, is not a ground for reversing the judgment. Reed vs. McGrew, 5 Hamm., 375—Jordice vs. James, ibid, 88.

436 After a verdict in favor of either party, he has a right to demand of a Court of Equity that they look to the evidence for only one purpose, and with a single eye to ascertain whether it was competent in law to authorize the jury to find the facts which make out the right of the party on a part, or the whole of his case. If, in its judgment, the Appellate Court shall hold that the evidence was competent, then they must found their judgment on all such facts as were legally inferrable therefrom, in such manner and with the same legal results as if they had been found, and definitely set out in a special verdict. So, on the other hand, the finding of a jury on the whole evidence in a cause, must be taken as negativing all facts which the party, against whom their verdict is given, has attempted to infer from, or establish by the evidence. Hepburn vs. Dubois, 12 Peters, 376.

Testing this case by the principles here laid down, we think the law is for defendants in error, upon the facts found by the jury.

The judgment of the Court below is therefore affirmed with costs. *Per curiam.*

CHARLES STEWART & JOHN FONTAINE, MERCHANTS, TRADING, &C. 437
AS STEWART & FONTAINE, vs. ARCHIBALD T. BENNETT.

Two pleas being filed, the one alleging that the cause of action did not accrue within *four*, instead of *five* years, and the other being a plea in abatement, not sworn to and filed after a plea in bar, the Court below took no notice of, or action on them: held, that these pleas being nullities which, on motion of plaintiff, would have been set aside, the judgment will not be reversed, because of the omission of the Court below to dispose thereof.

As a general rule, until judgment is signed or there is final judgment, amendments to the pleadings may be allowed to the parties upon proper and equitable terms, and the declaration may be amended at any time, so long as the proceedings remain in paper.

The doctrine of amendments as it stands at common law, independent of the statutes of amendments and jeofail, seems based upon the discretion of the Court, and applications for amendments are in nature of appeals to the equitable side of the Court.

Suit was instituted against four defendants, A., B., C. and D., and service of the writ perfected on A., B. and C., who filed a joint plea of non assumpsit: afterwards all the defendants filed a joint plea in abatement, and of the statute of limitations: plaintiff then dismissed the suit as to C., and a trial was had and a verdict rendered against A., B. and D.; but, on motion, a new trial was granted. Plaintiff, thereupon, by leave of the Court, amended his writ and declaration by striking therefrom the names of C. and D. as defendants; and upon a trial a verdict was rendered against A. and B. Held, that the Court had a right, in its discretion, to allow plaintiff to amend his writ and declaration by striking out the names of C. and D. as defendants, and that the allowing of such amendment was not error, for which the Court will reverse the judgment.

ERROR from Franklin county.

His Honor, Judge Douglas, presided at the trial of this case in the Court below.

This was an action of trespass on the case, instituted in the late Superior Court of the Territory of Florida, for Franklin county, at its Spring Term, 1841, against Charles Stewart and John Fontaine, merchants, trading, &c., as Stewart & Fontaine, and Hampton Smith and Philo D. Woodruff. Service of the writ was perfected on Stewart and Fontaine, and Smith; and returned, "not found," as to Woodruff.

On 12th April, 1841, plaintiff filed his declaration against all the defendants named in the writ: it contained two counts against the de- 438
fendants, as owners of a steam-boat called the Reindeer, for the loss of certain goods shipped on the said boat, and alleged that they were common carriers. On the 6th December, 1841, Stewart, Fontaine and Smith, filed a joint plea of non assumpsit. On the 31st October, 1843, the defendants pleaded jointly in abatement, that John Victory and Daniel J. Britt were part owners and ought to have been joined; but the plea was not sworn to. On the same day the defendants filed a joint plea of statute of limitations, that the cause of action did not accrue within four years. To neither of these pleas was there any replication or issue.

On 13th December, 1843, on motion of plaintiff the suit was abated as to Woodruff, and a trial was had and a verdict rendered against the other defendants. At the same Term of the Court a new trial was granted.

On the 15th April, 1846, plaintiff, after having moved to enter a nolle prosequi as to Smith and withdrawn it, by leave of the Court amended his writ and declaration, by striking out the names of Smith and Woodruff as defendants, and on the same day a trial was had, and a verdict and judgment rendered against Stewart and Fontaine.

On the 25th April, 1836, there was a motion in arrest of judgment, which was refused.

Plaintiff in error assigned the following errors:

1st. Because the Court gave judgment against the plaintiff in error, upon the trial of the issue, on the plea of non assumpsit, when there were two other pleas on the said record, upon which there were no issues, and upon which there has been no trial or action of the Court below.

2d. Because the Court allowed the plaintiff to amend the declaration and writ immediately before the trial, and after plaintiffs in error and their co-defendant, Hampton Smith, had jointly pleaded, by striking out the names of Smith and Woodruff, as defendants, from the writ and declaration.

3d. Because the Court below did not grant plaintiffs in error motion in arrest of judgment.

4th. Because the Court refused said motion, and entered judgment for defendant in error.

5th. Because said record is, in other respects, erroneous.

Carmack & Baker, for plaintiffs in Error, after reciting the facts of the case, said:

There is a plea in abatement alleging a nonjoinder of two persons, John Victory and Daniel J. Birtt, as defendants. To this plea there has been neither demurrer or replication, nor motion to strike out.

The same may be said of the plea of the statute of limitation.

Both of these pleas are defences to the plaintiff's action, and until they are disposed of in the Court below, there can be no valid judgment.

Again: the judgment ought to have been arrested on the ground, that, after the defendants, Stewart and Fontaine, and Hampton Smith had filed their joint pleas; and after a trial of the suit, in which the plaintiff obtained a joint judgment, and a new trial was granted, the defendant amended his writ and declaration, by striking from the same the names of Smith and Woodruff.

It is important to note the time at which this amendment was made. It was immediately before the trial—on the same day of the trial—and, of course, long after the defendants had jointly pleaded.

This is an important circumstances, to distinguish this case from that in 3 Sumner, 379. There the striking out the name of one of the defendants from the writ and declaration, was allowed, and it was called an amendment, instead of calling it by its proper name, a mutilation, to avoid the difficulty of a joint plea, and the consequent necessity of a nolle prosequi.

Judge Story takes a distinction between the right of a party to enter a nolle prosequi against one of the defendants before, or at, or after a trial, and the right of the Court to allow him to amend, by striking out a party from the record. "The latter," he says, "is a matter of discretion in the Court, to be granted or refused, according to circumstances. The former (at least in some cases,) is a matter of right, if it *exists at all,* dependent upon principles of law, and yet *subject* to the discretion of the Court.

Now, if Judge Story does not intend to confine the exercise of the discretion of the Court in allowing the amendment, by striking out to a time before the defendants have pleaded jointly, it is difficult to know what he means when he says, "that the very object of the present motion is to get rid of a possible difficulty, if the defendants should join in their pleas of entering a nolle prosequi at the trial. Is this not equivalent to the assertion, that, after the defendants have jointly pleaded that the difficulty could not be reached by a motion to amend, by striking from the record the name of one of the defendants.

The nolle prosequi would be unavoidable after that time, or, as he stated, when he points out the distinction between the amendment and a nolle prosequi, the latter is the remedy, (when it may be done, "before or after a trial." This, he admits, is not a matter of discretion in the Court, but is a matter of right, if it exists at all, dependent upon principles of law. If I have stated the meaning of Judge Story corectly, it is immaterial, in this case, whether the plaintiff chooses to call the process by which he undertook, in the Court below, to get clear of Smith and Woodruff as defendants, by the name of an amendment by striking out, or by our old acquaintance the nolle prosequi. It he called it an amendment, he made it too late, and the Court had no power or discretion to allow it. If he chooses to adopt the old name, then we say that, in this case, a nolle prosequi could not be entered as to one or more of the defendants, and the suit be prosecuted against the rest

Without regard to the case now before the Court, this last assertion is certainly true as a general proposition; the exceptions to it are enumerated by Sergeant Williams, in his note Salmon vs. Smith; 1st Saund. Reps., 207—Note L. D. In the case of Miner vs. The Mechanics Bank of Alexander, 1st Peters, 46. The case now before the Court does not fall within any of the exceptions. It is admitted to be a question of law by Judge Story, and if the general rule decides it, for the appellants.

W. G. M. Davis, for Defendant.

HAWKINS, J:.

The defendant in error, Bennett, brought his suit, trespass on the case on promises, against the plaintiffs in error, Hampton Smith and Philo. D. Woodruff, in the Court below. The writ was served upon Stewart & Fontaine, and Smith, and returned, *not found.* as to Woodruff. The declaration was filed against the above parties, and contained two counts against them, as owners of the steamboat Reindeer, for the loss of certain goods, alleging that they were *common carriers.*

On the 6th day of December, 1841, Stewart & Fontaine, and Smith, filed a joint plea of non assumpsit. Nearly two years after, the defendants pleaded, in abatement, the nonjoinder of two other persons, and at the same time pleaded the statute of limitations. To these pleas there are no replications. The plea in abatement was not sworn to; and the plea of the statute of limitations says, that the cause of actions, &c., in the declaration contained, did not accrue in *four* years, &c. At the same term a motion was made, that the suit abate as to Woodruff. A trial was had, and a verdict and judgment against the defendants. A motion for a new trial was made, and granted by the Court.

At the ensuing Term leave was granted by the Court to Plaintiff, to amend his writ and declaration, which was done by striking out the names of Hampton S. Smith and Philo D. Woodruff. On the same day a trial was had, and a verdict and judgment against Stewart & Fontaine, and, at the same Term, a motion in arrest of judgment.

The first error assigned is, "The Court gave judgment against the appellant upon the trial of the issue, on the plea of non-assumpsit, when there are two pleas in said record, upon which there are no issues, and upon which there has been no trial or action of the Court below." One of these pleas is, in abatement; the other, a plea of the statute of limitations.

The plea in abatement was not verified by affidavit, as is requisite at common law and by the statute of the State; and it could have been treated by the plaintiff as a nullity, or he might have moved to set it aside. Moreover, it was not filed in the preliminary state of the proceedings, but was filed after a plea in bar of action; the latter plea waiving all matter in abatement. The plea of the statute of limitations also put in, is bad on the face of it; for it does not come within the statute of limitations of the State, which declares that all actions of assumpsit, case, &c., shall be commenced and sued within *five* years, next after the cause of action or suit accrued; and the plea in this case alleges, that the cause of action did not acrue within *four* years. They are bad on their face—and will this Court reverse a judgment of the Court below on this account, when, even if the case were remanded thither, neither of them would avail the defendants, or place them in any better situation? Can the defendants suffer any detriment or injury—are any of their legal rights impaired—or are they deprived of any good defence, by this Court's disregard of these pleas? We think not. It would have been more regular to be sure, to have disposed of them; but they being, virtually, nullities, this Court cannot take action upon them, without deeming they would be doing injustice; for it must, upon an examination of the whole record; "decide according to the legal right, as it may upon the whole appear."

The second error assigned is, because the Court allowed the plaintiff to amend the declaration and writ, immediately before the trial, and after the appellants and their co-defendant, Hampton S. Smith, had jointly pleaded, by striking out the names of said Smith and Philo D. Woodruff, as defendants, from the writ and declaration.

As a general rule it may be remarked, that until judgment is signed, or there is *final judgment,* amendments to the pleadings may be allowed to the parties upon proper and equitable terms, and the declaration may be amended at any time, so long as the proceedings remain in paper. Stephens on Pl. 97. 1 Wilson, 7—149.

The doctrine of amendments, as it stands, at common law, independent of the statutes of amendments and jeofail, seems based upon the discretion of the Court, and applications for amendments are in the nature of appeals to the equitable side of the Court. The doctrine, even in England where great strictness prevails than in this country, has been carried to a great extent, and we will take a cursory glance at some of the decisions, as found in the reports of that country.

In the case of *Rex vs. The Corporation of Grampend,*—7 Term R.. 699,—a question arose as to the propriety of amending the return to a mandamus, after a mandamus was filed. Lord Kenyon remarked: "I wish that could be attained, that Lord Hardwick in the case before him lamented could not be done, namely, 'that these amendments were reducible to certain rules'; but there being no such rules, each case must be left to the sound discretion of the Court. And the best principle seems to be, that on which Lord Hardwick relied in the same case, that an amendment shall or shall not be allowed to be made, as it will best tend to the furtherance of justice;" and further, "that these amendments are not made under the statute of jeofails, but under the general authority of the Court.

In *Tomlinson and another vs. Blacksmith,* 7 Term Reports, 128,

443 (132), leave was granted upon the application of the plaintiff, to amend his declaration *after verdict*, by increasing the damages laid, according to the truth of the case as found by the jury; the former verdict at the same time being set aside, and a new trial granted to enable the defendant to make his defence to the demand so enlarged. So. we find in the case of *Sayer vs. Pocock*, 1 Cowper, 407, a replication was amended *after* verdict, by inserting the simileter, instead of the writ and declaration, and to proceed against the husband alone. of, &c.; Lord Mansfield remarking, that he did not stop to enquire whether the amendment was within the statutes of jeofails, or not.

The case of *Billing vs. Flight*, 2 Marshal R., 6 Taunton, 419, is an instance where *assumpsit* was changed to *debt*, after six terms of the commencement of the action. In *Mace qui tam vs. Lovett*, 5 Burr, 2833, the declaration was amended in an action for usury after record made up, carried down to trial and withdrawn by plaintiff. Justice Ashton says, "The Court here have gone a great way in allowing amendments towards the attainment of justice. They have amended in cases where the limited time of bringing the action would run against the plaintiff, if he were to be put to bring a new one. The case of *Millish vs. Robinson*, 9 Bing., 125—2 Term Rep., 738, can also be cited as affirming the doctrine of amendments.

The American decisions go still further than those of England. Judge McLean, in *U. S. vs. Buford*, 3 Peter's U. S. Reports, says: "This Court has repeatedly decided that the exercise of a discretion of the Court below, in refusing or granting amendments of pleading, or motions for new trials, affords no ground for writ of error." And this power of the Courts is sustained, and allowed to be carried to great extent in the following cases: *Chirac vs. Reinicker*, 11 Wheat. 280—5 Cranch, 15—*Green vs. Robinson*, 3 Howard's Missip. R. 117—10 Cow., 460—*Celdwell's Admr's vs. McKeo*, 8 Missouri R., 334—*Holloway vs. Lowe*, 1 Alabama R. N. S., 246, where additional counts were added after reversal of judgment in Court above, and *Palmer vs. Ledue*, page 743, of the same book, where leave was granted to plaintiffs to strike out one of the defendants—1 Cowen, 133, citing 18 John. Reports, 510—3 Cowen, 42—*McClure vs. Burton, et al.* 1 Carolina Law Repository, 473, case of caveat against Richard and James Bullock—there was a variance between writ and declaration, viz.: that the defendants, Richard and James Bulloch, were named in the writ, but were not parties to the deed; leave was
444 granted plaintiffs to strike out their names by virtue of the statute of North Carolina giving Courts the power of amendments. The Supreme Court of New Jersey have also gone far in sustaining the doctrine of amendments. *Van Dyke vs. Adm'rs of Catharine Van Dyke*, 4 Harrison Rep., 1—ib. 5.

The case of *Colcord and another vs. Swann*, 7 Mass., 292, would seem to be analagous to the case at bar. It was an action for covenant broken, and the Court ruling that it could not be maintained against the wife, a motion was made for leave to strike her name out of the writ and declaration, and to proceed against the husband alone. It was contended, that this could not be done except in actions for *torts*, but the Court granted the motion to strike out.

The case of *Parsons vs. Plaisted and others*, 13 Mass., 189, was similar to that of Colcord vs. Swann, and the same order made striking out the writ and declaration the name of one of the defendants, who was a *feme covert*. Judge Story holds the same doctrine in Tobin vs. Clafley and others, 3 Sumner's R., 379. Here the writ and declaration were amended by striking out the name of David Green, one of the defendants. Judge Story remarks in his opinion, that though the amendment, in a technical sense, might go to the foundation of the suit, if all the defendants are not proved to have joined in the contract, yet it is plain that it does not touch the merits: and if all the defendants are not proved at the trial to have made the contract, a cerdict must be found for the defendants. The object of the amendment was to get rid of this technical objection—that it is an application in furtherance of justice, and to suppress expensive litigation. He cites the cases from Massachusetts with approbation, and observes as to that of *Parsons vs. Plaisted*, that though the defendant in that suit was a *feme covert*, it made no difference in *principle*, since the only ground for striking out her name was, that she was not legally bound by the contract, which is equally true in regard to every other persons joined as a defendant in any suit, who is not a party to the contract sued on.

In Chitty's Pl. 15, note H., we find that even in cases where there has been a misjoinder of *plaintiffs*, "the doctrine of amendments has been, in some instances, usefully applied to remedy or mitigate the evil, as orders have been made to strike out the name of the plaintiffs, in a late stage of the proceedings, where otherwise the statute of limitations would bar a fresh action; and in Fox vs. Clifton and 445
others, C. P., Nov., 1829, an order was made just before the trial, that some of the defendants' names be struck out." See 3 Chitty's Gen'l Prac., 173—174.

The note from Chitty is not cited as the present law of the English Coutrs, but only to show their strong leaning in favor of their power to amend. It would be carrying the doctrine pretty far to allow the striking out the names of plaintiffs, for it is to be presumed that any plaintiff is aware of the names of those who should be co-plaintiffs; but this presumption cannot apply to the cases of defendants, and especially those who may be sued as common carriers. Take, for instance, the case at bar, where the defendants are sued as owners of a steam-boat. The slightest reflection must shew the extreme difficulty of ascertaining the true parties to be rendered liable. The names of all the owners of these boats are seldom known to the public, and if the old rule of misjoinder or nonjoinder is to be enforced, without the application of the salutary law of amendment, great injustice would arise. Even the register of the vessel, granted upon oath in accordance with the revenue regulations of the country, is not *prima facie* evidence of ownership. The Parliament of Great Britain seeing, no doubt, the extreme injustice done by those who sought redress from this class of defendants, passed a statute (1 Wm.4,) declaring, that *one or more* mail contractors, &c., *or common carriers*, may be sued, and no action shall abate for the nonjoinder. An appeal to the Legislature of our State as a remedy for a similar evil with us, would be superfluous, as long as the 17th rule of our Courts declaring that "amendments affecting the merits of a cause may be ordered at the discretion of the Court, on such terms as they may think proper to impose," is in force, and in which the power of granting amendments is so full and unqualified. It is not intended by these remarks to inculcate the idea, that a Judge at *nisi prius*, possesses that absolute and arbitrary power to overleap all or any of the old established rules of pleading, at a wild or capricious indiscretion, or set at naught the old land-marks of the law. There can be no doubt but that these technical rules of pleading were based upon principle, policy and reason, and lightly should the hand of innovation be placed upon them. But while responding to the sentiment of Lord Kenyon," the forms of justice always best used, when subservient to the cause of justice," we remark, that the administration of law in our 446
country cannot but partake somewhat of the free nature of our institutions, and imbued with this spirit a liberal judicial policy will guide our Courts in the dispensation of justice.

In fine, the doctrine may be summed up thus: a power to a certain extent inherent in our Courts, and rendered more ample by statutory regulations to allow amendments in pleading for the furtherance of substantial justice, to be exercised with a liberal and enlarged discretion, but with caution and due deliberation, and upon such terms as they may see fit to prescribe.

With these views, we think the Court below, in granting the amendments, acted in accordance with the discretion vested in it, and it is not for this Court to revise this discretion thus exercised.

Much stress is laid upon the fact that the trial took place on the same day of amendment. The record shews no motion for a continuance, and if one had been made, no doubt the Court would have granted it as one of the terms upon which plaintiff was permitted to amend his writ and declaration.

The question of entering a *nolle prosequi* cannot be raised in this case, where it is one of amendment purely—they are distinct and separate in their nature. Judge Story says: "The latter (amendment,) is a matter of discretion in the Court, to be granted or refused according to circumstances. The former (at least in some cases,) is a matter of right, if it exists at all; depends upon principles of law, and not subject to the discretion of the Court. 3 *Sumner R.*, 381. After a new trial, the pleadings of both parties can be amended by leave of the Court. 2 *Hayward's Reports*, 162—7 *T. R.*, 128—the judgment is not final, and till that occurs, the record is in *fieri*, and can be amended.

The judgment of the Court below must be affirmed with costs.

447 JOHN BRETT, JR., vs. SUSAN A. MING, ADM'X. OF FREDERICK L. MING.

Where it appeared by the record of a judgment rendered by the Court of Appeals, that the Administratrix of a deceased Appellee was, by her Counsel, before the Court, when its judgment was pronounced affirming the judgment of the Court below, but that from some cause, not stated in the proceedings *her name* was not inserted in the judgment, an execution issued on such judgment will be set aside.

A Court of Errors may amend an error apparent of record, if there is any thing to amend by.

When a suit has abated by the death of a party, it cannot be revived until some person has been named as the representative of the party deceased.

After the death of the Appellee, the judgment of the Court below was affirmed, without naming the Administratrix of the deceased Appelee, when, from the nature of the entry, in the judgment of the Court of Appeals, it was manifest that the Administratrix appeared there by her Counsel, and it was highly probable that her name, as Administratrix, must have been mentioned to the Court, else the Court would not have heard the cause; so, that it was almost a moral certainty, that the leaving of her name out of the record was a clerical error—Held, that upon the filing of the letters of administration, this Court will make the Administratrix a party, and so amend the judgment that she may have execution thereof in her own name; with a saving, however, to all persons of the rights which they have acquired, since the rendition of the judgment.

A final judgment of the Court of Appeals of the late Territory of Florida, is conclusive of the question, and stands on the same footing in regard to this matter, as if the judgment had been rendered by this Court.

A promissorp note, reading—"On demand, the first of January next, I promise," &c., is payable presently, and suit may be brought thereon immediately, without demand; the words, "first of January next," applying to the interest, and not the principal. The interest on such a note, begins to run from the first of January, and not from the time of demand.

APPEAL from Jackson County.

The facts are contained in the opinion of the Court.

Randal & Hagner, for Appellant.

C. Yonge, for Appellee.

DOUGLAS, C. J.:

This is an action of assumpsit, originally instituted by Frederick L. Ming, in the Superior Court of Jackson County, to recover the
448 amount of a certain promissory note, given by the appellant to the said Frederick L. Ming, which note is as follows:

$615. *On demand, the first day of January next, I promise to pay Frederick L. Ming, Agent, &c., six hundred and fifteen dollars, value received. Oct. 19th,* 1839.

(SIGNED,) *JOHN BRETT, Jr.*

Such proceedings were had in said suit, that, on the 18th day of October, A. D., 1843, judgment was rendered against the defendant for the sum of eight hundred and one dollars and fifty cents, in favor of the plaintiff, for his damages, with legal interest on the same, from that date until paid, together with his costs, &c. It appears from a bill of exceptions taken and filed in the cause which makes a part of the record in this case, that the note above described was the only testimony that was offered in the cause by the plaintiff, and that the defendant contended, that he was entitled to interest only after demand; and as no proof of any demand was made, interest should only be given after the ocmmencement of the suit; but the Court directed the Clerk to calculate interest from the 4th of January after its date, which being done, a judgment accordingly entered, and an appeal was taken by the defendant, (by agreement of the plaintiff's Counsel,) and the cause carried up to the Court of Appeals of the late Territory of Florida. During its pendency in that Court, the said Frederick L. Ming departed this life, and on the 13th day of December, A. D., 1843, letters of administration were duly granted on the goods and chattels which were of the said Frederick I. Ming, deceased, at the time of his death, to Susan A. Ming; and afterwards, to wit, on the 31st day of January, 1845, said cause came on to be heard in said Court of Appeals, when (as appears by the record of said Court) Judgment was entered as follows, viz: "Upon an appeal to a judgment of the Superior Court for the Apalachicola District for Jackson County, rendered on 18th day of October, 1843, whereby it was considered that the appellee recover against the appellant the sum of $801 50 with costs, &c. The death of the appellee having been suggested at a former term of this Court, and a scire facias awarded against the legal representatives, this day came the said representative of the appellee, and the said appellant by their attorneys, and they having been fully heard, and the transcript of the record of the judgment aforesaid having been seen and inspected by the Court,

and the Court being divided in opinion, the Hon. D. Jordan not hav- 449
ing heard the argument of this cause on a former day, it is therefore considered by the Court that the said judgment be affirmed, and that the appellee recover against the appellant his costs by him about his defence in this behalf expended, which is ordered to be certified to the Court below." At the last term of this Court, to wit, on the 21st day of January, 1846, the following proceedings took place in this cause, as appears by the record, and the following entry was made: "This day came the attorney for the appellee and moved the Court to docket this cause, and the same not being objected to by the attorney of the appellant, the same is done accordingly."

"And thereupon afterwards on the same day came Susan A. Ming, Administratrix of Frederick L. Ming, deceased, whose death was heretofore suggested at January term of the Court of Appeals of the Territory of Florida, in the year 1844, and scire facias awarded, and presented letters of administration in due form of law certified, and by her attorney moved the Court that she be made a party appellee to this cause in place of the said Frederick L. Ming, deceased, and the same is done accordingly. And now on the same day comes John Brett, Junior, appellant, by Thomas H. Hagner, his attorney, and shews to the Court here that an execution hath issued in this case from Jackson Circuit Court in the name of Susan A. Ming, Administratrix of Frederick L. Ming, upon the judgment entered in this case before the said Susan A. Ming, Administratrix as aforesaid, was made a party to the record, and that such execution hath been levied, and that the same is altogether irregular and illegal; and the said Susan A. Ming, Administratrix of the said Frederick L. Ming, not objecting hereto, and for good cause shewn—It is ordered that the said execution be set aside and held for nought, and it is further ordered that a copy of this order and judgment be certified to the Clerk of the Circuit Court of Jackson County, and a copy of said certificate by the said Clerk be certified to the Sheriff of Jackson County. And on motion of Susan A. Ming, by her attorney, it is ordered that this cause be continued till the next term of this Court, upon a motion for a hearing as to the regularity and validity of the judgment of the Court of Appeals, rendered in said case at the January Term, 1845, of said Court." And now, at the present term of this Court, the said Susan A. Ming, Administratrix, &c., as aforesaid, by C. C. Yonge, Esq., her attorney, comes and moves the Court that the said 450
judgment of the Court of Appeals be amended by introducing the name of the representative, Susan A. Ming.

To this the counsel for the appellant objects, that the motion made at the last term has been waived by the counsel for the appellee, and all benefit of it voluntarily surrendered by submitting a written argument on the whole case, on the 26th of January last, on the errors assigned. But if the motion can be sustained, the appellant by his counsel insists that there was no valid judgment rendered by the Court of Appeals. That the appellee has admitted it on the record of this Court. *First,* allowing the old cause to be docketed here after notice without objection. *Second,* presenting letters of administration here in this Court on the 21st of January, 1846, and moving to be made a party here in place of the decedent. *Third,* admitting that an execution had issued on the judgment of the Court of Appeals entered in this case before the appellee, Susan A. Ming, Admx., was made a party to the record. *Fourth,* admitting that in consequence of such failure to make the appellee a party before judgment entered, the execution was irregular and void, and that it is too late now after such admission of record, for the appellee to take them all back and attribute her own default to a clerical misprison. But may it not as well be said that the fact that Susan A. Ming, Admx., as aforesaid, was made a party in the case at the last term, without objection, placed her *"rectus in curia?"* We do not consider, however, that any admissions or waiver of objections was made by counsel on either side, that can prejudice their clients. The Clerk, in docketing the case ,followed the old docket instead of the judgment of the Court of Appeals. It had been more proper, perhaps, to have docketed it, "the representative of Frederick L. Ming." Then all that would have been wanting was precisely what the counsel asked, to have the name of Susan A. Ming, Admx., used in the further proceedings as such representative. Both parties were before the Court at the last term, and both moving in the case. It appears by the record of the judgment rendered by the Court of Appeals, that the legal representative of the appellee, by her counsel, was before the Court when the judgment was pronounced, although from some cause not stated in the proceedings, her name was *not* inserted in the judgment. We are not prepared therefore to say that the judgment is for that cause

a nullity, although we are satisfied that no execution ought to have issued up it *until she was made a party by name.* It was therefore properly set aside. From the letters of administration now on file, it appears that Susan A. Ming was Administratrix long before and at the time when the judgment was rendered, and that she yet continues to be such administratrix, and the question now presented is, whether she is entitled to have the benefit of her motion either *literally* or substantially, by an order that she have execution of said judgment in her name as such Administratrix. We think that she is thus entitled, but it must be with a saving to all persons of the rights which they have *"bona fide"* acquired since the rendition of the judgment . In the case of Zimmerman vs. Brigons, 5 Watts, 186, it was held that the entry of a defendant's name in a judgment is not amendable so as to affect a subsequent purchaser or incumbrancer: and in the case of the Bank of Newburg vs. Seymour, 14 John., 219, a judgment record was allowed to be amended by adding the name of *another* defendant, saving to all persons the rights they had bona fide acquired since the dcketing of the judgment. The case of John C. Chamberlain vs. Ebenezer Crane, 4 New Hampshire Reports, 115, was a writ of entry in which the demandant originally counted upon his own seizen in fee, but afterwards having obtained leave to amend, counted upon his own seizen as of freehold. Judgment was rendered in favor of the demandant at May Term, 1817. (See 1 New Hampshire Reps., 64). But judgment was by mistake entered upon the original instead of the amended count. Hubbard moved to amend by striking out the original count and inserting in its stead the amended count which was on file among the papers of the case. Parker, who appeared for a person to whom Chamberlain had conveyed the land since the judgment, cited 14 John., 219; Bank of Newburgh vs. Seymour, and 3 Cowen's Rep., 54, note Hart vs. Reynolds. *By the Court*: We entertain no doubt judgment was entered upon the original count in this case by mistake, instead of the amended count, and thus justice requires that the record should be amended; and we are of opinion that the record may be legally amended. And 19 John., 244, Mechanic's Bank vs. Minthorne; 18 John., 502, Lansing vs. Lansing; 17 do., 86, Lee vs. Custis; 14 ditto, 219, Bank of Newburgh vs. Seymour; 3 Durn. & East., 349, Rees vs. Morgan; 2 Tidds. Pr., 863; 1 Cowen's Rep., 9; 5 Burrow, 2730, Short vs. Coffin; 4 Maule & Selwyn, 94, Usher vs. Dansey; 1 Taunt., 221, Mann vs. Calow; 4 Taunt., 875, Halliday vs. Fitzpatrick; 1 Wilson, 61; 2 Strange, 1209; 4 Burr., 1989; 10 Mass., 251, and 1 Pick., 353, are cited; and the leave to amend was granted with a saving of all rights acquired by third persons under the judgment. This was at May Term, 1827; after a lapse of *ten* years, and without affidavit.

A Court of Error may amend an error apparent on the record if there is anything to amend by. Sears vs. United States, 1 Gall., 257. Smith vs. the United States, Ibid., 261; and see Boyle vs. Connelly, 2 Bibb, 7, 88. 1 Monroe, 18. There is nothing in the nature of an appellate jurisdiction, according to the common law, which forbids the granting of amendments. 1 Gall., 22. The permitting of amendments is matter of discretion. Mandeville and others vs. Wilson, 5 Cranch., 15. And there is nothing in the case of Turbin, Admr. of James, vs. Thomas' Representatives, 2 Hen. & Mumf., 139, cited by the counsel for the appellant (as we understand it) which militates against the exercise of such discretion in the case before us. These are the circumstances of that case. "The cause having abated by the death of one of the parties, was revived by consent against the representatives of the party deceased *without naming* them. No party having been made defendant by *name* in consequence of that order, I was of opinion, said Judge Tucker, that we ought not to proceed to a hearing of the cause, until the parties were before the Court by *name.* Judge Roan cited Southal vs. McKeand, 2 Wash., 339, which appeared to me to favor my idea. Judge Flemming concurred in opinion with me. Another cause was called; but Mr. Hay afterwards suggested that there was a Mr. Thomas, who was either Executor or Administrator, and the cause was *opened.* But the Court seemed to agree that in future no cause should be considered as revived until some person should be named as a party representing the party deceased." In the case now under consideration a judgment had been rendered which we had no power to disturb, but we have power over the execution that issued on that judgment, and therefore set it aside; and should not have permitted another to issue until the proper representative was made a party by *name.* And we fully agree with the Court of Appeals of Virginia, that no cause should be considered as revived until some person

should be named as a party, representing the party deceased. Although the record does not show the fact, yet from the nature of the entry in the judgment of the Court of Appeals, showing that the representative appeared there by her attorney, and the fact that the letters of administration of Mrs. Ming bear date long anterior to that time, it seems highly probable, indeed almost a moral certainty, that her name as such representative must have been mntioned to the Court, and that the leaving it out of the record was a mere clerical error. Indeed, it cannot properly be presumed that the Court of Appeals would have heard the cause unless it had been thus mentioned. At all events, we have now those letters of administration of Mrs. Ming on file to amend by if necessary; and they, together with the order of the last term making her a party, clears the case of all difficulty on that point.

The doctrine of amendments was so fully discussed in the case of Stewart and Fontaine against A. T. Bennett, decided on a former day of the present term, that we do not consider it necessary to enlarge upon it on the present occasion.

We proceed, therefore, to the next and only remaining ground of error assigned, which is that the note on which the suit is founded is payable "on demand on the first day of January next," &c., and that withotu proof of any other demand than the suit brought, the Court allowed interest to be computed from the first day of January, &c. But the decisive answer to this is, that the judgment of the Court of Appeals is conclusive upon that question; for notwithstanding this Court held in the case of Stewart vs. Preston, at the last term, that "the Act of the Legislature of the State organizing the Supreme Court is imperative that all cases now pending in said Court of Appeals shall be transferred to said Supreme Court, and tried and decided therein and theerby, except cases cognizable by the Federal Courts," and although we are disposed to give the most liberal construction to that Act of the Legislature, and extend its meaning so as to make it reach all the cases that were left in that Court at its dissolution, in which any action of this Court may be necessary to enable the parties to such cases to obtain the full benefit of them if possible, to the same extent that they could have done if the existence of that Court had been continued until they had been perfected and the judgment satisfied; or as if such judgment had been rendered in this Court,—yet we have never claimed the right, or supposed that we possessed the power to review a final judgment of that Court. Indeed, this Court has already decided, at the present term, that a petition for re-hearing of one of its own judgments must be presented at the same term at which the judgment was rendered, and within fifteen days after its rendition. The cases from the late Court of Appeals are transferred to this Court as its legitimate successor; and when here, stand upon the same footing in regard to this matter as if the judgment had been rendered by this Court. The only mode by which we could reach the point, would be to treat the judgment of the Court of Appeals as a nullity. This, as before stated, we do not feel authorized to do. But if it were directly before up for our decision therein, we are by no means satisfied that it would be our duty to render a different judgment. The objection is that this note was payable on demand on the first day of January next, &c., and that without proof of any other demand than the suit brought interest was calculated from that day. The general rule seems to be that a note on demand becomes due, and an action lies against the maker immediately, and *without any demand. Field vs. Nickerson,* 13 Mass., 131, 137. Conner vs. Harrison, 2 McCord, 246. Horton vs. Bishop, 3 Wendell, 13. Thompson vs. Ketchum, 8 John., 189. Herrick vs. Bennett, Ibid, 374. A note payable when demanded, is the same as payable on demand, and the statute of limitations begins to *run from its date.* Kingsbury vs. Butler, 4 Vermont, 458. Where no time of payment is specified in a promissory note, it has been held that its legal effect is that it is a note payable on demand, and must so declared on. Bacon vs. Page, 1 Conn., 404. Mason vs. Potter, 1 Miss., 279; and in Newman vs. Kettle, 13 Pickering, 419, the Court held that where a note is payable "on demand with interest after four months," payment may be demanded immediately, and intrinsic evidence is inadmissible to shew that the demand was not made till after four months. And in Rice vs. West, 2 Fairfield, 323, the Court also held that a note payable "on demand with interest after six months," is due presently, the six months applying to the interest and not to the principal. With these authorities before us, if we are called upon to decide this question, we should be very much inclined to hold that this note, being payable on demand, was due presently; that suit might have been brought

upon it immediately, and *without any demand;* and that the words, "the first day of January next," applied to the interest and not to the principal. We have thought proper to throw out these hints for the purpose of showing the appellant that he has not perhaps lost so much by the view that we have taken of this case, as he might have otherwise supposed.

The judgment of the late Court of Appeals rendered in this case affirming the judgment of the Court below must stand, and Susan A. Ming, Administratrix, &c., of the said Frederick L. Ming, deceased, as aforesaid, have execution of the aforesaid judgment of the Court below, but with a saving of the rights of all third persons, acquired, "bona fide," since the 31st day of January, A. D., 1845, the day of the date of said judgment of the Court of Appeals. All of which to be certified to the Court below accordingly.

Per Curiam.

BENJAMIN A. PUTNAM, EXECUTOR OF PETER MITCHELL, *vs.* JOHN H. LEWIS, ET UX.

Under the laws of this State, no appeal will lie from an interlocutory decree.

A decree for the partition of land, passed by consent, ascertaining the interest of the respective parties, and appointing commissioners to make partition of the land according to their respective rights and interest as therein ascertained by the Court and established by the decree, who were ordered, after having made such partition, to report the same in writing to the Court without delay, is not a final but an interlocutory decree, from which no appeal will lie.

A supplemental Bill is in the nature of a Bill of Review, or possibly an original Bill, and not a Bill of Review, is the appropriate remedy by which to have such interlocutory decree reviewed or reversed.

APPEAL from St. Johns County.

This was an appeal from a decree rendered by his Honor Judge Hawkins, at Spring Term, 1846, of St. Johns Circuit Court.

A petition was filed in the Court below for leave to file a Bill of
456 Review for the purchase of having a certain decree for the partition of the "Arredondo Grant," rendered at June Term, 1845, reviewed, reversed and set aside so far as defendants, John H. Lewis and wife who were parties and claimants under the said decree, were concerned.

The petition alleged that petitioner had been lulled into security by the letters and declarations of John H. Lewis, that he had no design to avail the claim of Peter Mitchel, his testator, until about the time the cause came on for hearing, when it was too late to make any effectual resistance: That being taken by surprise when the whole claim of Peter Mitchell in the said grant was most unjustly and unexpectedly assailed by said Lewis and wife, he was forced to submit to a compromise with the said Lewis and wife; and that he, under these circumstances, had consented to the said decree: That since the rendition of the said decree, newly discovered evidenc had come to his knowledge, which clearly showed the injustice of the claim then set up by Lewis and wife, by which they had acquired under the said decree a much larger share or portion of said grant than they were legally and equitably entitled to, and which should in equity and justice have been decreed to petitioner, whose claim had been proportionately diminished thereby

The petition was sworn to, and recited at length the facts and circumstances on which petitioner relied, and was accompanied by numerous exhibits.

The decree for partition sought to be reviewed and reversed, so far as the defendants Lewis and wife were interested therein, was made at June Term, 1845, with the consent of all parties. It ascertained and settled the rights and interest of each of the parties in the said grant, and appointed commissioners to make partition thereof in accordance with the decree, who after having done so, were directed to "report the same in writing to this Court without delay."

On motion to dismiss the petition, it was ordered, adjudged and decreed, "that the said motion to dismiss the said petition be granted, and that the prayer in the said petition contained for leave to file said Bill of Review be, and the same is hereby, denied and refused, with costs to said Lewis and wife."

From this order of the Court, petitioner appealed.

The following errors were assigned:

1. The petitioner having set forth as the ground for a Bill of Re- 457
view that new matter had come to the knowledge of the petitioner since the rendition and enrollment of the decree, of the existence of which the petition was ignorant at the time of the rendering and enrolling said decree, and which he could not have used or by any reasonable diligence have obtained at the hearing of said cause; and which said new matter is important and material to the issue, and would have materially altered the decree if it could have been adduced on the hearing of said cause, and that said new matter was in writing; the motion to dismiss should have been overruled and the petition granted.

2. That the matters alleged in said petition having been verified by affidavit, and not denied by answer under oath, the petition could not be dismissed on motion.

3. That the petition showed by his petition, that he was taken by surprise, and from necessity made the consent on which said decree was founded, being ignorant of the facts since discovered essential to the proper exercise of his discretion, and which, if true, entitle him to a review of said decree.

4. That the said Court refused to grant said petition principally on the ground that said decree sought to be reviewed was entered by consent; whereas, the petition sworn to shows that if such was the case, yet that the petitioner was deceived and imposed upon by the said John H. Lewis; and from the necessity in which the petitioner was placed, he submitted to the compromise and arrangement on which said decree was founded, being ignorant of the new and material evidence now presented, which at the time of the consent was not within his knowledge, but which has come to his knowledge since the hearing of the cause.

Thomas Randall. for appellant.

After stating the facts of the case, as disclosed by the record, argued the erors assigned, insisting—

That the materiality of the new evidence disclosed would be tested by the inquiry, "Whether it were possible that if the appellant had been in possession, at the time of decree rendered, of the evidence exhibited with this petition, he could ever have consented to the decree in question?" And next, "Whether, if the claim of the appellee had been advanced in behalf of Mrs. Lewis, in the 458
face of the evidence newly discovered now adduced, it could for one moment have been countenanced by a Court of Equity?"

After commenting upon the evidence in the record, he cited Lord Bacon's Ordinance in Chancery, (Cooper's Pleadings, 89), as the ground of the rule requiring application, "for *the special license* of the Court" to file a bill of review, and Lord Hardwicke's re-assertion of the same ordinance with an additional requisition by order of Oct., 1741. 2 Atkyn's Rep., 139. And he alleged—

1st. That the petition shows most clearly that the petitioner in consenting to the decree, "was taken by surprise, and from necessity and in ignorance of facts since discovered essential to the proper exercise of his discretion," was betrayed into such consent.

2d. The petition was deceived and imposed upon by the defendant, John H. Lewis, and that petitioner submitted to the compromise and arrangement under which the decree was founded, in ignorance of material facts, while there has been a studied suppression and concealment on the other side.

If the Court is satisfied on these points, then our case comes within the rule, and as a case of extreme hardship on the part of the appellant, and of unmerited success on the part of his adversary, the present application commends itself to the favorable consideration of the Court.

The Court (he said) desired argument upon this point, "Whether the judgment or decree rendered in the Court below in dismissing the petition for leave to file a bill of review, be such a *final decree* as justified the appeal? *Final* it certainly is, in its effect—a final determination of our right to relief in the more sought; and he submitted whether or not, as this *"license of the Court"* was an essential to the obtention of relief, the withholding the means be not equivalent to denying the end? If the door be shut against our entrance into the sanctuary of justice, is it not the same in result as if, having gained admission, our prayer had been denied? Before the Court below could thus summarily dismiss our petition, it must have decided in advance, that the same showing made on a bill of review, would not entitle the applicant to the relief sought. To him, therefore, the present decree dismissing his petition, is as final and as fatal as would be a decree dismissing a bill of review. Nay, this further hardship

459 results, he is not permitted even to appeal to the conscience of the other party, who thus escapes the ordeal provided for the exposure of fraud and detection of imposition.

But it will be argued on the other side, that the question refers back to the original decree of partition sought to be reviewed, and that that decree is not a final decree. Whether we confine our attention to the order of dismissal of our petition, or look back to the decree of 1845, in either respect it becomes important to regard our statute regulating appeals. (Duval, p. 109,) We contend that the case of the appellant comes clearly within the letter as well as the spirit of the statute,—"if a party shall feel aggrieved by a final judgment, sentence or decree," &c. And although ther is nothing which would seem to us to require the Court to go beyond the immediate judgment and decree appealed from, which must be conceded to be final, yet we contend on reason and authority that a like final character is impressed on the decree of partition itself. Pp. 24 to 35 of the record.

In this bill of partition, agreeably the rules of Equity Practice, two questions were involved mainly and specifically.

1st. The number and names of the tenants in common and the quality of their estates.

2d. The quantity of their respective estates in the whole tract.

These were the chief matters of equitable and judicial cognizance, properly speaking. All else was the consequence—the means of effectuating the decree: ministerial and not judicial acts. After ascertaining the various interests and settling the rights of the respective litigants, the judicial power of the Court was exhausted; and the decree is therefore final as to the results involved. The naming commissioners—the ordering surveys—are ministerial acts, and subject to the future control and supervision of the Court: *these are the executing the decree.*

As to what constitutes a final decree, he cited—1 aBrbour's Ch'y. Prac., 330-1-2-3. 2d Daniel's Ch'y., 175, 638. 1 Harrison Ch'y. Prac., 420. Mills vs. Hoag, 7 Paige, 18. Story's Equity Plead., sec. 408. Field vs. Ross, 1 Monroe, 137. Seaton on Decree, 382. 2 Bligh's Rep., 263. 7 Ves., 222. 1 McCord, b. Rep., 32. 4 Paige's Ch'y. Rep., 561. In Leigh's Va. Rep., 108, Harvey vs. Bronson, the Court will find a strong case, strikingly analagous to that at bar. Also, we cite Taylor vs. Royall's Admr., 1 Rand., 421.

460 We are next met by the objection, urged as an estoppel, that the decree of which we now complain, was entered up with the express consent in writing of the appellant himself. As this is a material point in the case, and is believed to have been the ground on which the learned Judge in the Court below dismissed in the petition, it has received full consideration at our hands.

Certainly a hasty examination of some of the cases might lead to the idea of the conclusiveness of this objection, but a more careful investigation and estimate of the weight of authority, will serve to convince us that an undue importance has been ascribed to the mere circumstance of *consent.* In 2 Smith's Ch'y. Prac., 50, it is laid down that "if a decree has been taken by consent, a bill of review will not lie against, for *'consensus tollit errorem.'*" For this broad doctrine a *single* authority is cited—Webb vs. Webb, 3 Swanston, 658—a case which we will examine. The Court will note, a consent there after great deliberation, to put a stop to afmily feuds: a settlement purely equitable and just—not impeached for fraud, or advantage, or surprise, or concealment—not for newly discovered matter, now upon any other legitimate ground for bill of review. In the absence of all the occasions for reviewing the decree, the prominent fact of consent given—a consent not impeached—seems to nave furnished the readiest answer; and a rule in a special case—thus commending itself to the Court, it has been sought to have extended to a universal application. For a like citation in Mitford, p. 94, a single case from Ambler, Bradish vs. Gee, stands as the sole support. That was a case of consent made by counsel. The remedy of the party was declared to be against his counsel. There was no allegation of fraud or covin, surprise or other ground of interference, the consent remaining unimpeached. It is true that the Lord Chancellor does state hypothetically, that "if the decree was by fraud and covin, the party may be relieved against it, *not* by re hearing or appeal, but by original bill." And it is this negative, wherein the value of the authority consists, in the eyes of our adversaries. For this *dictum,* however, two authorities are cited—Richmond vs. Tailleur, 1 P. Wms., 734-5. Lloyd vs. Mansel, 2 P. Wms., 73.

It is not too bold in us to say, that that *negative* cannot be established by those cases. They establish affirmatively that an original bill would not lie to set aside a decree by consent upon the fraud imputed in the *first* case; and in the *second,* that a decree by consent 461 obtained by fraud, not denied in the answer, was set aside upon original bill. If then, Lord Hardwicke is not supported by the authorities he invokes, what force can be given to the assertion, not pronounced upon the authority of his own great name, nor necessarily arising in the cause before him? In Lloyd vs. Mansel, Lord Macclesfield granted the relief, (as he says),*notwithstanding* the objection urged that, "according to this rule, a decree might be set aside by original bill," thus showing this course to be the exception and not the rule, and predicating the answer to the objection upon "the gross fraud"—"an abuse of the Court, and sufficient to set any decree aside."

In Hicks vs. Conyers, M. S. Rep., 7 Viner's Abridg., 398, Cowper, Ch'r., declares, "It is irregular to bring a new bill to alter and vary a decree already pronounced," &c. Again, "by the course of the court, if the original decree had been inrolled, the now plaintiff, upon affidavit of new matter come to his knowledge since the former decree, *might have a bill of review,* but he cannot now be relieved against the former decree by this new bill and rehearing the former cause; for the decree is right upon the pleadings and proof in the cause, and therefore cannot be varied upon a rehearing; and the now plaintiff canot be relieved upon his new bill, because it is *contrary to the course of the Court to alter a decree upon a new original bill exhibited after the decree pronounced.*" This case exhibits clearly the true bearing of the decision of Lord Macclesfield above cited. Another case relied on is Harrison vs. Ramsey, 2 Vesey, Sen., 488, A. D. 1752. That was a case of consent by counsel, against whom the party had recourse. Yet the Lord Chancellor, though he refuses the application, says—"If they could prove collusion against the counsel, it would be a different thing." Next, it is to be noted that there was no allegation of fraud or surprise—none of new evidence; but on the contrary, the editor and commentater, (Mr. Belt), in his supplement says, "the Court proceeded on the idea that the decree by consent was for the benefit of the infant, the party impeaching it." Again, the case is professedly founded on Bradish vs. Gee, in Ambler, and upon another cited, yet less reliable, viz., Norcott vs. Norcott, 7 Viner's Ab., 398. This case is reported at large in Colle's Parliamentary Reports, which we exhibit to the Court to speak for itself, as conclusively showing that the comment in Viner is as un- 462 waranted as it is vague. These embrace all the cases of conclusiveness of consent. Now let us examine the authorities on the other side.

I refer the Court to Butterfield vs. Butterfield, 1 Ves., Sen'r., 133, 154. 3 Ves., Sen'r., (Belt's Suppl't.) S. C. Here was an express decision that a decree by consent might be "set aside on appeal or after re-hearing." In Burnesby vs. Powell, 1 Ves., Sen., 119 and 283, the Court not only set aside a consent by a party, but also judgments or decrees of the Exchequer and Ecclesiastical Courts, which they could not directly review or reverse.

In order to show the disposition with which Courts of Equity proceed to defeat schemes of fraud, I cite—1 Molloy, 472; Lord Chancellor holding that there is no rule of court not flexible to justice. 2 Eden's Rep., 115. 2 Schoale & Lefroy, 666. Also, 1 P. Wms., 128.

On the main point of consent, I cite also—4 Russell, 142. 1 Brown, C. C., 484, which latter case clearly establishes that there is nothing conclusive in the *consent,* but that it may be explained and its reasonableness examined into. In Gould vs. Tancred, 2 Atkyn's 533, the leave to file such bill of review was refused upon grounds which repudiate the doctrine of the conclusiveness of the *consent* given; for the Lord Chancellor, speaking of the newly discovered evidence, declares, "this is a proper ground for a bill of review, supposing the evidence came up to it," &c.

Buck vs. Fawcett, 3 P. Wms., 242, has been sought to be wrested from us, who claim it as an authority in our favour, by an interpretation put upon the language of the Lord Chancellor opposed, as we think, to the plain meaning. The party petitioning for a rehearing had entered into *"an order by consent to submit to the decree and not to appeal."* Notwithstanding, Lord King, who made the decree, allowed a re-hearing, which his successor, Lord Talbott, refused to vacate. On the occasion of such refusal, he says, "This order is of a very singular nature, insomuch that had the agreement been disclosed to the Court, I hardly believe such order would have been made."

Our opponents attempt to ascribe the language of Lord Talbot, "this order is of a very singular nature," &c., to the order for re-

463 hearing, where as it is very plain he refers to *"the order by consent* to submit to the decree and not to appeal." Had that argument been disclosed to the Court at the time of entering the decree, Lord King would never have made it. There was nothing singular in an order *for re-hearing;* there was nothing even opposed to the consent *not to appeal.* And had the order for a re-hearing been considered so singular, why did not Lord Talbot discharge it? On the contrary, he says it is *"fitting* the Court should have the opportunity of amending it;" and yet *"more reasonable"* in this case, in view of the action of his predecessor. The reporter seems thus to have considered the true reading of the decision as shown in the marginal note. We hold this case as a clear instance of the reversibility of decrees by consent. There it was before decree enrolled—here, application is made after. The *mode of relief* is different, but the *right* to it stands on the same footing.

I cite also, Earl Portsmouth vs. Effingham, 1 Ves., Sen., 430. Cann vs. Cann, 1 P. Williams, 723, 727. In this last case, though declining to interfere under its peculiar circumstances, he yet excepts cases of *"ignorance and concealment,"* which he admits would invalidate the consent and all rights accruing from it; an exception sustained, we think, by authority, and upon principles of equity and natural justice. See Brodereck vs. Brodereck, 1 P. Wms., 240.

A case in principle, as well as in detail, strikingly like that at bar, we find quoted in 2 Wheeler's Am. Ch. Dig., p. 472. It is the case of Broaddus vs. Broaddus, 3 Dana, 526, where, in case of deception, it is declared that "the Court should at any time it has power over the cause, reinstate the parties and admit the defence."

But it is alleged that our relief is only by original bill and not by bill of review. If the authorities already cited do not sufficiently point to this as the proper remedy, we would cite also—Wormley vs. Birkhead, 3 Atkyn's 309. Dexter vs. Arnold, 5 Mason, 304. Story's Eq. Plead., sec. 412, 413. Also, 421, 422.

On the subject of parties we cite—Story's Eq. Plead., 428. 1 Leigh's Rep., 108 and 121. Calvort on Parties, &c., p. 15, and 48th Rule of Practice of Courts of Equity in U. S.

We have made all those parties whose rights we seek to affect—all with whom any controversy exists.

464 *Carmack & Baker,* for Appellee:

1. The granting of a bill of review upon new matter is within the discretion of the Court. 2 Mad. Chy. Pr., 710. Story Eq. Pr., sec. 417, and cases cited in note, especially Dexter vs. Arnold. 5 Mason Rep., 315. 2 Bar. Chy. Pr., 93.

2. Apeals cannot be taken from decisions of the Court, made in the exercise of sound discretion, as distinguished from strict right. Armstrong vs. Wright, 1 Hawks. N. C. Rep., 93, 94. Burkett vs. Burkett, 2 Howard, 240.

3. A bill of review will only lie from a *final decree.* Story Eq. Pl., sec. 408, a. 2 Bar. Chy. Pr., 93.

4. The decree in this case was not final, and could not be until the return of the commissioners' report, and a decree of confirmation thereon. Sess. Acts of 1844, p. 23, sec. 6.

5. No rehearing or review can be had from a decree entered up by consent. 2 Mad. Chy. Pr., 712. 2 Smith's Chy. Pr., 50. 1 Barb. Chy. Pr., 367. Webb. vs. Webb, 3 Swanst., 658. Harrison vs. Ramsay, 2 Vesey, 488. Bradish vs. Gee, Ambler, 229. King. vs. Wightman, 1 Antsruther, 80. Toder vs. Sansome, 7 Brown's Par. Cas., 244. Wall vs. Bushley, 1 Brown's Chy. Cas., 484. Morrell vs. Lawrence, et al., 12 John., 521. Walton vs. Harris, 20 Wend., 563. Atkinson vs. Maups, 1 Cow., 709. Ringgold's case, 1 Bland., 5, 12 Syke vs. Lewellen, Wend., 18. McKim vs. Thompson, Ib., 270. ones, et al., vs. Tollicoffer, 1 Car. Law Rep., 376. Bar. & Har. Eq. Dig., 4. Bridgman's Equity Digest, 143, sec. 5, 6.

T. H. Hagner, for appellant, in reply said, that he proposed briefly to exhibit the circumstances under which the consent decree was made, the facts as then disclosed, and the newly discovered evidence whereon is grounded the prayer for the intervention of the Court. This proceeding for partition of the Arredondo Grant, in its inception, was an amicable proceeding as between the parties to this record. The claim of the appellant was for one fourth of the whole grant; the evidence of his claim a deed from Arredondo & Son, dated 21 Jan., 1822, declared on its face to have been made pursuant to a contract entered into in 1818, the next year after the grant was made. This claim of the estate of Peter Mitchell had been recognized by the appellees. In a letter of 19 Sept., 1843, (pp. 18, 18, 467 of record), John H. Lewis declares to Benj. A. Putnam, the Executor, "I have been long aware of Mr. P. Mitchell's claim, and am satisfied as to its justice;" and again, in the same letter, "Peter Mitchell claimed under deed from the Arredondos say 70,000 acres;" and again, "I have no design to thrown any impediment in the way of Mitchell's heirs." And, as is shown in the record, this very proceeding for partition was the result of the united friendly action, as made to appear at the time, of the appellee, John H. Lewis, and the appellant.

On the 15th March, 1821, Arredondo & Son sold 144,822½ acres of the grant to Jasper Ward—(pp. 11, 12, of record), The agreement does not appear to have been signed by Sam'l. H. Betts, under whom the appellees claim, but by the Arredondos, whose partner Betts is alleged to have been. The appellant had no evidence at any time before the decree in this case, that eBtts had assented either to the sale to Ward or to that to Peter Mitchell; nor was such evidence called for had good faith been kept between the parties. The claim set up by Lewis and wife had been known to be 15,000 acres of land, conveyed by F. Arredondo on 15th Dec., 1831, under an arrangement between them, declared in the deed to be "a full and satisfactory arrangement by which a final settlement had been effected between the said Arredondo and the said Lewis and wife, heirs and representatives of Betts." And this 15,000 acres is alleged to be given and received in *release* and *acquittance* of all and every claim which the said Lewis and wife "may now, or at any time might or could, have to any part, share or interest of, in or to the results of the said mercantile house of F. M. Arrendondo & Son, as the representatives of the said Samuel H. Betts, deceased, a partner of said house, as well as to any *further claim to any part or portion of said grant."* Pp. 14, 15, of record

The appellant, as Executor of Mitchell, assured by the repeated recognition of his claim, without suspicion of the truthfulness of the frequent reiterations by Lewis of the absence of all design to throw any impediment in the way of Mitchell's heirs; seeing that the limited extent of the claim of Lewis and wife forbade the idea of any conflict from that quarter; knowing that there was no other claimant who could molest him, felt that his case was sufficiently made out—even in the absence of the contract of 1818, recited in the deed 468 to Peter Mitchell, which contract had been lost or destroyed. While such was the character of this proceeding, Lewis and wife filed their answers to the bill denying generally the titles of Mitchell and Ward; yet, even after their answers, lest they might awaken suspicion of hostility, renewed protestations are conveyed to the appellant of the sincerity of Lewis—of the absence of all design on his part to interfere with the interests of Peter Mitchell's estate. But what was his consternation when, on the trial of the cause, he discovered that all these protestations were unmeaning words, and that the Executor was now called upon to make proof of his claim as against the representatives of Samuel H. Betts,—they insisting that Betts was a full partner of Arrendondo & Son; as such, entitled to one-third of the whole grant; denying that he had ever joined in the sales to Mitchell and Ward, and demanding *then and there proof of both.* The appellant was thus completely at the mercy of John H. Lewis; and to save any part of the land to the estate of his testator, was forced into a concession, without equivalent, of upwards of 30,000 acres of land, while Lewis and wife unjustly acquired, by his adroit management, 45,000 acres over and beyond what they were fairly and legally entitled to.

The Court will see that the whole case, at the time of this forced consent, turned upon the point, whether Betts, being a partner in the house of Arredondo and Son, did or did not assent to the deeds to Peter Mitchell and to the sale to Jasper Ward. The appellant had no evidence of such assent—was ignorant of the existence of such evidence, and submitted from necessity—advantage being taken of the circumstances by which he was surrounded; inveigled by a blind confidence into the trial of the cause, he was forced to succumb; and the rights of the estate in his hands have been thus grossly trenched upon. Since that consent given—since that decree made—he has discovered "new proof, relevant and material," "come to light after the decree was made, which could not possibly have been used at the time." This new evidence, no wset forth with the petition, as the ground of application "for the license of the Court" to file a bill of review, discloses the following distinct facts.

1st. That Samuel Betts, on 29th August, 1820, acknowledged that the house of Arredondo & Son were then "owners of three-fourths

469 of the grant only, having previously disposed of one-fourth;" (p. 9 of record)—which facts settle that the sale to Mitchell was prior to 1820, and that the one-fourth sold to him was an entire fourth of the original grant.

2d. That Samuel Betts, on 15th March, 1821, together with his associate, did close with Jasper Ward, the sale of 144,822½ acres of land—(p. 9 of record)—and on that declared they had but 70,000 acres left; and that the sale was negotiated by Betts, and the contract drawn up and prepared by himself.

3d. That Joseph Arredondo, prior to 1825, did expressly affirm to John H. Lewis the right of Peter Mitchell to 70,000 acres, as against each and every member of the firm of Arredondo & Son.

4th. That in the winter of 1831-2, Lewis had a meeting with F. M. Arredondo, at St. Augustine, and with much trouble and by an advance of $200 in money, got him to transfer to Mrs. Lewis 15,000 acres—she agreeing to give him a release of all other claims accruing to her; and that said deed was so accepted in satisfaction. (P. 17 of record).

5th. That, on Oct. 30th, 1833, Lewis declared his interest in the grant to be 15,000 acres; and referred to his deed on record as the evidence of his title—(p. 12 of the record),—and on the 29th Oct., 1842, again declares this the extent of his claim, alleging that he "could have recovered more land by suit;" and that he received such undivided portion of 15,000 acres, abandoning all further claim to any part or portion of the said grant.

And the appellant alleges that these new proofs, at the same time that they establish an estoppel in law on Lewis and wife's setting up these pretensions to a greater interest in the grant, render such pretensions, if set up, worse than idle.

The counsel for the appellees, feeling the force of this accumulated evidence, yet insist that although it may prove that Lewis & wife got too much of the land, it does not show that Putnam, Executor of Mitchell, got *too little*. And they insist that there is nothing in the record to show that Samuel H. Betts, when he declared, on the 29th Aug., 1820, "we are owners of three-quarters of the whole tract, *having previously disposed of one-quarter,*" referred to the previous sale of one-fourth to Peter Mitchell. Now concede this for the sake of argument, and then the dilemma in which the learned counse
470 places his clients, is as fatal as his hypercriticism is refined. Lewis, as has been shown, repeatedly recognized Peter Mitchell's claim at 70,000 acres; and it is evidenced, in 1822, by the highest muniment of title; this quantity must, then, come out of the land. Now, in March, 1821, Samuel H. Betts, declares, "We have about 70,000 acres left." The deed, then, to Peter Mitchell in January, 1822, took *those* 70,000 acres—the whole remainder of the grant; and the counsel has thus proved his clients to be entitled to *not one acre* of land!

But, I ask, does it not as well appear that Mitchell's estate got too little as it does that Lewis got too much? Was not Mitchell entitled to one-fourth of the whole grant? Was not the sale to him made prior to 1820, and the deed in 1822; and is it now shown that Betts was a party to the contract himself, admitting the sale made? Does not Betts himself declare that they had sold three-fourths of the grant, and in March, 1821, had property only in 70,000 acres? Representing a third interest in this residue, Lewis and wife have obtained 62,000 acres, more than 6-7ts of the whole—while Mitchell's estate, representing one-fourth of the original grant of upwards of 280,000 acres, have received less than 27,000 acres of land. The Court seeing, then, such rank injustice done under the forms of law, will it not look around it for the means of relief?

But we are told, "your resource is an original bill to set
consent for fraud." And we are told at the same time, "there is no fraud—Lewis has been guiltless of all fraud." How then will such original bill bring us relief? It would be superfluous for me to go over the argument of my associate who examined nearly every case since cited by the other side; nor will it be needful for me to bring in review the authorities which fortified our positions in the outset. We believe that *these* have lost none of their original force under the attack of the learned counsel while *those* have gained no new vigor since their true bearing was pointed out by my associate.

To the case of Atkinson vs. Manks, 1 Cowan, 693, we were cited by the appellee's counsel, to establish that an order or decree in Chancery, entered by consent, is not the subject of an appeal or rehearing. Now that case was in the Court of Errors, the appeal was from the decree of rerefence, and that decree was by consent. That is not this case. But examine the opinion of the Court, p. 709,—

"Whether that decree was erroneous I do not consider open for in- 471
quiry. The decree, in everything that respects the reference, purports to have been made by consent. If the Chancellor was mistaken in supposing Atkinson's counsel to have consented to it, *application should have been made to him* to have the mistake as to the consent corrected. *That course not having been pursued,* this Court *cannot* try the question," &c. *"We* must take the facts as stated in the decree," &c. Now what does this prove but that our course here is the correct one—to apply in the Court below to get rid of the consent. We do not appeal from the decree of partition. If we had done so, then our case would have been analogous to 1 Cowen, and we would have been met by the consent decree. But here, if the Court pleas, our appeal is from a refusal of the Court below to grant just such an application as the Court of Errors in New-York declare ought to be made.

In Brockett vs. Brockett, 2 Howard, 238, the Supreme Court simply declare that an application to the Circuit Court to *re-hear the same case* after decree rendered, is an application to the discretion of the Court; and that no appeal lies, such refusal not being "a final decree or order." We apprehend it has no bearing upon the case at bar.

It is next alleged, that the granting or refusing of leave to file a bill of review is a matter of *"judicial discretion,"* not open to appeal. Although I concede the general principle "that where the subject decided by the inferior Court is left by law to their dischetion, as in the refusal to grant a new trial, it has been adjudged that a writ of error will not lie," (for which I cite 2 Har. & Gill, 81); yet I cannot yield that this comes within the rule. True, the granting of such a bill of review is not a matter of right, but of sound discretion in the Court; but the license of the Court is t obe given or refused under the law of Courts of Equity, and to affirm that when exercised it is incapable of review in an Appellate Court is to clothe the inferior tribunal with an amplitude of power, beneath which the rights of parties litigant might be overwhelmed.

The objection has been urged at some length, that the petition for leave to file a bill of review should have been filed on behalf of Peter Mitchell's heirs; that Executors and Administrators have only power over the lands for the payment of debts or to effect division among those entitled, and the acts of 1841, pp. 39-41, have been cited.— 472
To this we say that the Court can decree that the bill of review may be filed—it will be at our own hazard whether all the parties proper are then made Putnam, as Executor, is certainly a proper party though perhaps not the only party. But if he is to be regarded, not as a party *in interest,* then in entering into the stipulation, he can alone be viewed as counsel entering into an improvident and ruinous consent under surprise and ignorance of the facts material to the exercise of a sound discretion, and *a fortiori* ought not the heirs be bound by such a consent. Drought vs. Bedford, 1 Molloy, 572. Furnival vs. Bogle, 4 Russ., 142. Gould vs. Tancred, 3 Atk., 533. Buck vs. Fawcett, 3 P. Wms., 242.

And if the counsel have indeed succeeded in disproving any fraud on the part of Lewis, then our case rests on the ground of surprise, ignorance of facts, newly discovered proofs come to light since the decree made—and this bill of review, and not an original bill, is the proper remedy.

The only remaining matter I will examine is upon the suggestion of the Court, the nature of a decree of partition. It is *final* or *interlocutory* merely? The 6th sec. of Act of 1844, under which this bill was filed, contemplates yet another decree, upon the confirmation of the report, a *"final* decree shall be entered, which shall accordingly vest in the respective parties the title," &c. But may it not be that the term was here used merely to indicate the closing of the whole matter, and not in the sense in which our Statute of Appeals and the Courts regard it? The proceeding by partition at common law was by writ *"de partitione facienda."* That partition was made by the Sheriff, and 12 lawful men of his bailwick, the text of Littleton is, "the judgment shall be thus, that partition shall be made," &c. 1 Coke's Inst., 168, a. Lord Coke adds, "and it is to be observed that there be two judgments in a writ of partition. Of the former, Littleton speaketh in this place. And when partition is made by the oath of twelve men and arrangement and allotment thereof, and so returned by the Sheriff, then the latter judgment is *"ideo consideratum est, quod partitio praedicta firma et stabilis in perpetuum teneatur;'* and this is the principal judgment. And of the other, before this is given, no writ of error can lie." Now, in the notes on 3d book of the Institutes, 169, a, note 23, several new modes

473 of partition are noticed, amongst the rest, "a compulsory mode by decree of Chancery exercising its *equitable* jurisdiction on a bill filed praying for a partition, in which case it is usual for the Court to issue a commission for the purpose to various persons who proceed without a jury." This mode was unknown in Littleton's time,—the earliest instance of a bill for partition is thought to be in the time of Elizabeth

It is manifest that this is the character of the proceeding in analogy to which our statute is framed, and the practice in Chancery will be the best guide to determine whether the decree in question is *final* or not. In Baring vs. Nash, 1 Ves. & Beames, 555, we are told that the remedy at law by writ was extended to bills in equity by stat. 31 Hen. 8, and 38 Hen. 8; and in Wiseby vs. Frisby, 3 Randolph, 370, it is declared to be a remedy substituted for the difficult and perplexed remedy by writ of partition.

Now the difference between a judgment at law in partition (which is that spoken of by Littleton & Coke where they tell of *two* judgments and that the second is the principal one), and a decree in equity in partition is very great. It is pointed out in 1 Maddock's Chan., 245: "A partition at law operates by the judgment of a Court of law and delivering up of possession in pursuance of it, which concludes all the parties to it; partition in equity proceeds upon conveyances to be executed by the parties." In 2 Newland's Ch., 327, is a precedent of such a decree. Sir William Grant, Master of the Rolls in Agar vs. Fairfax, 17 Ves., 543, says, "the Court is to ascertain the proportions and rights of the parties, and when that is done, then the duty of the commissioners begins." From the decree in that case an appeal was at once taken to Lord Eldon, Chancellor; and it will be noted that after the appeal, the cause was yet heard for further directions and upon the casts. Yet a decree may be final although it require the confirmation of a further order of the Court before it can be acted on. 1 Barbour's Chan. Prac., 332. Neither does the reservation of liberty to any party to apply to the Court for directions, alter the final nature of the decree. Same, p. 333. We would submit then, under these authorities, that although the bill in equity may be in its effect and object the same as the writ at common law, yet the decree embodies in itself *both* judgments. All the
474 judicial power of the Court is put forth in the *one* decree—all that follows after is the execution of it.

BALTZELL, J., delivered the following opinion:

The record in this case presents an application for a bill of review through a petition and affidavit for that purpose, alleging the pendency of a suit in Chancery between petitioner and other, and defendants and others, for partition and the rendition of a decree in the case, which is stated to have been duly recorded and signed. It asks for liberty to file a bill of review for the purpose of having said decree reviewed, reversed and set aside, having recited facts, in the opinion of the applicant, sufficient to entitle him thereto.

The Court below refused the application, from which an appeal is taken to this Court.

It is conceded that a bill of review lies only after a final decree, so that the first enquiry is whether the decree rendered in this case is of that character.

By reference to the record, it is seen that the decree passed by consent for the ascertaining the interest of the respective parties, and also appointing commissioners to make partition of the lands and premises mentioned in the pleadings among the said parties, according to their respective rights and interests therein, as ascertained by this Court and established by this decree, and said commissioners were ordered, after having made such partition, to "report the same in writing to this Court without delay."

We are clearly of opinion that this is an interlocutory and not a final decree. "In proceedings in partition, both at law and in equity, there are two judgments and decrees, the one interlocutory and the other final. The first is *quod partitio fiat inter partes detenementis*, upon which a writ or commission goes comanding that partition be made, and upon the return of this writ or commission executed, if the proceedings are approved by the Court; the second judgment is given *quod partitio praedicta firma et stabilis in perpetuum teneatur*. This is the principal judgment, and of the other before this is given no writ of error lies." 1 Coke Litt., 167, b., 168, a. Thomas Coke, 1 vol., 807-8. 8 Missouri Rep., 55. "All the authorities state that a bill for partition is exactly the same as the writ at common law." 17 Vesey, 549.

It is contended, however, that the test of a decree's being final, is 475
that an appeal will lie upon it; and we have been referred to various cases of partition in the English Courts, showing appeals from decisions of the Master of the Rolls to the Lord Chancellor in cases like the one under consideration. If their mode of proceeding were like ours, such an authority would be entitled to great respect. But we find no such similitude or resemblance. By our statute, which in this respect is the same as that prevailing in the Circuit and District Courts of the United States, a decree must be *final* before an appeal can be had. Not so in the English Courts of Chancery; for there an appeal may be taken from every order on a petition; motion or interlocutory decree, in the progress of the suit; and this seems to be the course in New-York. 3 John. Chy., 66, 68, 123, 163. 15 Vesey, 184. 16 Vesey, 213, 218. 18 Vesey, 453 9 Vesey, 319. 14 Vesey, 184. 15 Vesey, 585.

If there were doubt, however, as to the character of this decree upon the authorities, there can be none under the law of the Legislature under which this proceeding was instituted. The sixth section of the Act "to provide for the partition or division of real estates. approved 14 March, 1844," enacts that either party may file objections to the report of the commission within ten days after they shall be notified of the filing of the same, &c.; and if no objections are filed, or if the Court is satisfied that they are not well founded, then the report shall be confirmed, and a *final decree* shall be entered up, which shall accordingly vest in the respective parties the title of the several parcels or portions of the premises allotted to them respectively, and shall give to each of them the possession and quiet title to their respectiev shares as against the other parties to the suit, or those claiming through or under them, and a certified copy of said decree recorded in the office of the County Clerk in which the lands lie, shall have the same effect as if mutual releases had been executed between the parties. Acts of 1844, pages 23-4.

The decree in this case being interlocutory, a supplemental bill in the nature of a bill of review, would seem to be the appropriate remedy. 2 John. Chy., 490. 2 Atk. 40, 534. 2 Vesey, Senr., 598. Mit., 71. 17 Vesey, 177. Possibly an original bill might accomplish this object. This, however, will be for the consideration of the Circuit Court. We. then, concur with that Court in refusing to grant the petition and dismissing the case, and order that the same 476
be affirmed without prejudice to an application, if thought proper, for other appropriate proceedings.

The decree is therefore affirmed with costs.

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REPORTS

OF

CASES ARGUED AND ADJUDGED

IN THE

Supreme Court of Florida.

AT

JANUARY TERM, 1848.

By JAME8 T. ARCHER, Reporter.

VOLUME II.

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1927

JUDGES

OF THE

SUPREME COURT OF FLORIDA,

DURING THE PERIOD OF THESE REPORTS.

HON. THOMAS DOUGLAS, Chief Justice.

HON. THOMAS BALTZELL,
HON. GEORGE S. HAWKINS,
HON. J. B. LANCASTER,
} Justices.

JAMES T. ARCHER, Attorney General.

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THE DECISIONS

OF THE

SUPREME COURT OF THE STATE OF FLORIDA.

AT

JANUARY TERM, 1848.

THE UNION BANK OF FLORIDA, FOR THE USE OF CHARLES MORRISON, *vs.* BURWELL MCBRIDE.

A writ of Error will be dismissed on motion made for that purpose, where the plaintiff in error was the original plaintiff, and had not, *previous* to suing out his writ of error, paid all costs incurred in the court below, and given bond, as required by statute.

There is no exception to this rule in favor of non-resident plaintiffs.

LANCASTER, JUSTICE:

This cause comes up by Writ of Error, from the Circuit Court for Jefferson county, Chief Justice THOMAS DOUGLAS having sat at the trial.

MCCANTS, for Defendant, moved the court, that this Writ of Error be dismissed.

1st. Because plaintiff in error (who was original plaintiff) had not, at the time of suing out the writ, paid costs. 2nd. Because the plaintiff in error had not given a bond for costs, in such case provided by law.

Hagner, for Plaintiff, stated:

He did not know that costs had been paid, but thought it probable that, pursuant, to a general understanding between the Clerk of the Circuit Court and himself, the costs had been charged to him. Also that a bond for costs in this court has not been given, and that Morrison, the real plaintiff in interest, resides in England, too far away to have been yet heard from, since the trial below.

8 The statute of February 12, 1836, Thompson's Digest, 447, section 5, referred to by defendant's attorney provides that "no "appeal, or Writ of Error, shall hereafter be granted to the original "plaintiff in any suit, unless said plaintiff *first* pay all costs which "may have accrued, in and about said suit, up to the time when "said appeal or Writ of Error is prayed; and, also, enter into bond, "with one or more securities, in a sum sufficient to cover all costs "which may accrue, in the prosecution of said appeal, or Writ of "Error, conditioned to pay the same, if the judgment, sentence, or "decree of the court shall be affirmed."

This act of the Legislature (believed by the court to be in full force) is regarded by them as applicable to and conclusive on this motion. The payment of all costs below, and entering into bond, as in the act prescribed, seem to be steps precedent to granting a Writ of Error, imperatively required by the statute. Any other construction would, they think, be repugnant to the act, an evasion of it, and, in some instances, render it inoperative.

The reason assigned for not having given the required bond does not, in the opinion of the court, strengthen the plaintiff's position. He is admitted to be a non-resident, and, therefore, not within the reach of process from the courts of this State. It is not sufficiently apparent that he paid all costs which accrued in and about his suit in the Circuit Court, the best evidence of which would be the certificate of the Clerk of that court, and in the opinion of this court, therefore, the most proper evidence. He failed in his suit below, yet, without payment of past costs, or security for those which may here accrue, he seeks further to pursue this defendant. His being a non-resident, adds legal force to the liability he was under to pay all costs below, as well as give bond for those which might accrue here before suing out his writ.

The court are unanimously of opinion the motion must be allowed, and do order this cause to be dismissed, and that the defendant, Burwell McBride, have judgment for his costs.

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9 MARGARET BUTLER, ADMINISTRATRIX, &C., *vs.* THOMPSON & HAGNER, TRUSTEES.

WHERE, in an action of debt against two joint defendants the writ is returned "*non est inventus,*" as to one, and a verdict is obtained against the other, but judgment on the verdict is arrested on motion, on account of the insufficiency of the return as to the other: and where the order granting the motion in arrest, after reciting that the parties appeared by counsel, and that the motion was argued, simply concludes, "it seems to the Court that said motion be sustained," the Court may, at a subsequent term, permit the return of the Sheriff to be amended, and the pleadings to be amended, and a trial upon the merits to be had, notwithstanding such order arresting the judgment.

The order sustaining the motion in arrest was not final, but the cause remained in *fieri,* and the plaintiff might very properly have had leave to amend.

Where in such case the plea to the original declaration reached the whole merits of the cause, as well after as before the amendments to the declaration, it is a plea to the amended declaration, and makes an issue between the parties to be submitted to the jury.

Whether an entry by the Clerk, reciting "*this day came the parties by their attorneys,*" is of itself evidence of the appearance of both parties—quære?

This cause was tried in the Leon Circuit Court, before Judge BALTZELL, and comes up on Writ of Error. A full statement of the case is given by the Chief Justice, who delivered the opinion of the Court.

Mr. *Archer,* for Plaintiff in error:

If the judgment of the court upon the motion in arrest was incomplete on the record, amendments at any time would be allowed to complete and perfect it, there being that in the record to amend by. Nevertheless, the order is final, as much so as any other informal entry of judgment. If the order was final, the further proceedings at the next term, being without notice to defendant, are of course void. Hair *vs.* Moody, 9 Alabama, 397. And such proceedings are without notice, unless the entry of the clerk, "this day came the parties," &c., is to conclude the defendant. But this entry is no evidence of defendants appearance. Gwin *vs.* Planter's Bank, 1 Howard, Miss. Rep., 527.

But the amendments in this case should not have been permitted. 10 The object of amendments to informal judgments is, in all cases, to *perfect* them. Here amendments are allowed to *defeat,* to *set aside* the judgment. This is the exclusive province of an appellate tribunal.

Again: there was no issue in May, 1847, to be tried by the jury. The amended declaration (the amendment being in substance) was a new declaration, and the plea to the original was not to be regarded as a plea to the amended declaration, particularly in the absence of the defendant, who, by such construction of the pleadings, was made a party to those subsequent proceedings, when *in fact* he was not a party.

Mr. *Thompson,* for Defendants in error.

DOUGLAS, Chief Justice:

This is an action of debt instituted by the defendants in error in the Leon Circuit Court against Alexander Patterson, Thomas J. Latham and Bradley McKimmy. The writ is in the following words to wit:

"STATE OF FLORIDA.

"TO THE SHERIFF OF LEON COUNTY—GREETING.

"We command you to summon Alexander Patterson, Thomas J. Latham, and Bradley McKimmy, if they are within the County of Leon, personally to be and appear before the Judge of our Circuit Court for said County, in Tallahassee, on the second Monday in November, next, being the first day of our next term, to answer Leslie A. Thompson and Thomas H. Hagner, Trustees, &c., of an action of debt. Debt $10,000, damages $5000, and have you then and there this writ.

Seal of Court } Witness, Daniel McRaeny, Clerk of our said Circuit Court this 31st day of October, A. D. 1845, and 70th year of American Independence.

D. MCRAENY, *Clerk.*
By JOHN B. KEEN, *D. C.*"

Which said writ was duly returned by said sheriff endorsed in these words: "Executed by serving a copy hereof on two of the defendants, Latham and McKimmy. Patterson '*non est inventus.*' October 31st, 1845. A. A. FISHER, *Sheriff.*
By J. W. SHERWOOD, *D. S.*"

Margaret Butler, Administratrix, &c. vs. Thompson & Hagner, Trustees.

11 At the November Term of said court for the year 1845, 70 days were allowed the plaintiffs within which to file their declaration, and by the record, it appears that they filed it on the 10th day of February following, complaining of Bradley McKimmy and Thomas J. Latham defendants, against whom (together with Alexander Patterson, not a resident of said County of Leon,) process has been served, summoned to answer said plaintiffs of a plea that they render unto the plaintiffs the sum of ten thousand dollars lawful money, &c.—The first count declares that a joint and several bond for the sum of two thousand dollars, and the second and only remaining count charges the defendants with the sum of $8000, had and received by them part of the $10,000 demanded. No account for this latter sum is annexed to or filed with the declaration as required by the statute, and it does not seem to have been relied upon in the subsequent proceedings.

To this declaration the defendants, Bradley McKimmy and Thomas J. Latham, put in the plea of *non est factum* upon which issue was joined, and on the 10th day of November, 1846, (the death of Bradley McKimmy, having been previously suggested,) this issue was submitted to a jury, who returned a verdict in the following words, to-wit:

"We the jury find that the bond sued on, is the bond of the defendants." Upon which the following judgment was entered, viz:

"Therefore it is considered by the court, that the plaintiffs recover of said defendant, the debt in the declaration mentioned and their costs. But forasmuch as it appears to the court here, that said bond hath a condition, thereunder written, and the court doth not know what amount of damages said plaintiffs have sustained, therefore let a writ of enquiry issue, returnable at this term."

On the record for the 16th day of the same month of November, the following entry appears, viz:

"This day came the parties, by their attorneys, and thereupon the motion in arrest of judgment upon the jury's verdict in this cause, being argued, it seems to the court that said motion be sustained."

And afterwards, on the same day, the plaintiffs filed their assignment of breaches of the condition of said bond, which breaches are set out at length in the record. Nothing more appears to have been done in the case, until the next term on the 30th day of June, 1847, when the following entry was made upon the record, to wit:

12 "This day came the same parties, by their Attorneys, and on motion of the said plaintiffs, by their attorneys, it appearing to the court, that the judgment heretofore entered in this case, was arrested by reason of the insufficiency of the return of A. A. Fisher, by J. W. Sherwood, D. S., as to Alexander Patterson, one of the original parties named in the writ returned *'non est inventus,'* and it also appearing to the court, that the first writ or summons was sufficient: It is therefore ordered by the court, on the motion of the plaintiffs' attorneys, that the Sheriff of Leon county, amend his return as to the said Alexander Patterson, and that the said Sheriff make return whether or not the said Alexander Patterson, did or did not reside in the county of Leon at the time of the service of said writ upon the other defendants; and thereupon the said Sheriff did amend his return accordingly, and thereupon the court do allow the said plaintiffs to amend their declaration according to said return, and the same was done accordingly, and thereupon came a jury, to-wit:—Charles Demilly, (and eleven others, naming them) who being elected, tried and sworn the truth to speak upon the issues joined upon their oath do say, 'We the jury find that the bond sued on is the bond of the defendant Thomas J. Latham, and we do assess the damages said plaintiffs have sustained by occasion of the defendants breach of the condition thereof at seven hundred and thirty-three 49-100 dollars." Therefore it is considered by the court that the plaintiffs recover against the defendant $10,000 the debt in the declaration mentioned and their costs by them about their suit in this behalf expended, and the said defendant in mercy, &c. But this judgment is to be discharged by the payment of the damages assessed as aforesaid and the costs."

The plaintiff in error, by her attorney, has assigned the following errors, viz:

First, That the proceedings in this cause, had, after the November term, 1846, are without notice to the defendant Latham, and not binding on him or his representatives.

Second, That the judgment of the court arresting the judgment upon the verdict of the jury, was final and could not be disturbed after the expiration of the term, save by the action of an appellate court.

Third, The court erred in permitting the return of the summons to be amended, and the declaration to be amended.

Fourth, The verdict of the jury, on the 30th of June, 1847, is a 13 nullity, as there were no issues joined between the parties and by them submitted to the country.

Fifth, That the proceedings and judgment appealed from, are otherwise irregular and insufficient.

The 12th section of the Act regulating judicial proceedings, Duval's Comp. 92, Thompson's Digest, No. 3, page 327, provides that 'when any original summons has been sued out against two or more defendants, and returned by the sheriff or other officer, served upon one or more of the defendants, and that the other defendants do *not reside* in said district or county, as the case may be, it shall be lawful for the plaintiff at his option to proceed to judgment against those upon whom process has been served, or obtain from the court time to perfect service,' &c.

The plaintiffs in this case seem to have selected the first alternative of this provision, and the amendment of the Sheriff's return, and of the declaration complained of, appear to have been made to meet it.

The counsel for the defendants in error insist that the amendments were made at the same term of the court at which the order arresting judgment was entered, and that the court then directed the record to be amended commencing at the first error. As, however, the record does not show these facts, we do not permit them to influence our action, but proceed to enquire whether they could properly be directed and made at a subsequent term. It is contended in behalf of the plaintiff in error, that the order in relation to the arrest of the judgment is final and conclusive and could not be disturbed after the expiration of the term, save by an appellate court.

We cannot assent to that proposition. The order upon the motion to arrest the judgment is in these words:— 'It seems to the court that the said motion be sustained.' It would we think, have been more correctly entered in this form:—"It seems to the court that the said motion should be sustained," or "it is ordered that said motion be sustained." Entered however in either way the effect is the same. It does not import finality or conclusiveness, but is substantially just such an order as our statute on the subject in such a case would seem to require, to be followed by the order to amend, and it may well be doubted, whether the court could, with propriety, have entered one of any other import. In the case of Edwards *vs.* the Union Bank—Florida Reports, 144, which was cited by the at- 1 torney for the plaintiff in error as in point, final judgment was entered upon the motion in arrest. On reference to that case it will be found that it was so entered because the opinion of the court was against the plaintiff in the court below, upon the merits of his case, the court holding that the action (which was trespass,) would not lie against a corporation, and the plaintiff had not by law a right to judgment in his favor. Here the reason on which the opinion of the court was founded, was the insufficiency of the return of the sheriff as to Alexander Patterson, one of the original parties to the writ returned "*non est inventus*" whereas it appears the return, according to the provisions of the statute above cited and the facts of the case, should have been "the said Alex. Patterson does not reside in Leon county," a defect that had nothing to do with the merits of the case. This error of the sheriff was no fault of the plaintiff's, and they should not be permitted to suffer by it, if by the rules of law such a contingency could be avoided. The question is could that be done. The 52 section of the Act (above cited) regulating judicial proceedings, Duval's Comp. 99, Thompson's Digest No. 2, page 351, provides that 'When a judgment is arrested the plaintiff shall not be compelled to bring a new suit, provided, the first writ or summons shall be sufficient, but the court may order new pleadings to commence where the error causing the arrest began.' The first writ or summons we have seen in this case was sufficient. No objection was taken to it. In view of this provision of the statute therefore, it does not appear that the defendant in the court below was (as has been contended,) out of court so soon as the order of the 16th of November, 1846, was made, or that he has been out of court at all. The objection therefore, "that the proceedings in the cause had after the November term, 1846, are without notice to the defendant, Latham, and not binding on him or his representatives," fails. When a party is once brought into court, he is chargeable with whatever is done there in the suit in which he is a party, although he did not in fact appear, and had no actual knowledge on the subject, Deleplaine *vs.* Hitchcock, 6 Hill's N. Y. Reps., 17. After that order was made, the cause remaining *in fieri*, the plaintiff might very properly have had leave to amend. They did it seems, actually amend, immediately after the order was made, but the record does not show that they had leave so to do. The defendant did not move for a final judgment in his favor, and thus the record stood over until the next

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term, when it is objected that it was too late to permit these amendments to be made. Upon general principles, however, we see no objection to the amendments. In the case of Malone *vs.* Samuel, 3 Marsh, 350, it was held to be correct to allow the sheriff to amend his return even at a subsequent term, and the amendment, (said the court,) will relate back to the proper return day. In Gay *vs.* Caldwell, Harden 63, a sheriff was permitted to amend his return to a writ of *ad quod damnum,* several years after he went out of office there being the inquest to amend by. So in Hutchins *vs.* Brown, 4 Harr. and McHenry, 498, a sheriff was permitted to amend his return of an attachment *several years* after the term to which the return was made. And in Thatcher *vs.* Miller, 11 Mass. 413, it was held that an officer may be allowed to amend his return, although several years have elapsed. And so of a common recovery. Ibid. Ringold *vs.* Brown, citing 2 Bl. Reps., 747—1065, and 3 Wil. 154. And in Smith *vs.* Daniel, 3 Murph. 128, the court held that the sheriff might be permitted to make or amend, according to the truth of the case, a return upon an execution at any time after the return day, even when important consequences may be produced by such amendment. In Massachusetts a declaration may be permitted to be amended, even after judgment *is arrested* for defect in the original declaration, a new trial being granted. Williams *vs.* Hengham Turnpike Co., 4 Pick., 341. And in Wilson *vs.* Brown, 5 Monr., 35, it was also so held, and the provisions of our statute above cited, would seem to be tantamount to the granting of a new trial in a case where the defect does not reach the substantial merits of the case. Where a plaintiff on leave to amend, struck out a count erroneously supposing he had a better remedy for the cause of action on which it was founded, and took judgment on the remaining counts, he was permitted on a review of the first action to restore that count, having first unsuccessfully attempted his other supposed remedy. Parker *vs.* Parker, 17 Mass. 376. And in Salters *vs.* Bayard, 12 Wendell 228, it was held that though a cause had been two years at issue, and twice noticed for trial, the declaration may be amended by adding a *new count* upon the same cause of action on the plaintiff's paying only the costs of the motion, unless the pleas are withdrawn or a new defence is rendered necessary by the amendment. And in Miller *vs.* Watson, 9 Wendell 506 a declaration was permitted to be amended, by adding a new *count* setting forth a special agreement nine years after
16 the commencement of the suit and after three trials at the Circuit. With these authorities before us we do not deem it going too far to say that the amendments made in this case were properly permitted at the next term after the order of arrest was entered. Indeed we presume the learned counsel who argued this case for the plaintiff in error would hardly have contended that it was too late to amend if he had conceded that his client was properly in court when they were made.

And we might perhaps have dispensed with the citation of cases to this point, but we have thought proper to refer to a few out of the many that might have been adduced to show how far other courts have gone in relation to such amendments and to these we may have added that of Stewart & Preston *vs.* Bennett decided by this court at the last term, Florida Reports 442; where we held that as a general rule "until judgment is signed or there is a *final judgment,* amendments to the pleadings may be allowed to the parties upon proper and equitable terms, and the declaration may be amended at any time so long as the proceedings remain in paper," citing Stephens on Pl. 97, and 1 Wilson 7 and 149.

But it was further insisted on behalf of the plaintiff in error that there was no plea to the amended declaration and consequently no issue for the jury to try, and that the verdict of the jury on the 30th of June, 1847, is a nullity. The answer however to this is, that the plea of *non est factum* was in, which reached the whole merits of the case as well after the amendment as before. The defendant had the right to plead over to the amended declaration, but if he chose to waive that right and go to trial upon the issue as it stood, he might do so. Had he asked leave to plead anew we presume he would have obtained it. As a general rule where a party is permitted to amend or amends without leave, the other party has a right to plead *de novo.* Crosby *vs.* Hill, 1 Wash. 360. Perry vs. VanCleef 1 Hall 165. But if a defendant when a declaration is amended instead of availing himself of this right goes to trial upon a plea or pleas already in which reach the whole declaration and upon which an issue or issues had been joined, he cannot we apprehend properly assign for error that there was no issue for the jury to try. On amending the declaration in King's Bench after plea pleaded the defendant is at liberty to plead *de novo* if the case requires it, and has two days allowed him for that purpose after amendment made. 1 Tidd's Pr. 3 Amer. from 9 London Ed. 107. And in Common Pleas he may do so if he has occasion or thinks proper, but he is not 17
obliged to vary his first decision. Ibid, 708.

Where the plaintiff neglected to reply to the statute of limitations, and went to trial upon a *nisi prius* record omitting it, but the defendant had the full benefit of a defence upon the statute at the trial, the court refused to set aside the verdict for the plaintiff for irregularity, but suffered him to amend. Snyder *vs.* Snyder, 4 Cowan, 394. And the same was virtually decided by the Common Pleas, in the late case of Cooke *vs.* Buell, 8 Taunt., 184—where there was process against two, one not served and pleadings and judgments against both, judgment was permitted to be amended at a subsequent term, by striking out the name of the defendant not served.

The case of Hair *vs.* Moody, cited by the attorney for the plaintiff in error, from 9 Alabama Reports, 399, is not, according to our view of this case, in point. There the suit had been dismissed, and there was no question but the defendant was out of court. It was, therefore, undoubtedly irregular to set aside the judgment of *non pros.* at a subsequent term, without notice to the defendant; but even this irregularity was waived in that case, by the subsequent appearance of the defendant. Here, as we have seen, the defendant was never out of court—but, on the contrary, was rightly in court, and chargeable with notice of every step there taken in this case. The question, therefore, to which the case of Gwin *vs.* the Planter's Bank, 1 Howard's Miss. Rep., 527, also cited by the attorney for the plaintiff in error, whether an entry by the Clerk, "This day came the parties by their attorney," &c., would, or would not, be conclusive evidence of the fact of such an appearance does not arise, as, if we are right in the opinion that this defendant was never out of court, that entry on this record was properly made. But it may certainly be very questionable, whether in every case, such an entry would not at least be *prima facie* evidence of the appearance of both parties, unless the contrary is shown by some other part of the record.

In the case of Williams *vs.* Hingham Turnpike Company, before cited, Chief Justice PARKER, in delivering the opinion of the court, said: "It is unpleasant to arrest the course of judicial proceedings, on account of defects which have nothing to do with the real merits of the matter in dispute." And again: "Certainly objections which are apparent in the beginning of a cause, but which are passed until the expense of a trial has been incurred, ought not to 18
be favored." And we fully accord with that able and enlightened jurist in these sentiments. Such is the case before us.

But we find ourselves more fortunately situated than the learned judge, whose words we have just now quoted; for he was obliged to yield to the objection, but there was no charge in the declaration in that case which would support the verdict. But we think the judgment in this case is sustained by the provisions of our statute, and the general principles of law applicable to it, and it is therefore affirmed.

Per curiam.

ROBERT MITCHELL *vs.* JOSEPH CHAIRES, EXECUTOR, &C.

Where the plaintiff in an action of Assumpsit, filed a replication to one of several pleas of defendant, and, afterwards, by leave, filed an amended replication, to which the defendant demurred, and the court sustained the demurrer; and where, on motion of the *plaintiff,* the judgment on the demurrer was set aside, and the plaintiff permitted to have a trial of the issue made by the *original* replication, as well as of the other issues in the cause. Held:

That the plaintiff cannot now be heard to complain that the demurrer to said amended replication remains undisposed of, or to insist upon any matter in relation to it as error, the judgment upon it having been set aside at his instance to enable him to submit the matters of fact in his case to a jury, and he having pleaded over for that purpose.

If he intended to rely upon this objection, he should have permitted the judgment to stand, and assigned it as error.

And although error should appear upon the record, yet if, in distinct pleadings, a complete bar is shown to the action, the judgment for defendant must be affirmed.

Where there are several issues, requiring proof on the part of the plaintiff to sustain them, and a verdict upon them was rendered for defendant, and there is no bill of exception, to show on what ground it was rendered, the court will presume the verdict to be right, and will sustain the judgment entered upon it.

This case was tried below in the Leon Circuit Court before Judge BALTZELL, and comes up by Writ of Error. A statement of the case will be found in the opinion of the court.

Robert Mitchell, vs. Joseph Chaires, Executor, &c.

19 *Hagner*, for Plaintiff in Error.

Long, for Defendant.

DOUGLAS, Chief Justice:

This case was brought up by writ of error from the Leon Circuit Court. It is an action of assumpsit instituted by the plaintiff against the defendant as executor of the last will and testament of Benjamin Chaires, deceased, to recover the amount of two promissory notes; one for the sum of $1998 64 1-4 dated February 8th, 1838, payable on the first day of January, 1839, and the other for a like sum bearing the same date and payable on the first day of January, 1840, both made by one Jesse H. Willis, payable to the order of the said Benjamin Chaires at the Union Bank of Florida, and endorsed by him. The declaration contains a count upon each note, counts for work and labor, goods sold and delivered, and the common money counts.

To this declaration the defendant puts in five pleas:

First, That neither he nor the testator undertook or promised in manner and form, &c.

Second, That said Benjamin Chaires in his life time did not undertake or promise in manner and form, &c.

The *third plea* denies demand upon or notice to the defendant as alleged in the first and second counts of plaintiff's declaration.

The *fourth* sets up the statute of limitations of five years as a bar, &c., "*non actio accrevit.*"

The fifth is in the following words to wit: "And for further plea in this behalf the said defendant by leave, &c., says said plaintiff *actio non, &c.*, because he says that after his appointment and qualification as executor of the last will and testament of said testator by advertisement dated the 20th day of October, in the year 1839, which he caused to be published that day, and once a week for the space of four weeks in a newspaper printed in Tallahassee, Leon county, Florida, giving notice to all creditors, legatees and persons entitled to distribution of said estate that their claims and demands would be barred unless exhibited within two years; and said defendant avers that said several claims and demands in said plaintiff's declaration mentioned, or either, or any of them, were not
20 exhibited to him within said period and this he is ready to verify wherefore he prays judgment," &c.

To the first, second and third pleas, the plaintiff joined issue and to the fourth and fifth replications as follows, to wit:

"And as to the said plea of the said defendant by him fourthly above pleaded the said plaintiff says he ought not to be barred or precluded from having, &c. Because he says that the said several causes of action in the said declaration mentioned, did accrue to the said plaintiff within five years next before the commencement of this suit and this he prays may be enquired of by the country, &c.

"And as to the said plea of the said defendant by him fifthly above pleaded the said plaintiff says that said plaintiff ought not to be barred from having and maintaining his aforesaid action, &c. Because he says that the said several claims and demands in said declaration mentioned were exhibited to him the said defendant within two years from the publication in said plea mentioned, and this he prays may be enquired of by the country."

After the filing of these replications the plaintiff obtained leave to amend his replication to the said fourth plea, and filed an amended replication as follows, viz:

"And the said plaintiff saith that the said defendant ought not to be admitted or received to plead the said plea by him fourthly above pleaded wherein he alleges that said several causes of action in plaintiff's declaration mentioned did not accrue to said plaintiff within five years next before the commencement of this suit. Because he says that the said several causes of action in the plaintiff's declaration mentioned accrued to the said plaintiff after the death of defendant's testator, and that after the same so accrued the same were duly presented to the said defendant, executor of the last will and testament of Benjamin Chaires deceased, as demands of said plaintiff against the said estate of the said testator within the period of two years after the grant of the letters testamentary to said defendant, executor as aforesaid, to wit, at the county aforesaid according to the statute in such case made and provided and this he is ready to verify, wherefore he prays judgment if the defendant ought to be admitted or received against the said presentment and demand aforesaid to plead the plea by him fourthly above pleaded in this suit as aforesaid."

To this last replication, the defendant, by his attorneys, demurred, and their demurrer was sustained. The following entries in 21
regard to it appear on the record, to wit:

"This day came the parties by their attorneys, and thereupon the matters of law arising upon the defendant's demurrer to the plaintiff's replication to the plea of the said defendant, by him fourthly above pleaded, being argued, it seems to the court that the said replication, and the matters therein contained, are not sufficient in law to maintain the action aforesaid. Therefore, it is considered by the court, that the said demurrer be sustained, and that the plaintiff take nothing by his bill, but for his false clamor be in mercy," &c.

Twelve days after which, the following entry appears: "This day came the parties by their attorneys, and thereupon, on motion of the plaintiff, by his attorneys, the judgment herein entered on the 17th day of June instant is set aside, and thereupon came a jury, to wit: Edward Houston, &c., (naming the other eleven jurors,) who, being elected, tried, and sworn the truth to speak upon the issue joined, and having fully heard the evidence, upon their oath do say: 'We the jury find for the defendant.' Therefore, it is considered by the court, that the plaintiff take nothing by his bill, but for his false clamor be in mercy," &c.

The only point insisted upon as error is, "That the court erred in refusing to sustain the replication of *estoppel* to the bar of limitations of five years."

We are by no means prepared to say, that the court erred in sustaining the demurrer to this replication. But whether it did so or not, is wholly immaterial to this inquiry, for the judgment rendered upon it was set aside on the plaintiff's own motion, and for his benefit.

The plaintiff's counsel alleges that he understood at the time that the order of the court, setting aside the judgment on the demurrer, was intended merely to change that judgment from a final one to a judgment of *"respondeas ouster,"* and so he treated it; for it appears by the record, that he refiled his original replication to the defendant's fourth plea, (after this judgment,) which he had abandoned by putting in his amended replication. The effect of all which seems to be, that the defendant waived his demurrer to the amended replication to the fourth, and that the plaintiff abandoned his amended replication, fell back upon the original one, and that the case was submitted to the jury upon the issues joined upon the *first, second* and *third* pleas, and the replication to the *fourth* plea, 22
(as originally filed,) and to the *fifth* plea.

And the plaintiff cannot now be heard to complain that the demurrer to said amended replication remains undisposed of, or to insist upon any matter in relation to it as error, the judgment upon it having been set aside at his instance, to enable him to submit the matters of fact in his case to a jury, and he having pleaded over for that purpose. If he intended to rely upon this objection, he should have permitted the judgment to stand, and assign it as error here. In the case of Davis *vs.* Dickson, 2 Stewart's Reports, 370, it was holden, "that where a plea in abatement to a writ and declaration is overruled on demurrer, the party cannot insist on the same matter in arrest of judgment, if he pleads over." If, after the refusal of a court to reject a plea, the plaintiff reply or join issue on the plea, the refusal to reject the plea cannot be assigned for error 7 Blackford, 355.

There were five distinct issues of fact submitted to the jury in this case—a verdict upon them for the defendant, and a judgment upon that verdict. None of the testimony is before the court, no bill of exceptions is to be found in the record, and it is to be presumed that the plaintiff failed in his proofs. No motion appears to have been made for a new trial—from which it may be fairly inferred that the plaintiff himself was satisfied that his testimony did not sustain his issues.

In the case of the United States *vs.* Carlton, 1 Gallison Reports, 400, the court held that, "although error appear upon the record, yet if in distinct pleadings, a complete bar is shown to the action, the judgment for the defendant must be affirmed." Here no error appears, certainly none of which the plaintiff has any right to complain. The pleas present a complete bar to the action unless met by proof, and there is nothing to show what proofs, if any, were offered.

In the case of Blaney *vs.* Findley, *et al.*, 2 Blackford's Reports, 338, the court said, "There is no bill of exceptions to show us on what grounds the court decided, but as the presumption of law is in favor of the decision, if there were any facts that could have been legally before the court that would authorize their judgment, we are bound to sustain it." The reverse of this here holds good, as there were several distinct issues that required proof on the part of the plaintiff to sustain them, and a verdict was rendered for the defendant

23 upon them, and there is no bill of exceptions to show us on what grounds it was rendered. We are bound to presume that the verdict is right, and to sustain the judgment entered upon it.

The judgment is, therefore, in all things affirmed.

David Gordon and Wife *vs.* John G. Camp.

The Territorial act of Feb. 12, 1836, entitled *"an act to amend an act regulating the mode of suing out writs of error and prosecuting appeals in the Territory of Florida, passed February* 8, 1832, is not repugnant to the 5th Sec. of the act of Congress approved May 15, 1826, entitled *"an act to amend the several acts for the establishment of a Territorial Government in Florida."*

The act of February 12, 1836, is restraining and prohibitory. What was before a writ of right, is no longer so to original plaintiffs. They are not entitled to a writ of error unless they *first* pay all costs incurred in the court below, and give bond as required by the statute.

Filing money in court to be substituted for the personal security required in the plaintiff's bond under that act, will not meet the requirements of the act.

The powers of an attorney at law do not extend to the execution of a bond for his client.

Motion to dismiss the case for non-payment of costs below, and for want of bond to secure costs to accrue.

Douglas & Hogue, for the motion.

Brockenbrough, Contra.

Lancaster, Justice.

On motion to dismiss this cause for want of bond for costs.—Brockenbrough showed cause against the motion.

It is admitted that at the time the writ of error in this case was granted, no bond was then given. Since that time the attorney at law of the plaintiff has signed and filed a bond in their name, for costs, and as security on the bond, has deposited with the Clerk, one hundred dollars in money.

24 Perceiving that the opinion delivered at this term in the case of Morrison *vs.* McBride, had not met the approval of the bar, and being anxious to be right, the court have bestowed much care in an examination of the statutes, on the subject of appeals and writs of error. It was objected that the first section of the act Feb. 12, 1836, Duval's laws, 112, on which the decision in the case of Morrison *vs.* McBride proceeded, was never of force, being repugnant to the 5th Sec. of the act of Congress, entitled "an act to amend the several acts for the establishment of a Territorial Government in Florida." Approved May 15, 1826. By reference to that section it appears to the Court, it was provided "that writs of error and appeals shall lie and may be taken on all final decisions of said Superior Courts where the matter in dispute shall amount to the sum or value of one hundred dollars exclusive of costs, to the Court of Appeals of said Territory, in the cases in that section enumerated, all of which are cases arising under the Constitution and Laws of the United States, in the same manner that appeals are directed to be taken from a District to a Circuit Court of the United States. The 6th Section then provides that in the cases enumerated in the first part of the preceding secion, certain sections of the act of 24th Sep., 1789, entitled "an act to establish Judicial Courts of the United States," and another act to amend and explain the 22d Section of that act shall as far as practicable be observed as the regulations to govern writs of error and appeals in such enumerated cases.

The fifth section of the act of 15th May, 1826, then provides in the last part of it, in *all other cases* writs of error and appeals may be taken from said Superior Courts to the Court of Appeals in such manner as the Legislative Council have directed or shall direct. What other cases? Doubtless all such as do not arise under the Constitution and laws of the United States, and such as the Courts of this State have new jurisdiction of under the Constitution of the State.

The Legislative Council under the authority of the provision of the act of Congress before recited, passed an act regulating appeals and writs of error, dated Feb. 10th, 1832. See Duval's laws 108-9. The seventh of that act provides for the test of writs of error that they shall issue *on demand as matter of right,* and then enacts sundry other regulations concerning them. This act remained in force until the year 1836 when the statute of Feb. 12, was enacted. That provides that no appeal or writ of error shall *hereafter* be

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granted to the original plaintiff in any suit unless he shall *first* pay 25 all costs accrued up to the time, &c., and also *enter into bond* with &c., Duval's laws 112. It must be seen that the act of 1832 remained in force four years; what evils if any resulted from it, is not declared in the act of 1836. But so much of it as provided that writs of error should issue on demand as a matter of right, is clearly repealed by the act of 1836, in the case of original plaintiffs praying appeals or writs of error, unless they shall *first* pay all costs, &c., and enter into bond, &c., as therein prescribed. In all cases of which the Circuit Courts of this State now have jurisdiction, the act of 1836 was fully and completely in force at the time of its passage, because the act of Congress before referred to had given power to the Legislative Council to provide by law the manner in which appeals and writs of error might be taken in all such cases.

Let it be remembered that the act of Feb. 12, 1836, in the case of original plaintiffs, provides that all costs in the court below shall *first* be paid, and a bond with one or more securities shall *first* be entered into, before an appeal or writ of error shall be granted to such parties, and that this act succeeded or rather superceded another which provided that writs of error should issue on demand as a matter of right. It will be difficult to imagine a form of words, better calculated to restrain and prohibit the granting the writ, except upon the precedent conditions in that act prescribed.

No statute of any other State (brought to the notice of the court) is so conclusive, or rather exclusive in its terms, and the construction given by the courts to theirs furnishes us no precedent in construing ours. The statute of New York, referred to as among the most restraining, contains no requirement that costs below shall be *first* paid, and bond with security also *first* given, before the writ shall be granted. Their courts had a discretion left them. There was no room for construction. It is said that the act of 1836 is remedial, and should be construed most effectually to meet the beneficial end in view, and to prevent a failure of the remedy. It appears to the court to be restraining and prohibitory. What was before a writ of right, is no longer so for original plaintiff's unless they *first* perform the conditions upon which it may be granted.

The counsel for the plaintiffs in error alleges the bond given and security filed in this case are sufficient to meet the requirements of this act. It will be sufficient on this point to say, the bond was signed for plaintiffs by their attorney at law—that the powers of an 26 attorney at law, do not extend to such a transaction, and the party plaintiff can execute a valid bond only by himself, or his attorney in fact to whom that power is delegated. Moreover, the bond filed was not given until after the writ was granted, nor is there one or more securities on the bond as required by the act. The bond is therefore defective and insufficient. A majority of the court are of opinion that filing money in court, to be substituted for personal security, will not meet the requirements of the act which is prohibitory and restraining, and only such a bond as it provides for is allowable.

It is not necessary for the Court to attempt to assign the reasons which influenced the Legislature in the passage of this act. It may have been to restrain plaintiffs who fail in their suits below, from further harrassing defendants, except on the terms in the act prescribed; or some other reason may have influenced them. Be this as it may, the act is too plain to be misunderstood. *"Ita lex quod scripta est,"* and the alternative remains with the court to enforce the law, or to annul and repeal it. The power of repeal is Legislative. The power of the court is judicial. If the act is unjust, impolitic, or oppressive, the remedy is with the Legislature.

The motion must be allowed. It is therefore considered and ordered by the court, that this writ of error be dismissed, and the defendant do recover his costs in this court, to be taxed by the clerk, &c.

David C. Wilson, Administrator of James Lunn &c. vs. Richard Hayward.

27 DAVID C. WILSON, ADMINISTRATOR OF JAMES LUNN *vs.* RICHARD HAYWARD.

The Territorial act entitled, "An act to regulate the foreclosure of mortgages by the Courts of common law of this Territory and for other purposes," approved December 11, 1824, may afford a remedy in favor of the mortgagee, or his assignee, against the *mortgagor*, but not against the *assignee* of the mortgagor, because the statute gives judgment for the debt which cannot be rendered against the assignee of the mortgagor.

The party claiming a judgment of foreclosure under the statute should be the owner of all the demands secured by the mortgage, otherwise he is not entitled to judgment.

Where several notes in the hands of different parties were secured by mortgage, and the holders of a part of the notes had by petition under the statute obtained judgment of foreclosure against the administrator of the mortgagor, whereby he and all persons claiming through his intestate were barred of all right and equity of redemption in the mortgaged premises, and a sale of the premises had been made under the judgment—the holder of any of the remaining notes, secured by the same mortgage cannot afterwards have a foreclosure under the statute of the same mortgage against the same defendant.

Writ of error to Leon Circuit Court.

In Nov. 1845, Richard Hayward filed a petition against David C. Wilson administrator of James Lunn, deceased, under the statute regulating the foreclosure of mortgages approved December 11, 1824, setting forth in substance—that on the 4th June, 1840, Lunn executed a mortgage to Robert K. West, of a certain lot in Tallahassee, to secure the payment of $5000 due from Lunn to West on five several promissory notes, bearing date with the mortgage, of $1000 each, payable respectively in one, two, three, four, and five years from the date. That on the 6th May, 1841, West endorsed and delivered to Hayward the note last due and also assigned and transferred the mortgage by written agreement endorsed thereon. That Lunn died intestate and on the 15th October, 1841, administration of his estate was committed to Wilson the plaintiff in error. The petition concludes with a prayer for judgment for the amount of the mortgage debt due to Hayward, and for a foreclosure of the mortgage.

To this petition Wilson filed several objections by way of plea
28 under the statute alleging that the mortgage had already been foreclosed under the same statute, by judgment and decree against him as the administrator of Lunn rendered in the Leon Circuit Court, at the fall term 1843, in favor of Wilson & Herr merchants of Baltimore, who had become the holders of three of the notes secured by the mortgage, being the three first due. That a sale without objection, under the judgment and decree had been made by the marshal according to law, that Hayward had notice of the sale, and that said Wilson & Herr became the purchasers of the mortgaged premises. Upon these facts, Wilson insisted that another judgment of foreclosure, ought not to be given against him, and also that the claims of Wilson & Herr, to satisfy which the premises had been sold, had priority over the claim of Hayward.

To these objections the petitioner demurred, and the court (Douglas, Chief Justice presiding,) sustained the demurrer, and gave judgment for the petition on the 12th November, 1847, for the amount of the note assigned to him with interest, to be levied of the mortgaged premises, and if that was insufficient then to be levied of assets of James Lunn, *quando acciderint*, &c.; and also entered decree of foreclosure of the equity of redemption in usual form.

To reverse this judgment and decree under the statute, Wilson the administrator of Lunn prosecutes his writ of error in this court.

Douglas & Hogue, for Plaintiff in Error.

Thompson, for Defendant in Error.

BALTZELL, Justice:

The case before us arises upon an application of the holder of one of five notes secured by mortgage, to obtain a foreclosure and sale of the mortgaged property. The defendant insists that another party, holder of three notes secured by the same mortgage due before that of the petitioner, and to whom the mortgage was assigned, obtained at prior term of the court judgment of foreclosure in legal form against the defendant, the representative of the mortgagor. That a sale was had under the judgment, and Wilson & Herr the plaintiffs in the judgment and execution became the purchasers. It appears by the mortgage that there is also a fifth note outstanding, and embraced in the same mortgage. The plaintiff objects to the defence as insufficient to prevent his recovery, and the Court agreeing with him gave 29
judgment of foreclosure. The propriety of this decision is now presented to this Court. The statute for the foreclosure of mortgages by the Courts of Common Law, under which this proceeding was had, has created no little embarrassment in the decision of cases based upon it.

It may answer where there is merely a mortgage between mortgagor and mortgagee, or between the assignee of a mortgage, having a transfer of the entire debt, and the mortgagor. We incline to the opinion that it will not answer where there is an assignment by the mortgagor against his assignee, because the statute gives judgment for the amount of the principal and interest with costs, &c.

In many cases beyond this there may be difficulty, owing to the peculiar character of the instrument—its complexity and the various conflicting interests to be settled, adjusted and arranged. Mortgages are the creatures almost entirely of the Courts of Equity, in opposition to the sterner rules of the Common Law, asserting an absolute transfer of the title on the failure by the mortgagor to pay the debt. The Courts of Equity moderated this rigor and harshness and in a decree obtained their almost entire regulation and control by framing rules and principles adjusted to their nature and character.

In imposing upon the common law Courts the duty hitherto discharged in equity, it was clearly not the design to revive common law rules and principles in reference to this subject—this would be to destroy them. So far from it, equitable rights are maintained by requiring the person holding the equity of redemption, whether he be mortgagor or any one else to be served with notice, and by the permission to him to file objections, and contest the foreclosure.—Still the Legislature provide but imperfect means of executing their purpose, and give few directions as to the mode of action. We are then left to the rules in equity; or we have none to direct us. These we are constrained to adopt, approved as they are by the experience of ages and founded on the highest wisdom and propriety. So far then as the statute furnishes proper directions, we look to it as the guide, but beyond this the rules of Courts of equity applicable to this subject must govern. We find a difficulty of this kind in the case before us. There has been already a foreclosure and sale of the property mortgaged to pay a portion of the debt embraced in the mortgage. The same tribunal is asked for a second order for sale of the same property to pay another portion of the same debt against the 30
same defendant, while in all probability an application will be made by the holder of the last note for a third judgment and a third sale of the same property. There being then separate interests, there will be necessarily three claimants of property under three judicial sales. Suits and conflicts between the owners of the various judgments if they purchased, and if others purchased between innocent parties, will ensue, and no one will know what he is buying and each one will dread a controversy as to the title. Such a state of things, so well calculated to do injustice and injury and impair confidence in the action of the Courts is to be avoided, if possible. It could not occur in a Court of Equity under the mode of proceeding prevailing there. Thus in the case of Palmer *vs.* the Earle of Carlisle, on an application by the owner of *one sixth part* of the money due on a mortgage, by bill to foreclosure a *sixth part* of the mortgage estate, the Vice Chancellor held "there can be no foreclosure or redemption unless the parties entitled to the mortgage money are before the Court." Palmer *vs.* Earle of Carlisle, 1 Simons and Stu., 423. 1 Brown, Ch. 368. Story's Eq. Pl. 201. 1 Daniel's Prac. 260, and this we consider as the settled rule of that Court.

Finley *vs.* Bank of U. S. was an application by a mortgagor to set aside a sale had under a decree at the instance of a party holding a subsequent mortgage. The Court say "it cannot be doubted that Coleman ought regularly to have been a party defendant, and that had the existence of his mortgage been known to the Court, no decree ought to have been pronounced in the case, until he was introduced into it." We do not think the decree erroneous because the prior mortgagee was not made a defendant, that fact not having appeared to the Court until the decree was completely executed.—11 Wheaton, 304—6 Cond., 321.

The first section of the law of mortgages itself contemplates the plaintiff to be owner of the entire interest, in saying that the "assignees, &c., may take the same remedies which any mortgagee can take for the foreclosure of any mortgage and *for the recovery of the money secured thereby.*"

The necessity of all parties in interest being before the Court is apparent, for reasons manifest in this very case. Justice cannot, in our opinion, be done without it. If new parties are to be made, the proceeding at law is unsuitable, there being no provision adequate to the object. The true and only remedy is in a Court of

31 Equity—which accommodates itself to every variety of interest—where the purchaser under the previous sale, who is now a party directly in interest, and which may yet be maintained as far as equity demands, the plaintiff under the first foreclosure and the holder of the last note may all be made parties. The conflicting rights and interests being adjusted and determined, the property may then be sold, with a fair prospect of finding a purchaser, and of the rightful holders of the mortgaged security getting paid to the extent of their interest.

In considering the present case, we have been struck with the difficulty of giving a valid judgment against the present defendant, owing to his position in the matter. By the first judgment, if entered as prescribed by the statute, he was forever barred and foreclosed, and all persons under him, from all right and equity of redemption of or in the said mortgaged property, and every part thereof, the purchaser getting his right, as well as that of the plaintiff in execution, and being substituted to the place of both. If right in this view, the defendant had no further interest, but the proper course was to go against the purchaser, as the proper party to the petition, according to the terms of the statute itself. The prayer is, "that the mortgagor, and all persons claiming, or to claim, by, through, or under him be foreclosed;" and by the 4th section, "personal service of notice, &c., shall be served upon the mortgagor, or *other person* having the equity of redemption." Duval, p. 40.

It has been insisted that this plaintiff has, through the assignment of the mortgage, the superior legal right. But the party having the prior judgment of foreclosure has, by intendment of law, an assignment also, for without it he could not properly have obtained judgment. The counsel for defendant has contested the position, that a parol assignment will carry the interest in the mortgage.—It is sufficient in the present case to decide, without considering this point, that the party claiming a judgment of foreclosure at law should be the owner of all the notes which the mortgage was given to secure, and without it is not entitled to judgment.

The judgment of the Court below will, therefore, be reversed and set aside, and the cause remanded, with instructions to dismiss the petition, without prejudice to the right of the party to file a bill in Chancery, as herein directed, so as to protect the interests of the various parties under the mortgage and the decree of foreclosure already had, as far as possible.

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32 JAMES LANIER AND BENJAMIN C. WEST, APPELLANTS, *vs.* DANIEL McCABE, APPELLEE.

Where a note is given in the name of a firm by one of the partners for the private debt of such partner, and known to be so by the person taking the note, the other partners are not bound by such note unless they have been previously consulted and consent to the transaction.

In such case it lies upon the creditor to show that his debtor had authority so to give him the joint security of the firm.

Where several persons formed an association, for the purpose of establishing and putting in operation a steam saw mill, one of the parties cannot issue notes in the name of the company, which shall bind the other members of the company, except the authority be given by their articles of association or otherwise. The partnership must be in a trade or concern to which the issuing or transfer of bills is necessary or usual, otherwise a copartner will not be liable for the act of his partner, unless he gave express authority.

Where a note is made by one stockholder of such association as treasurer or agent of the company, payable to another stockholder, and the latter endorses it over to his creditor in payment of an individual debt, it is in effect the making of a note by two of the members of the company, but does not vary the rule which requires that a note so given should, to bind the other members, be given with the express authority of the other members. And where the plaintiff relies upon a subsequent acknowledgment of liability by defendant such acknowledgment must be explicit and express.

APPEAL from Gadsden Circuit Court.

Daniel McCabe, in 1844, filed his bill in Equity in the late Gadsden Superior Court, against James Lanier, Thomas Hodgson, and Benjamin C. West, alleging that James Lanier, in 1844, became indebted to complainant, and being unable to otherwise extinguish his debt to complainant, transferred in payment a note dated 31st March, 1841, payable on 1st January, 1842, to defendant Lanier for the sum of $258, with interest from date, and signed by C. Harris, who describes himself as treasurer of the Quincy Steam Saw Mill Company. That at the date of said note defendants Lanier, Hodgson, and West, together with Cervantes Harris (since deceased,) who signed the note, were members of and constituted, so far as complainant was informed, the "Quincy Steam Saw Mill Company." That the note was executed in good faith by Harris as agent of the company, and upon valuable consideration passing from Lanier to *the said company*. That complainant had often demanded of the members of the company payment of the note, but that the same remains unpaid. The bill prays that defendants discover the names of the persons composing the company at the date of the note; whether Harris was not the agent of the company authorized to execute notes and contracts for the company; whether he was not in the habit of executing such notes with the knowledge of the company; whether similar notes or contracts had not been adopted by the company, and whether they ever repudiated his authority of public notice, and if so when; whether said Harris left the service of the company of his own accord, or whether he was dismissed for exceeding his authority by executing this or similar obligations; and if so, whether such acts constituted the only ground of dismissal; and whether it was so announced to said Harris or the public; and if to the public in what manner, and at what time. The bill also prays that the amount of the note and interest be decreed to constitute a debt against the Quincy Steam Saw Mill Company, and in default of payment thereof by the company, that it be decreed to constitute a joint and several debt against defendants as copartners, and concludes with a prayer for general relief, and for subpœnas, &c. 33

In November, 1844, West filed his answer, under oath, admitting that he is and was on 31 March, 1841, a member of the Quincy Steam Saw Mill Company, and that defendants Lanier and Hodgson, and Cervantes Harris (deceased,) were also members of said company. The answer states that he knows nothing of the consideration that passed from Lanier to the company for the note. That Cervantes Harris was employed by the company to stay at the saw mill and sell lumber and other articles, and to receive the money for the same, and to keep an account of the receipts and disbursements of the mill, but denies that Harris had authority to issue notes binding on the company. He denies having any knowledge that such was the practice of Harris until after the notes were signed and issued by Harris, and states that he immediately advised Harris that he was transcending his authority, to which Harris assented, and that he believes no other notes were afterwards issued.

West further states in his answer, that no public notice was given by the company relative to said notes, as the notes were all made to James Lanier, one of the partners, and not transferable by delivery or endorsement. That he never, to the best of his knowledge and belief, recognized any of the notes so issued; that Harris was not dismissed on account of issuing the notes, as the notes were then in 34
hands of Lanier, and considered as certificates merely that he had advanced such sums to the company.

He further states that prior to 1st January, 1841, he had advanced for the company in cash, $2177 10-100th, which exceeded the advances made by any other member. That Harris died insolvent; that defendant Hodgson is also dead and that he died insolvent and greatly indebted to the company. That Lanier is insolvent and that he (West,) is the only responsible party.

He also states that since the 1st January, 1841, he has advanced $3215 62-100th in payment of debts and expenses of the company, and that there are outstanding demands against the company to a large amount say $3000. He states that James Lanier, his co-defendant, is still interested in the recovery of the note, and has procured complainant to file the bill, well knowing that himself (Lanier) was greatly in arrears to defendant.

He insists that complainant is entitled to no greater relief than Lanier would be, and offers to account with Lanier and every other member of the company.

In November, 1845, Lanier filed his answer under oath, which states that in 1839, an incorporated company was formed, for the purpose of establishing and putting into operation a Steam Saw Mill, in the county of Gadsden. The stock was limited to $5000, and divided into shares of $50 each. That divers citizens of Gadsden together with respondent became owners, and formed the company whis has ever since been called the Quincy Steam saw mill company. That Hodgson, Harris, West and respondent were members of the company, on the 31 March, 1841, and for a long time afterwards; that at this period the company becoming embarrassed and some dissatisfaction existing among the members, it was determined to settle up the affairs of the company. That to that end Harris was authorized by the company, to collect the demands in favor of the company, to pay the debts, to audit and allow the claims against the company, and to give notes in behalf of the company for debts due by the company. That said Harris then became the active partner in the concern, and had the exclusive management of its affairs. That Harris in the settlement of the business, executed many notes similar to that held by complainant, and which so far as respondent knows and believes were always regarded by the members of the company as binding upon them. That respondent held large demands

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against the company (for the services of his wagon and teams, for hire of slaves, for money advanced and for goods sold,) beyond his share of the capital stock, which by agreement were submitted to Harris for allowance. That on 31 March, 1841, said company was found indebted to respondent about $4000, and that Harris executed and delivered to him sundry notes in liquidation of that sum, of which the note held by complainant is one. That a few months after the date of said note, and before the same was due, respondent transferred to complainant the note in question for valuable consideration. That Harris was authorized to sign the notes for the company, and no attempt to repudiate his authority, was made until after payments began to be demanded and suits to be instituted. That Harris was recognized as the active partner of the concern long after the notes were given, and until he voluntarily gave up the business. That no notice by the company, or any member thereof, was given to the public, repudiating the notes signed by Harris.

The death of the other defendant *Hodgson,* is not suggested by complainant but is stated in the answer of defendant West.

At the fall term, 1845, the complainant filed a general replication to the answers of West and Lanier, and at the November term, 1847, the cause was tried upon the bill and answers, before DOUGLAS, Chief Justice, who pronounced the following decree:

"This cause came on to be heard upon the bill and answers, and was fully argued by counsel, whereupon it is ordered, adjudged and decreed that the complainant do recover of the defendants the sum of three hundred and ninety-two dollars for principal and interest of the demand sued on; and it is further ordered, adjudged and decreed that the complainant do recover of the defendants his costs in this behalf expended and that he have execution for the same."

To reverse this decree the defendants now prosecute their appeal before this Court.

Carmack, for Appellants.

Dupont, for Appellee, contended:

I. That Cervantes Harris, who signed the note on behalf of the company, had authority to do so.

1st. Harris had the authority as an agent, *impliedly* and by *ratification.* It is a doctrine so fully recognized as to require the citation of no authority to support it, that whatever legal act a man does by another binds him as firmly as if performed by himself. It is also an admitted doctrine, that an *implied* authority in the agent is as binding upon the principal as if *expressed;* and that this *implication* may be gathered either from the relation of the parties, or from subsequent *ratification,* or even tacit *acquiescence* in the acts of the agent. Now, if we apply these principles to the case under consideration, it will be perceived that the authority of Harris as 'agent,' to sign the note sued upon, is amply established. It is true, that West, one of the defendants, denies that any express authority was ever given to Harris to sign notes on behalf of the company; it is true also, that the same defendant in his answer, *pretends* to deny that the act of the agent was known to the company, but the pretended denial is couched in such equivocal and contradictory terms as to amount to a full admission of the knowledge of the fact. The answer of this defendant does not fully negative the allegation in the bill—the allegation is, that the fact of signing by Harris, was known to the company—the answer is, that it was not known to this individual partner, and is a tacit admission of the allegation as it is set forth, and if this knowledge is brought home to any one member of the firm, and not *repudiated,* it will bind the company. But again, the answer even as to his individual and personal knowledge is so *equivocal* and contradictory, as to amount to a full admission of the allegation, for he only denies having any knowledge that such was the practice of said Harris, *until* after said notes were signed and issued by said Harris." Now it is very evident that he could have had no knowledge of the existence of the fact *before* it had actually occurred and the tacit admission that he knew it *after* it had occurred, and that he did not repudiate it, is a full admission of the allegation in the bill. The law upon this branch of the case is well established—it is laid down in the books as a salutary rule in relation to agencies, "That when the principal has been informed of what has been done, he must dissent and *give notice* in a reasonable time, or his assent will be presumed." Hammond's Prin. and Agent, 232. 12 John. Rep., 300, Cairnes and Lord *vs.* Bleecker. 2 Kent, Comm. 615-16. 1 John Cases, 110. Paley on Agency, 74. 2 Term Rep. 189 and notes.

But if the facts of the case do not establish an authority to sign the note as an agent on behalf of the company, then we assume,

2d. That his authority to bind the company was ample as a *copartner.* The fact that Harris was a copartner at the time that he executed the note, is fully admitted by the answers of both West and Lanier. The law upon this subject is well established, "that one partner has an implied authority to bind the firm by contracts relating to the partnership, whether such contracts be evidenced by bare agreements, oral or written, or by negotiable securities as bills of exchange and promissory note." Collier on Partnership, 212.—Ibid 220.

If it be objected that the note given by Harris did not "relate to the partnership;" then we contend that this is admitted in the answer of West, who says that "the note was considered as a mere *certificate* that said Lanier had advanced the sum therein mentioned," and consequently is not obnoxious to the anticipated objection.—Again, if it is objected upon this branch of the case, that McCabe, the assignee of the note, or alleged "certificate," is bound by the *notice* which Lanier, the assignor, must have possessed relative to the character and consideration of the note, then we invoke the principle of equity, that "where one of two innocent persons is to suffer that party shall suffer who by his own act and conduct has enabled the other to be imposed upon." Story on Agency, p. 56, Sec. 56. Paley on Agency, p. 201. 2 Barn. and Ald. p. 143, Baring *vs.* Corrie.

And consequently if it was the understanding of the company that a security which had been signed upon their behalf, purporting to be and possessing all the essential qualities of a "promissory note," should stand only in the character of a "mere certificate," it was their duty to have given public notice of this understanding; and upon failing to do so, the loss, if any, must be borne by the company, and McCabe be viewed in the light of an innocent holder *without notice,* and entitled to all the privileges of the same. But again, the limitation of the general authority of a partner, that the securities made by him on behalf of the firm, must relate to "transactions growing out of the partnership business," is to be taken with this qualification, 'that the holder of the paper has taken it with full knowledge that it *does not* relate to the business of the firm,' otherwise the firm will be responsible whether the security so taken relate to the partnership or not. 14 Wend. Reps. 133-140. 15 Wend. Reps. 364-66, Catskill Bank *vs.* Stall.

This doctrine results from the *implied authority* growing out of the relation of the parties as copartners.

II. The second objection made in the Court below to a recovery upon this note against the company was that "it is the individual note of Cervantes Harris."

In reply we allege, that the law establishes no particular mode of signing, and if it be apparent that the note is signed with the *intention* of binding the firm, it is sufficient. For examples of signing Vide Collier on Partnership 228 and 228, (a.)

III. The third objection taken at the hearing was "that the paper sued upon is not a valid '*promissory note,*' not containing any words of negotiability."

In reply we state the law to be that "it is not essential to the validity of a bill or note as an instrument, that it should contain any words of negotiability." Vide Chitty on Bills, 180.

IV. The fourth objection was, "that the assignee of the note took it from Lanier, the assignor, subject to all the 'equities' existing at the date of the assignment between Lanier and his copartners of the Quincy Steam Saw Mill Company." These "equities" are alleged to be the obligation of Lanier as a copartner to contribute to the settlement of the partnership debts. Now we contend that according to the *proofs* in the case, there are no partnership debts to be settled, and in order to determine this point it will be necessary to look into the *pleadings and proofs,* as presented by the Record. It will be remarked by the Court that there was a *general replication* filed to the separate answers of Lanier and West, which put the cause completely at issue, under the 66th rule, dispensing with a "rejoinder," or subpœna to rejoin, required by the English practice, and that without further *proofs* than what are furnished by the allegations and admissions contained in the bill and answers, respectively, the cause was brought to a hearing and argued accordingly. To the bill and answers *alone* therefore must we look for the proofs.

It is true that West, one of the defendants below, set forth in his answer, a large indebtedness due by the company; but this matter is alleged as a *substantive* matter of defence, or by way of *avoidance,* and is not *responsive* to any allegation contained in the bill, and in order to have made it available to him as a defence, it ought to have been supported by positive or *independent testimony.* This has not been done, and therefore so much of his answer as relates to the alleged indebtedness, must be rejected in the consideration of the case, *as not amounting to any evidence.* Vide Story's Eq. Sec. 1528-9. 2 John. Ch. Rep., 88-90, and note (a.) 7 Vesey, 587. 1 Wash. Rep., 224, Beckwith *vs.* Butler. 1 Munford

James Lanier and Benjamin C. West, Appellants, vs. D. McCabe, Appellee.

39 Rep., 373, Paynes *vs.* Coles. 2 Caines Cases in Error 66, Bush *vs.* Livingston, et al. 1 John. Rep., 580, Greene *vs.* Hart.

V. The fifth objection made in the court below to a recovery in this suit was, "that the complainant had his remedy in a court of law."

The English doctrine upon the point is too well understood by the court, to require any citation of authority to sustain it, to-wit: "that the assignee of a bond or other security not containing any words of negotiability, cannot sustain an action upon it *in his own name in a court of law* but has the *alternative* of either suing in a court of law, *in the name of the assignor,* or original obligee, or of resorting to a court of equity;" and in accordance with this doctrine have been the decisions in the State Courts. Vide 11 Ohio Reports 21, Townsend *vs.* Carpenter.

Such was the law in this state until the passage of the Judiciary act of 1828; the 34th section of which was evidently intended to operate only as a cumulative or *enlarging* statute, and not to *restrain* or otherwise limit or deprive the courts of equity of their original jurisdiction in matters of this kind. Upon the construction of statutes, Blackstone lays down the doctrine by way of illustration, that "if by a former law an offence be indictable at the quarter sessions and a later law makes the same offence indictable at the assizes; here the jurisdiction of the sessions is not taken away, but both have a concurrent jurisdiction, and the offender may be prosecuted at either, unless the new statute subjoins express *negative* words, as that the offence shall be indictable at the assizes, and not elsewhere." Vide 1 Black. Com. p. 90, (marginal.)

A case in point is found in our statute book, where a special statute gives to a mortgagee the right to foreclose his mortgage in the courts of common law, and yet it has never been contended or even conceived by any one, that the ordinary or original jurisdiction of the courts of equity in cases of *"foreclosure,"* is in the slightest degree *restrained* or *limited* by the operation of this statute.

The case of 'Williams *vs.* Judge' lately decided in the Supreme Court of the U. S. was cited in the court below, to support the point above relied upon; but it is a sufficient answer to that authority to remind the court that, that case *only* decides, that under the 34th section of the statute above referred to, a bond made by an individual and others, payable to himself, *may* be sued upon in the name of the assignee, *in a court of law;* but does not in the remotest manner
40 intimate the opinion that a suit in chancery might not also be maintained.

VI. A sixth objection was made by the appellant in the court below, to wit: "that the answer of Lanier (which fully admits all the material allegations of the bill) was no evidence against his co-defendants."

It is admitted as a *general rule* of evidence in courts of equity "that the answer of one defendant cannot be read against his co-defendant;" but to this general rule there are exceptions, and one of the exceptions is when the co-defendant is also a copartner.—Vide Gresley's Eq. Ev., 25; citing 1 Taunt. 104, Good *vs.* Braddick. 1 Russ. and Mylne, 191; Prichard *vs.* Draper. 8 Mod. 180, Hilliard *vs.* Phaley.

This point of objection is here referred to, not so much for the purpose of invoking the aid of Lanier's answer, as to set forth the doctrine with its proper limitations.

Baltzell, Justice, delivered the following:

This is a suit in chancery to recover upon a note purporting to be executed by Cervantes Harris as Treasurer of the Quincy Steam Saw Mill Company. The authority of Harris being denied an effort is made to sustain it by the position that he was also a member of the company and as such had a right to execute notes in the name of the firm—and secondly, that West the party charged as another member of the firm acquiesced in the notes executed, and neither repudiated nor rejected them. Conceding that Harris signed the note as a member of the firm the question arises as to its obligation upon the other members and particularly upon West, regarded now as the only responsible party. If the company had been indebted to McCabe, for articles purchased of him which were necessary for the concern and in their usual line of business we presume there would be no difficulty. But McCabe had no claim against the company. His claim was against Lanier for a debt unconnected with the company and he took this note by the statement in the bill "believing Lanier to be in failing circumstances and unable to make any better arrangement for the payment of the debt." It is too well settled to be now disputed that "where a note is given in the name of the firm by one of the partners for the private debt of such partner and known to be so by the person taking the note, the other partners are not bound by such note unless they have been previously consulted and consent to the transaction." 16 John., 38. 2 Caines, 246. 2 John., 41
300. 4 Ibid., 251. 1 Wend., 531. Chitty on Bills, 47.

In such case it lies upon the creditor to show that his debtor had authority so to give him the joint security of the firm: *prima facie* the transaction is fraudulent on the part of both debtor and creditor Bailey on Bills, 57. Green *vs.* Weakin, 2 Stark. 307. Williams *vs.* Walbridge, 3 Wend., 415.

We have considered the case most favorably to McCabe by treating this as a partnership concern having the right to issue bills, but are satisfied that no such authority exists as to this company except it be given by their articles of association or otherwise. The partnership must be in a trade or concern to which the issuing or transfer of bills is necessary or usual; for otherwise a copartner will not be liable for the acts of his partner unless he gave express authority. Therefore a director or shareholder in a mining or gas light company, or a partner in a farm, is not liable like a partner in trade for every bill issued without his authority. Chitty on Bills 39-46. Dickinson *vs.* Valpy, 10 B. & C. 128. 5 M. & R., 126. 4 John. 267.

Nor do we consider that there was a subsequent approbation, acknowledgment, or admission as made out in the bill and answer to fix the liability of West. There must be an acknowledgement to the plaintiff or some prior holder of the bill and it must be explicit and express. Chitty 46. So far we have treated the note as signed by Harris, without reference to the endorsement by Lanier. This does not in our opinion alter the case. There was a signing by one stockholder and an endorsement by another of a note passed by the latter for his individual use. This is in effect but the making of a note by two of the members of the company in a form different from an ordinary note signed by two, but does not vary the rule which requires that a note so given should be with the consent of those sought to be charged and if not it imposes no obligation upon them. Instances have been cited of a recovery upon bills and notes issued by a firm and passed by an individual member in good faith for his own use. This may well be where a company indebted, by the consent of all the members give a note or bill. Sometimes a recovery has been had on a bill or note of this kind fraudulently put in circulation but being in the hands of a *bona fide* holder. But there is nothing of the kind here either by proof or the admission of the parties, indeed the very contrary appears. McCabe however as
assignee of Lanier stands in his place to the extent of the note with 42
the company if anything shall be due to him on a settlement of their affairs and if he thinks proper his bill may be continued for an account and settlement with that view. If this however be unnecessary by the state of their affairs and is declined, then the bill of complaint should be dismissed.

It is therefore decreed and ordered that the decree of the Circuit Court be and the same is hereby reversed and set aside as to West and the cause remanded to that court with directions to allow the complainant, if he chooses, to have an account and settlement of the affairs of that Steam Saw Mill Company or to amend his bill to allege express ratification by West and for other proceedings consistent with equity, and if not, that his bill be dismissed with costs as to West.

Hopkins and Moody *vs.* Arthur Burney.

The common law did not give damages in replevin to a defendant, and the Stat. 7, Hen. 8, ch. 4. and 21 Hen. 8, ch. 19, only gave damages to avowants or other persons making connusance or justifying as bailiffs in replevin for rent or service, and have not been extended to defendants claiming property.

Under the plea of *"non cepit"* in replevin evidence of damage on the part of the defendant is not admissable in any case.

This plea admits the property of the thing taken to be in the plaintiff, and if the defendant means to dispute the question of property he must plead specially.

The property being by this plea admitted to belong to the plaintiff, it results as a matter of course, in the absence of all proof to the contrary, that the taking and carrying away of the property was *wrongful.*

The defendant cannot have a judgment of *retor no habendo* on a verdict in his favor upon an issue joined on a plea of *non cepit.*

Where the jury were sworn to try the *issue joined* and there was in fact no issue, and judgment upon the verdict was entered, the statute of jeofail does not cure the error and the judgment must be reversed.

Error to Duval Circuit Court, where this cause was tried before Judge Macrae.

Hopkins and Moody, vs. Arthur Burney.

43 *Fraser*, for Plaintiff in Error.

Burritt, for Defendant in Error.

DOUGLAS, Chief Justice, delivered the folowing:

This is an action of replevin instituted in the Circuit Court of Duval county by Benjamin Hopkins and Solomon Moody against Arthur Burney to recover a certain negro slave named Charles. The declaration contains but a single count to which a plea of *"non cepit modo et forma"* was put in, but was on the same day on which it was filed withdrawn by leave of the court for reasons stated in the record, which however are not material to the decision of this case. On the 17th day of November, 1847, the plaintiffs by their counsel moved the court for a continuance of the cause, and filed an affidavit in support of their motion, which was after argument had thereon overruled, and on the next day, a jury was empanelled and sworn "well and truly to try the issue joined between the parties," who found for the defendant and assessed his damages at one hundred and twenty dollars for the detention of the said negro Charles from the 25th day of November, 1846, until the 18th day of November 1847, and further that the defendant was entitled to a return of the said negro Charles, upon which verdict judgment was entered for the sum so found, with interest thereon until paid, and that said plaintiffs return to said defendant the said negro Charles, and that a writ of restitution be awarded, and that said plaintiffs pay to said defendant the costs of these proceedings taxed at twenty-one dollars thirty-two cents.

The following bills of exceptions are on file, which by agreement of the parties are to be taken and considered as a part of the record in this case, viz: "on the trial of the above entitled cause to prove the *issue joined* in the same, the plaintiff produced William Hickman as a witness, who being duly sworn, testified as follows, to-wit: That he knew the parties, knew the negro Charles in controversy in this suit. That he was deputy sheriff and served the replevin issued in this suit; that he found the negro Charles aforesaid at Arthur Burney's potatoe patch digging potatoes; that Burney then claimed said negro as his; that the potatoe patch where he found the negro was near said Burney's house; that he has known said negro four or five years, perhaps more; when he first knew him, he was in possession of James Piles' family; does not know whether he was
44 owned by James Piles, or his wife. He was owned by some of Piles' family."

The plaintiffs here rested their case, and the defendant offered to prove the damage of the detention of said slave to him under the said replevin. To this the plaintiffs objected, but the court overruled the objection, and the counsel for the plaintiffs excepted and prayed the court to seal this bill of exceptions, which was done accordingly.

The counsel for the plaintiffs then requested the court to charge the jury, that under the pleading and evidence in this cause the plaintiffs are entitled to recover. This the court refused to do, and on the contrary charged the jury, that it was incumbent on the plaintiffs to show by evidence affirmatively, that the property belonged to them, or that they had such right of possession as could not be lawfully divested by the defendant, they must prove that the slave was wrongfully taken. The court directed the jury that they find for the defendant in the absence of the proof required, and assess his damages for the detention of the property by the plaintiffs. To which charge of the court, and every part thereof, the plaintiffs' counsel excepted, and prayed the court to seal this bill of exceptions, which was done accordingly.

Whereupon the plaintiffs sued out their writ of error to the said Circuit Court, and have herein assigned the following error, to wit:

First. The court erred under the plea of *non cepit* in admitting evidence of damage on the part of the defendant.

Second. The court erred in refusing to charge the jury that under the pleadings and evidence in this cause, the plaintiffs are entitled to recover.

Third. The court erred in charging the jury that it was incumbent on the plaintiffs to show by evidence affirmatively, that the property belonging to them, or that they had such right of possession as could not be lawfully divested by the defendant.

Fourth. The court erred in charging the jury that the plaintiffs must prove that the slave was wrongfully taken.

Fifth. The court erred in charging the jury that they find for the defendant, in the absence of the proof required, and assess his damages for the detention of the property by the plaintiffs.

Sixth. The court erred in rendering a judgment for a return upon a verdict found upon an issue joined upon a plea of *non cepit.*

That the court erred as charged in the first error assigned there can be no doubt. The common law did not give damages in replev- 45
in to a defendant, but they were allowed to certain defendants in that action by the statutes of 7 Hen. 8, ch. 4, and 21 Hen. 8, ch. 19. But these statutes only gave damgaes to avowants, or other persons making conusance, or justifying as bailiffs in replevin for rent or services. Brittenton *vs.* Turker, 1 Brad. & Bing. 517. And they have not been extended to defendants claiming property, 2 Bac. Abr., Tit. costs (F) 53 Turner *vs.* Gallillie, Hard. 153. Hopewell *vs.* Price, 2 Harris & Gill, 276—277. Nor to defendants who deny the taking.

The plea of *non cepit* controverts all the material allegations in the declaration except that which affirms that the goods are the property of the plaintiff. It disputes the plaintiff's right to recover damages, whilst it admits his right to have the chattel. Ruckey, *et al. vs.* Handy, 2 Mills R., 446. And it would seem absurd to deny (as does the plea of *non cepit*) the taking, renounce all claim to the property and yet to ask damages for the detention. In the case of Phillips *vs.* Harris, 3 J. J. Marsh, 121, which was an action of replevin, and a plea of property interposed by the defendant on which issue was joined, the court said that a judgment for the plaintiff in replevin, is for damages and costs, and a judgment for the defendant is for a restoration of the property and costs. This last remark was of course applied to the issue on the plea of property. And see 5 Dane's Abr. of American law, 515, Sec. 2, where the same principle is recognized.

The second error assigned is that "the court erred in refusing to charge the jury, that under the pleadings and evidence in this cause plaintiffs are entitled to recover." The instructions asked embraced matter of fact as well as of law. It is often very difficult to separate the one from the other, and as there is some diversity of views amongst the members of this court, as to the propriety of the refusal of the court below to give this instruction to the jury, and a decision of the question is not necessary to our determination of the cause and its importance has been very much diminished by an act passed at the last session of our General Assembly, prohibiting the Judges of the Circuit Courts from charging juries upon the facts in any case, we forbear expressing any opinion upon it.

The third error is deemed to be well assigned. Under the plea of *non cepit* it was not incumbent on the plaintiffs to prove that the slave Charles belonged to them, and the court should have so charged the jury. The plea admits that fact, and puts in issue only the ta- 46
king (as alleged in the declaration,) and the detention. McKinley *vs.* McGregor, 3 Wharton 69, 369. Ruckey and others *vs.* Handy 2 Mills Rep., 449. Golusha *vs.* Butterfield, *et al.*, 2 Scammon Rep., 227. Seymour *vs.* Billings, 12 Wendell, 286. 1 Stark. Ev. 715. 2 Leigh's *Nisi Prius*, 1330. Bemus *vs.* Beekman, 3 Wendell, 667. Williams *vs.* Welsh, 5 Wendell, 290. In this last case the plea *cepit in alio loco*, was put in by the defendant, and the court below decided that the plaintiff must make out his case in the same manner as he would have been required to do, had the plea *non cepit* been interposed. The plaintiff proved the taking at the place charged in the declaration. The case was carried up, and the Supreme Court of New York held that this ruling was right. Chief Justice Savage in delivering the opinion of that court, said, "this plea does not admit the taking as the plaintiff has laid it; it traverses the *place* and in this action the *place* is material. The plea denies the taking at the *place*, but if the plea of *non cepit* alone be put in and it appear that the defendant had the goods in his *custody* in the place alleged in the declaration, the plaintiff will be entitled to a verdict on this plea." Leigh's *Nisi Prius*, 1330. Walter *vs.* Kersop, 2 Wilson 354, 355. But if the defendant proves the taking in another place, the plaintiff will (according to the rule laid down in 1 Strange, 507) be non suited. As however, our tenth general rule of practice page 12, pamphlet; rule 13 page 5 annexed to acts of the General Assembly of 1845, provides that the plaintiff shall in no case be compelled to submit to a non suit, the rule here would be different. The plaintiff would have a right to submit the proof to a jury but would not on such proof be entitled to a verdict. The plea of *non cepit*, admits the property of the thing taken to be in the plaintiffs in the action, and if the defendant means to dispute the question of property, he must plead it specially. He will not be allowed to dispute the ownership under an issue which only denies the taking. 2 Phil. Ev. 126. 1 Chitty's Pl., 159. Bemus vs. Beekman, 3 Wendell Rep., 673.

The fourth error is also well assigned. The slave in controversy (being admitted by the plea of *non cepit*, to be the property of the plaintiffs, it results as a matter of course, in the absence of all proof to the contrary,) that the taking and carrying away of said slave was wrongful. The taking and carrying away of a personal chattel of another person, to his damages is (*prima facie* at least) a tres-

47 pass. 1 Saund. on Pl. and Gv., 84, N. 2, 3. Toller on Executrs, 112. Cro. Jac., 362. 2 Bouvier's L. Dict. Title Trespass, 579.

And proof that the property was in possession of the defendant at the place charged in the declaration, is evidence of such taking.—Walton *vs.* Kersop, 2 Wilson, 354, 355. Croke Eliz., 869. 1 Saund. on Pl. and Gv., 347, N. 1. Bull N. P., 54. 7 Leigh's *Nisi Prius*, 1330. Amos *vs.* Sennate, 4 Scamm., 445. (In this last case it was held that a plea of *non cepit* in replevin for a wrongful detention presents an immaterial issue.)

The case of Moore and Moore *vs.* E. Moore, administrator of N. Moore, 4 Missouri Rep., 421, is also in point.

Under the plea of *non cepit* in replevin, the court will not permit the defendant to give evidence of special matter in justification.—McFarland *vs.* Baker, 1 Mass. Rep., 153. - Leigh's *Nisi Prius*, 1330. Dane's Abr. of Amer. Law, 530, sec. 5. 1 Saund. on Pl. and Gv., 387.

The fifth error assigned is a mere corrollary from the third and fourth, and they being well taken is consequently sustained.

The sixth. That the court erred in rendering judgment for the return upon a verdict found on an issue joined upon a plea of *non cepit* is well sustained by authority. This plea in replevin is said to be like a general issue in other actions. It may be so in some respects; but, if found for the defendant, if the jury say he did not take the goods, how can there be a judgment *"pro retorno habendo."* *Non cepit* is a plea in bar not involving the merits of the action, and if a defendant claims a return of the goods, he must add an avowry or cognizance inducing a return. *Per* Savage, Chief Justice, in the people at the relation of P. Tower *vs.* Niagara, C. P., 4 Wendell's Rep. 217. 1 Chitty's Pl., 490, 537. 1 Saund. on Pl. and Gv., 374, N. 1. 1 Strange, 507. Wilkinson on Replevin, 50. 6 Law Lib., 18.—The defendant cannot have a judgment of *retorno habendo* on a verdict in his favor upon an issue joined on a plea of *non cepit*, Hill *vs.* Stocking, 6 Hill's N. Y. Rep., 288. 2 Leigh's *Nisi Prius*, 1330. Seymour *vs.* Billings, 12 Wendell, 286. Carpenter *vs.* Stevens, Ibid. 589. Smith *vs.* Snyder, 15 Wendell, 671. McPherson *vs.* Melherich, 20 Wendell, 671. Prasser *vs.* Woodward, 21 Wendell, 205.

Hitherto we have considered this case as though the plea of *non cepit* was in, and issue regularly joined upon it, because from this state of the record it appears that the parties and the court at the
48 trial below acted under that impression, and because the counsel for plaintiffs in error insisted at the argument of the cause that it ought to be so considered. But that plea was withdrawn upon the same day in which it was filed and now constitutes no part of the pleadings in the case. It remains therefore to enquire what effect this should have upon our judgment.

The plea of *non cepit* having been withdrawn and no other plea put in, there was no issue for the jury to try, and where it does not appear that there was no issue presented to the jury a judgment on their verdict will be reversed. Oliver vs. Judge, 2 Stewart's Rep., 483. If the jury are empanelled to try the issue joined when in reality there is no issue joined, the judgment must be reversed and the verdict set aside. Wilkinson *vs.* Bennett, 3 Munf. Rep., 314. The want of a plea in replevin is not cured by a verdict. Lucky *vs.* McDermot, 5 Serg. and Rawle Reps. 331.

But it was suggested on behalf of the defendant in error that perhaps the statute of jeofails cures that defect. This question was directly presented in the case of Snyder *vs.* Burke and wife, 4 Rand. 161, and the court there held that the act of jeofail will not sustain a verdict and judgment in a case in which the record states that the jury were sworn to try the *issue* joined but does not show that any plea was filed by the defendant upon which issue could be joined, and Lucky *vs.* McDermot above cited is also an authority in point. This question however was fully considered at the last term of this court in the case of Miller and Croom, *vs.* F. Hoc, and it was then held that where the jury were sworn (as in this case) to try the *issue joined* and there was in fact *no issue*, the statute of jeofail did not cure the error, and judgment must be reversed. Florida Reports, 195. And upon mature reflection we see no reason to doubt the correctness of that opinion.

It would seem from the case of Wilkinson *vs.* Bennett, 3 Munf. 314, before referred to, that in Virginia a verdict in such a case will not cure the error under the statute of jeofails, although it may be against the party who failed to meet by a negative on his side, affirmative matter pleaded on the other side.

It was insisted upon the argument of this cause by the counsel for the defendant in error, that the affidavit above mentioned, filed by the plaintiffs in support of their motion for a continuance, show that the property in the slave Charles is not in the plaintiffs in error in their individual capacity and that if they have any interest in or right to him, it is not personally but as trustees, and that therefore 49 they cannot under any circumstances recover in this suit. Upon this subject it is sufficient to observe that this affidavit is not before the court; it is no part of the record and ought not to have been put into it. There is nothing to show that it was offered in evidence to the jury but if it had been thus offered, still it would constitute no part of the record unless brought into it by a bill of exceptions.

Upon a full review of this case we are constrained to reverse the judgment and remand the cause to the court below for further proceedings not inconsistent with this opinion.

Per totam curiam.

CHARLES BROWARD AND WILLIAM EUBANKS *vs.* MARIA DOGGETT, EXECUTRIX OF JOHN L. DOGGETT.

In an action of assumpsit where no damages are stated in the declaration, the defect is cured by verdict and judgment, especially when sufficient damages are stated in the writ.

Where, in an action by the executrix to recover for professional services rendered by her testator, as general attorney of an estate of which defendants were the representatives, after the testimony of several witnesses had been received, going to establish that plaintiff's testator had for several years acted at the instance of defendants as attorney of the estate, and placing estimates upon these services—it was testified by a witness for defendants, that the plaintiff had admitted that her testator was employed to collect money due to the estate represented by defendants on a considerable number of notes which were placed in his hands, and that one of the defendants agreed to give him ten per cent. on all moneys collected. Held, that it should have been left to the jury to determine whether such agreement did not embrace all the notes which plaintiff's testator had in his possession belonging to the estate, whether collected through means of suit or otherwise.

Where in such case the defendants gave in evidence two notes of the plaintiff's testator, given for negro hire, payable to defendants as executors of the estate for which the professional services were rendered, and there was a receipt endorsed on each of the notes, one of the receipts being in the hand writing of plaintiff's testator, the receipts created a presumption of payment on account of the professional services of the plaintiff's testator, rendered for the benefit of the estate of which the defendants are the representatives.

The presumption is, that a debtor will pay his debt through an indebtedness of his 50 **creditor in preference to making a payment in cash.**

Error to Duval Circuit Court.

This was an action of assumpsit by defendant in error, to recover of plaintiffs in error, for professional services alleged to have been rendered to them by John L. Doggett (the plaintiff's testator,) as an attorney at law. The declaration contained a count for work and labor, and two special counts (*indebitatus* and *quantum meruit*) for professional services by the said John L. Doggett, "in prosecuting and defending divers causes, suits, and business for the defendants, executors of Stephen J. Eubanks, deceased, and for fees due, and of right payable to the said John L. Doggett, in respect thereof; and also for other work and labor, care, diligence and attendance of the said John L. Doggett in his lifetime, in and about the drawing, copying and engrossing of divers conveyances, deeds and writings for the said defendants at their special instance and request. And also for divers journeys and other attendances by the said John L. Doggett in his lifetime, before then made, performed and given in and about the said business and other business of the said defendants, and at their special instance and request.' The amount of damages laid in the declaration, was left in blank.

The defendants appeared and pleaded separately.

The defendant, Charles Broward, pleaded *non assumpsit*, and two special pleas. Issue was joined on the plea of *non assumpsit* and demurrers were filed to the special pleas. The demurrers were sustained, but as no error was assigned by the defendants on that account a further notice of these pleas is unnecessary. The defendant Eubanks also pleaded *non assumpsit* and issue was joined thereon.

The cause was tried at the November Term, 1847, Judge Macrae presiding.

On the trial the plaintiff in the court below introduced Isaiah D. Hart as a witness, who testified, "That Judge Doggett was, as he supposed, general attorney for the defendants as executors of Stephen J. Eubanks, deceased. That he supposed so from the fact of having seen Mr. Broward and Judge Doggett frequently together in the clerk's office, attending to the business of the estate. Knows of no other attorney employed by defendants. Doggett was Judge of the County Court, and defendants frequently had business with

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51 Doggett at his office and at the Clerk's office. Broward was the active executor. Knows of Doggett being generally employed by defendants. Saw them frequently doing business in the Probate and Clerk's office. Does not recollect to have seen Mr. Eubanks the defendant, with Judge Doggett. Broward was the active executor, and seemed to attend to all the business. Saw Doggett frequently with him transacting the business of the estate, and saw him attending to defendants business in court, and knew that they had no other attorney. Would conclude that they employed him as their attorney for the same reasons that I would conclude that they employed Mr. Fraser."

William Hickman, a witness for plaintiff, also testified and said that "he had frequently heard defendants speak of Doggett doing business for them. Of Doggett bringing suits for them. Eubanks died in 1837, he believes. Knows the defendants, and knew Doggett well."

Henry D. Holland testified that he hired some negroes of the estate. In dispute about the hire, Charles Broward referred witness to Judge Doggett as their lawyer. Doggett died in February 1844.'

Robert Robinson, also testified that he had hired some negroes from the defendants as executors of Eubanks. That there arose a controversy about the wages and defendants referred witness to Judge Doggett. This was in 1841.

Wm. F. Crabtree also testified as a witness and said that he had a claim against the estate of Eubanks and called on the executors to pay it—they said they had no money but referred witness to Doggett as their attorney and collector who might have made collections and would in that event pay him—this was seven or eight years ago. Witness also says he is Judge of Probates of Duval county and that from his knowledge of the estate and its amount and its transactions he should think these services, worth $500 per annum in the same. Does not know precisely what service Doggett rendered. Heard defendants say Doggett was their general attorney. Doggett served about four years and until his death."

Plaintiffs then read in evidence a receipt of defendants to plaintiff given under a schedule of notes or claims. Receipt as follows:—

[Schedule.] "Received, Jacksonville, February 22, 1844, from the hands of Maria Doggett, executrix of the estate of John L. Doggett
52 deceased, the above papers and notes, which were given in the hands of John L. Doggett attorney at law for collection, with the exception of those marked not found.

WM. EUBANKS, }
CHAS. BROWARD, } *Executors.*

James W. Bryant, another witness, testified that Doggett conducted the business of defendants in court, and was their general attorney; that he had a knowledge of the estate, and from his knowledge of the estate and its business in court and elsewhere, including advice, &c., thinks Doggett's services worth at least three hundred dollars per annum; indeed, thinks his services, exclusive of matters in court, were worth that sum; thinks Mr. Burritt would have charged $600; but Doggett's services were worth less, regarding his business and professional capacities. The witness having examined the papers in five different cases in Duval Circuit Court, in which Doggett was attorney for the executors of Eubanks, said that the fees for prosecuting four of these cases to judgment should be $20 each, and for the other case pending when Doggett died $10.

It was then proved that the letters testamentary granted to defendants were dated 13th April, 1847.

Philip Fraser, a witness for defendants, was then sworn, and testified—that, as attorney of defendants, he had several interviews with the plaintiff in relation to the claim which she, as executrix of John L. Doggett, preferred against the defendants, as executors of Stephen J. Eubanks, deceased, for services alleged to have been rendered to them as attorney in the business of Eubanks' estate. That in those interviews she told the witness that Judge Doggett was employed to collect money due the estate on a considerable number of notes which were deposited in Judge Doggett's hands, and that said Broward agreed to give Doggett ten per cent. on all moneys collected, for his services—the plaintiff claimed four or five hundred dollars as her due. She claimed a sum sufficient to balance the judgments of defendants against her, and said that Judge Doggett had a great deal of trouble with the business of Eubanks' estate—that he had been the executors' attorney in all their business, and she thought enough was due him for his services to balance the said judgment—that witness, as defendants' attorney, offered to compromise by paying her one hundred and thirty-five dollars. Witness also stated that there were but four or five cases prosecuted to judgment in favor of defendants by said Doggett, as their attorney— 53
that witness had been the attorney of defendants since Doggett's death, and was familiar with business of the estate of Eubanks—that he would have done all that was done by Doggett in the business of the estate, so far as he had been able to discover from the papers and business in court, for one hundred and fifty dollars, and thinks that a high compensation.

James McRory sworn as a witness for defendants says. He knows the parties, has known Broward eight years. In January 1840 was at the hiring of slaves of Eubank's estate. Judge Doggett cried the hiring. Witness was clerk of the executors from January 1841, to the time of the division of the estate. Doggett was not the general attorney of the executors employed to manage the affairs of the whole estate. The executors consulted him also as Judge of the County Court relative to their duty. When he performed any extra services such as hiring the negroes, he was paid for it at the time. Broward was forward in transacting the business of the estate, and Eubanks concurred in his acts and undertakings as joint executor and witness considered that they acted jointly in the executorship.

Witness was Clerk generally. Doggett approved bonds as Judge of Probate. The executors were generally together when with Doggett, and held the estate indifferently between them. No other counsel was employed by them than Doggett up to the time of the latter's death. Knows of no advice given by Doggett as Judge of the County Court except as to the bonds for hires. Witness was perfectly conversant with the business of the estate, and if Judge Doggett had been employed or retained generally *in all business* of the estate, would have known it.

The defendants also offered in evidence two promissory notes made by Doggett jointly and severally, with Charles Merrick as his security payable to the executors of the estate of Stephen J. Eubanks, the first for the sum of $225, dated 1st January, 1840, and payable 1st January, 1841, and the other for $145, dated 4th January, 1841, and payable 1st January, 1842.

On the back of the first note was endorsement as follows:

"Received January 4th, 1841, ten dollars on account of the within note. CHARLES BROWARD, Executor."

On the other note was endorsement as follows:

"Received on the within note seventy dollars.
April 2, 1842. CHARLES BROWARD, Executor."

It was proved that the body of the last mentioned endorsement 54
was in the handwriting of John L. Doggett. It was also admitted that the notes were given for negro hire by Doggett as principal and Merrick as security. Also that these notes had been sued and prosecuted to judgment against the Executrix of Doggett; that execution had been issued and property sold, but that said judgment was still unsatisfied as to a considerable balance.

It was further admitted that the account for professional services now sued on had been filed as a set off in the suit on these notes, but owing to the pleadings was not availed of but was in some way withdrawn and that counsel waived all objections on that account.

The testimony was here closed and the counsel for defendants asked the court to instruct the jury "that, as there was a special contract between John L. Doggett and the defendants respecting the subject matter of this suit, the plaintiff cannot resort to an implied one"—which instruction the court refused and in substance charged the jury "that to the mind of the court the evidence does not show an express contract, and that no express contract is proved except as to the rate of compensation to Doggett for collections, viz: ten per cent."

The defendants counsel then asked the court to instruct the jury "that the endorsement upon the last named note in the handwriting of Doggett is evidence of an account stated between the said Doggett and defendants at the date thereof." Which instruction the court refused and in substance charged the jury "that the said notes and the said endorsements were not of themselves evidence of a settlement or account stated between the parties thereto as to all matters of account between them, but that the jury might consider them in connection with the other testimony, if any there was, tending to show that there had been such a settlement or account stated as that contended for. That it was most probable, so far as the court was capable of judging of the evidence, that these notes were given and were to be accounted for, separately, with a view to a more precise and careful administration of the estate, and to disconnect them from private individual transactions of the Executors with Doggett. That the jury need not consider the same, in making up their verdict, in any other point of view."

The defendants excepted to the opinions of the court. The jury returned a verdict for the plaintiff for $500 10-100 and judgment was entered thereon on the 22d Nov., 1847.

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55 To reverse this judgment the defendants prosecute their writ of error in this Court and assign for errors that no damages are laid in the declaration and that the Court erred in refusing the instructions prayed and in giving the instructions given.

Fraser, for Plaintiff in Error.

I.—1st. No damages are laid in the declaration. The Court erred in entering up judgment on a verdict rendered upon so defective a declaration.

Where two declarations were sent up to the Supreme Court, in one of which a blank was left for damages, and it did not appear upon the record that leave had been granted to file a second declaration, it was held that the Court might presume that the cause was tried on the perfect declaration, and that leave had been given to file the second. 1 Wharton's Dig., 613, 614. Pedan *vs.* Hopkins, 13 Serg. & R., 45.

2d. "In actions sounding merely in damages, it is an established rule that the plaintiff can recover no more than the amount laid in the declaration." 1 Wharton's Dig., 588. Gratz *vs.* Phillips, 5 Binney, 564. Ferry *vs.* Stone, 2 Dall. 184. S. C., 1 Yeates, 186. H. Blackstone's Rep., 643. Kennell's Forms, 11—(n. 1)—viz:

"A sum sufficient to cover the plaintiff's demand, with interest (if recoverable) to the time when it is likely that final judgment may be obtained, should be here inserted, as he cannot recover grater damages in assumpsit than those laid in the declaration, and if judgment be entered for more, it is error." Chearly *vs.* Morris, 2 Blac. Rep. 1300.

"Though where the jury give greater damages, the objection may be got rid of, by entering a *"remittitur"* of the surplus *before judgment,* or the plaintiff may amend his declaration, and have a new trial, if the amount of the excess should render it advisable." 2d Tidd 896, 806, 652-'3.

3d. "The jury cannot give more damages than are laid in the *end* of the declaration." 1 Chitty's Pleading, 372. Fitz. Abr. tit. Damages, 7-13-16. Yelv., 45-70. Cro. Jac. 297. 1 Bulst., 49.

II.—1st. It is a rule that where there is an express contract, the plaintiff cannot resort to an implied one. 1 Chitty's Pleading, 372. 2 B. & P., 118. 3 Esp. Rep., 213. 1 N. R. 273. 2 Marsh,
56 273. And if there were no privity between the parties, independently of the special contract, the common counts would be of no avail. 3 Maule & Sel., 173. 3 Camp., 101. Chitty on Bills, 7th Ed., 364. 2 Phillips Ev. 108-9. Livingsdale *vs.* Livingston, 10 John. R., 37. Raymond, *et al. vs.* Bernard, 12 John. R., 274. Witt & Green *vs.* Ogden, 13 John R., 56. Jennings *vs.* Campbell, Id., 94. 2d Starkie Ev., 78, 1 N. R., 104.

III.—1st. "A promissory note given to the plaintiff by the defendant is evidence of an account stated." 2d Starkie's Ev. 75.

2nd. "A promissory note is *prima facie* evidence of money lent by the payee to the maker, or of a balance due from the maker to the payee upon an account stated." 2d Starkie's Ev., 182. Storey *vs.* Atkins, 2 Str., 719. B. N. P., 136-7. Harris *vs.* Huntback, 1 Burr., 373.

3d. A receipt upon a bill is *prima facie* evidence of payment by the acceptor. 2d Starkie's Ev., 184. Peake's C., 26. Peake's L. E., 221. 2 Camp, 439.

Long & Walker, for Defendant in Error:

BALTZELL, Justice:

The Court below erred, we think, in the instructions given to the jury in this case. According to the admission of plaintiff, her testator was employed to collect money due the estate *"on a considerable number of notes,"* which were deposited in his hands. Broward, one of the defendants, agreed to give the testator Doggett "ten per cent. on all money collected." Now, it is obvious that this agreement extended as well to the notes deposited as to the compensation, yet the Court instructed the jury "that there was no express contract proved, except as to the rate of compensation to Doggett for collections, to wit, ten per cent." It should, in our opinion, have been left to the jury, whether this agreement for ten per cent. did not embrace all the notes which Doggett had in his possession belonging to the estate, whether collected through means of suit or otherwise."

The second instruction is as to the effect of the notes and receipts. In reference to these, the Court say, "they were not of themselves evidence of a settlement or account stated between them, but the jury might consider them in connection with other testimony tending to show that there had been such settlement or account; that it was most probable, so far as the court was capable of judging of the 57
evidence, that these notes were given to be accounted for separately, with a view to a more precise and careful administration of the estate, and to distinguish it from the private and individual transactions of the executors with Doggett, and that the jury need not consider it in any other point of view.

The effect of this would seem to be to destroy the weight of both the notes and the receipts. Now, we know no grounds upon which such a course may be justified. They were both in evidence and a part of defendants' case, who were entitled to the benefit of them as far as they tended to prove a fact, or conduce in any degree to thir defence. It has been insisted here, that the notes were evidence of an account stated. Without enquiring into the correctness of this position in general, it is sufficient to say, that by the admission of the parties, they were given for the hire of negroes by Doggett, so that presumption as to the cause of their execution may not be indulged. The receipts present greater difficulty. They are evidence of an acknowledgement of payment of the sums specified, and have probably had this effect already in the case in which judgment has been rendered against the estate of Doggett. Whether a jury could infer that the receipts were evidence of payments on account of those services rendered by Doggett to the estate, for which payment is now claimed by his executrix, is of more diffcult solution. The presumption is, that a debtor will pay his debt, through an indebtedness of his creditor, in preference to making a payment in cash. This is the usual and ordinary course of business, and we, therefore, incline to the opinion, that defendants were entitled to the benefit of this presumption, however slight, leaving it to be rebutted or explained by other testimony. In denying this weight to the receipt and notes, and in excluding them from the jury, as was virtually done by the instruction given, we think also the court erred.

We do not think the objection to the want of damages at the conclusion of the declaration is available, after verdict and judgment, especially, where there is sufficient in the writ, as in this case, to cure the defect.

The judgment will be reversed, and the verdict set aside, and the cause remanded for further proceedings, not inconsistent with this opinion.

DARIUS WILLIAMS AND JOHN A. CRAIG, *vs.* JOHN C. MCGEHEE, 58
ADMINISTRATOR OF JOHN MILLER.

The tendency of the present age is to allow objections to be taken rather to the credibility than to the competency of a witness, and competency is always presumed until the contrary is established.

Where a witness had vertally assumed the payment of the expenses of a suit for the benefit of the plaintiff, so as to create a mere honorary or moral obligation on his part to comply, he is not rendered incompetent to testify as a witness for the plaintiff.

Where money has been overpaid by an agent, or paid by mistake, he is a competent witness for his principal in an action to recover it back.

No man can, by the voluntary payment of the debt of another, make himself that man's creditor, and recover from him the amount of the debt so paid.

ERROR to the Jefferson Circuit Court.

This case was tried at the Circuit before Judge BALTZELL.—The facts of the case are fully set forth in the opinion of the court, delivered by the Chief Justice.

McCants, for Plaintiff in Error.

1. The whole record is before the court. 6 Har. & Johns. 81.

2. Wm. C. Miller was incompetent from his interest in the event of this cause. He was interested, because he had engaged to pay the cost, and the plaintiff had refused to conduct the suit; because the plaintiff's success would gain him a credit on reimbursement—the plaintiff's failure would cause him to loose the one or the other.—Stewart *vs.* Kip., 5 J. R., 256. 5 Hill's N. Y. R., 202. Greenleaf's Ev., 458. Story on Agency, 364-'5-'6-'7. Paley on Agency, 108. Starkie on Ev., 1731—note. 3 Hill, N. Y. R., 580. 1 Phillips, 61-'3. 2 Ib., 110-'17.

3. The judgment below was the consequence of William C. Miller's testimony, because no other testimony sustains the plaintiff's action for money paid by witness to defendants for John and Elizabeth Miller.

4. If we admit the testimony of William C. Miller, it proves that the witness' own money, not the plaintiff's, was paid to defendants, and in a sum different from the accounts of John and Elizabeth

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59 Miller. But plaintiff must show that it was his money that was paid. Archbold's N. P., 186.

5. Wm. C. Miller's testimony, if admitted, was overbalanced by the testimony of Pettus, the entry of Rouquie, the pass book, the conduct of John Miller in paying the account of Elizabeth Miller, after being informed of the pretended payment by Wm. C. Miller, and by the inconsistency of Miller's testimony with the circumstances arising in the case, and his improbable explanation of the loss of the accounts and receipts. 4 Washington, C. C. R., 123.

Hagner, for Defendant in Error:

The questions which present themselves on this record all arise upon the point of competency of witness William C. Miller. The Court below overruled the objection made, and allowed his testimony to go before the jury.

Let us establish the general principles on which the Courts at the present day proceed. Old cases stood on subtle grounds, 1 Phillips Evid. 46. Glenn *vs.* VanKapff, 2 Gill & Johnson 132.

The tendency of the present age is to allow objections to be taken rather to credibility than to competency and *competency is presumed* until *the contrary is established;* in cases of doubt witness is always received. 2 Stephens' *Nisi Prius* 1727.

Interest of witness to exclude must be *real,* not apprehended.—1 Greenleaf on Evid. 455-6.

The obligation of honor, or apprehension of moral obligation is not such *real* interest as will exclude. 1 Campbell Rep. 144. 10 New Hamp. 88. 1 Turner & Russell, 366. 4 Wendell 292. 9 John. Rep. 219. 3 Gill & John. 282.

The reason why such obligation of honor shall not exclude is very forcibly given by Phillips Evid. 54.

Because if sense of honorary obligation be powerful enough to cause the witness to pay where not legally bound, so will it *a fortiori* make him speak the truth *under oath.*

But next it is alleged that William C. Miller, as agent, is liable to a civil action at the suit of the representative of his princpal, and that therefore he was interested to protect himself.

The starting this objection brings to view the fact that William C. Miller as the agent who transacted the business is, *ex necessitate rei,* competent. Greenleaf on Evid. p. 459, also declared in case cited by the other side, 5 Johnson's Rep. 236.

60 But neither John Miller nor his representative could have sued said *William* for alleged breach of duty in not paying Darius Williams & Company, because by this very action they exculpate the witness and allege that he did fulfil his duty.

But even were he liable to a civil action such liability will not exclude, 1 Hall's Law Journal, 230. 1 Gill & Johnson's Rep. 366.

The cases from 3 Hill's Rep. 379, and 5 Johnson 256, cited by the other side, are clearly distinguishable from the case at bar.—That from 5 Hill 202, has no sort of bearing, for the witness here has no lien on the fund, he can have none in any event.

I will now undertake to show that William C. Miller was plainly swearing *against his interest.* Now by the testimony of Rutgers and the check on the bank, it is plain *prima facie,* that William C. Miller paid his own money to D. Williams & Company. Williams & Company, though called upon *failed to show any transaction* they ever had *with William C. Miller.* Is it not plain then that he could have sued them and recovered this money *as his own,* paid *without* consideration? Yet this very witness swears he paid it on account of his brother, and transfers to that estate the benefit, if recovery is had.

Was it not the duty of D. Williams & Company to have accounted for the possession of the check of William C. Miller, and to have shown on what account they received the money? Yet they do not do so. Their own books are produced in evidence, yet D. Williams trumps up a cock and bull story, attempting to show that the money they got credit for was sent by private hand Can any man doubt that this check took $550 from William C. Miller's credit in bank, and transferred it to D. Williams & Company? Surely no man can be so blind as not to see that. If then D. Williams & Company did send money by Dr. Pettus, it was different money from this, and if they have not credit for it in bank, it only proves their right of action against the bank.

Finally, I contend, that John Miller, in his lifetime, and John C. McGehee his administrator, since his death, have had *such a vested* interest in William C. Miller's testimony, as *utterly prevented him* from *rendering himself incompetent by subsequent interest.* Budd's testimony shows that the imputed interest did not arise until after *revival* of suit in name of administrator of John Miller.

Now the authorities on this head are plain and abundant from the oldest times, and yet recognized in these days. Skinner Rep. 586. 61
1 Greenleaf on Evid. 204-462. Cowper 736. 3 D. & E. 27.—3 Levinz 152. 3 Connecticut 267. 2 Dev. 187.

See also 1 Cooke's Rep. 115.

McCants, in reply:

It is contended that plaintiff has a vested interest in the testimony of the witness Miller. But is is sufficient to reply that plaintiff himself disavows this interest by refusing to conduct the suit.

It is also contended that the liability to civil suit does not exonerate witness. But witness does not claim exemption. On the contrary, he labors anxiously to press his testimony into the cause. The cases cited on this point belong to a different rule of evidence from the one under consideration. When witness says his answer would criminate him he shall not be *compelled* to answer.

It is also contended that an honorary obligation does not disqualify.

But in this case witness engaged to pay the costs, for without it the suit would have fallen to the ground. The case of Gilpin *vs.* Vincent is a fair instance of honorary liability, and is very different from the present one.

The defendants in error rely also on the customs of banks and merchants in relation to interest of cash and checks.

But defendants have fully accounted for their credit of $550, on the 13th of March, 1848, in the bank, by the testimony of Pettus, the entry of Rouquie dated 12th March, 1838, by the pass book crediting cash, &c. Besides the general customs of banks and merchants are different, and in this case afford no ground of inference.

The case of Elizabeth Miller is deemed to stand on the same grounds, and the same views are offered in that case. Besides plaintiff cannot contradict his own witness as is attempted in this case.

Douglas, Chief Justice, delivered the following opinion:

This is an action of assumpsit instituted by John Miller in his lifetime against Darius Williams and John A. Craig to recover a sum of money alleged to have been overpaid to them and money paid them by mistake. The declaration contains counts for work and labor and for an account stated and common money counts.

Plea non assumpsit, upon which issue was joined and upon the 62
trial of that issue there was a verdict and judgment for the plaintiff (in whose name the suit had been revived by *scire facias* before the trial) for the sum of $574 17. And the plaintiffs in error now seek to reverse the judgment upon the following grounds which they have assigned as error to wit: That the testimony of William C. Miller, a witness examined in behalf of the plaintiff in the action below, was not admissible by the law of the land, for that the said witness was interested in the said cause and the event thereof, as appears by the record and proceedings of said cause, and by the testimony made a part of said record. And also there is error in this, that the judgment aforesaid by the record aforesaid appears to have been given for the said John C. McGehee, Administrator of John Miller, against Darius Williams and John A. Craig Merchants, &c., whereas by the laws of the land the said judgment ought to have been given for the said Darius Williams and John A. Craig against the said John C. McGehee, Administrator as aforesaid.

The whole question depends upon the fact whether the record shows that the said William C. Miller was so situated that he would either gain or loose by the direct legal operation and effect of the judgment in this case, or that the record will be legal evidence for or against him in some other action. It must be a *certain, present, vested* interest, and not *remote* or *contingent.* If the interest is of a doubtful nature it goes to the credit of the witness and not to his competency. Being always presumed to be competent, the burden of proof is on the objecting party to sustain his exception to the competency, and if he fails satisfactorily to establish it, witness must be sworn. 1 Greenleaf's Ev. 458.

Having premised thus much, we proceed to examine the question presented, and to test it by the record.

The deposition of William C. Miller was taken by the plaintiff in the Court below and offered in evidence at the trial, when it was objected to by the Attorney for the defendant, but his objection was overruled and the deposition was permitted to go to the jury; to which the defendant excepted and the deposition is set out in a bill of exceptions which constitutes a part of the record in this case and proves in substance, that in the year 1838 he was agent of the said John Miller and also one Elizabeth Miller. That his power from John Miller was both by parol and in writing. That John Miller was the agent of Elizabeth Miller and being his (John Miller's) acknowledg-

63 ed agent, he (William C. Miller) acted for both and his agency was always admitted. That he settled accounts, made payments and performed like services for both John Miller and Elizabeth Miller.—That on the 12th day of March, 1838, he settled accounts for both John Miller and Elizabeth Miller with the defendants. That he on that day gave to Darius Williams a check for $550 on the Union Bank of Florida being the supposed amount of his account against John Miller and Elizabeth Miller. That he gave the check to Darius Williams in a room he occupied at Brown's Hotel in Tallahassee. That there was no one present but Darius Williams and himself. That when he gave the check to Darius Williams at Tallahassee he had not the two accounts with him, but had the amount (as well as the witness could recollect) on a list, and he proposed when witness next went to Monticello to have them made out and the surplus or deficiency of the check for the supposed amount settled at the same time. Shortly afterwards the two accounts were as well as he (witness) recollects receipted and on his (witness,) return to Tallahassee they were left with other papers and never afterwards could be found. That he witness never had the least business transaction with Darius Williams at any time on his own account. That he never sold a check to the defendant or any one else in his life. That some time after the date of the check his brother John Miller asked him why he had not paid Darius Williams and that he stated to his brother that he had. That his brother then said Darius Williams demanded payment of him for both of the accounts and he had settled them. That the witness afterwards called on Darius Williams knowing there was an error in the business and on reference to his cash book found the amount of the check properly debited, but no credits carried to accounts of John and Elizabeth Miller. On his cross examination he was asked the direct question "are you or not interested in the event of this suit," to which he answered I do not believe myself to be legally interested in the suit. Again he was asked "are you not responsible for costs, attorney's fees, or any of the expenses connected with these suits." To which he answered the suit was brought in my brother's name; since his death I understood that the Administrator of his estate had refused to become responsible for attorney's fees or any incidental expenses. I have therefore for the benefit of the estate of John Miller assumed the expenses, although I do not consider myself legally bound for them. The witness was shown the check and recognized it. It is as follows.

Tallahassee, March 13th, 1838.

64 $550. Cashier of the Union Bank of Florida pay to D. Williams & Co. or bearer Five Hundred and fifty dollars.

In pencil (at Cr. D. Williams & Co.) W. C. MILLER.

William Budd, a witness introduced by the plaintiff to explain the testimony of William C. Miller, testified that he was Clerk of the Superior Court of the Middle District of Florida for Jefferson county, at the time of the institution of this suit and at the death of the original plaintiff. That after the issuing of the *scire facias* to revive said suit William C. Miller the witness verbally stated that he would pay the expenses of the suit, meaning the costs of the court as witness understood, but said William C. Miller did not enter into any written agreement. There was ill feeling between said William C. Miller and the Administrator of John Miller, and said William C. Miller said he heard that said Administrator had refused to become responsible for the costs. But this was after the suit had been revived in the name of the administrator and after costs had been incurred. The plaintiff's attorneys without objection and with consent of defendant's attorney then stated as evidence before the court, that William C. Miller had entered into no engagement with them to pay atorney's fees or any other expenses and was not bound for any part. The deposition of Henry L. Rutgers was also offered by the plaintiff's counsel, which was read to the jury and proves in substance that he had known the parties for at least seven years; that he was paying and receiving teller of the Union Bank of Florida in the month of March, 1838. That Darius Williams & Co., had an account with that Bank before and after that date, that on the 13th day of March, 1838, Darius Williams & Co. deposited a check in bank to their credit for five hundred and fifty dollars. "Check D. Williams & Co., $550," in my own hand writing (said the witness) is the form of the entry. That on the same day a check of $550 was debited to the account of William C. Miller, and a similar amount was credited to the defendants. The entry in the Ledger is "W. C. Miller, March 13th, 1838, by cash $550" and in Walter Veitch's hand writing. Said Veitch is dead. The form of the entry in the cash book of the bank is "D. Williams & Co. 13th March, 1838, credited by $550," and on the same day W. C. Miller debited with $550 all in the same hand writing of Walter Veitch the book keeper of the Bank since deceased. There is no other of like amount of that date.

The plaintiff's counsel then gave in evidence the admission of the 65 defendant that John Miller's account of $332 23-100 was paid to said defendants on the 19th of February, 1838, said account was paid by John Miller in person.

The defendant by his counsel to sustain the issue on his part then offered Dr. John G. Pettus who deposed and said—that in the Spring of 1838 he carried from Monticello to Tallahassee a sum of money, it was $500 to be deposited in the Union Bank of Florida in favor of Darius Williams & Co. That said money was handed to him in Monticello by Darius Williams the defendant. That he left Monticello on one day and on the next he deposited said money in said Bank and then returned to Monticello on the same day of making said deposite. That he left Darius Wiliams in Monticello and on his return saw him still at Monticello; it was in the Spring; it was about March; he says he never carried down money but once for said Wiliams; it was about $500; it was not as late as May; the sum was $500.

Defendants counsel then offered William Budd who deposed and said that he knew Gabriel Rouquie—he was dead—he was a clerk for Darius Williams & Co. Knew his hand writing. Defendants counsel then showed said witness a book of accounts of said Darius Williams & Co. and an entry in the same thus "1838, March 12, Union Bank deposits sent by Dr. Pettus, $550." Witness stated it was the hand writing of the said Gabriel Rouquie. Witness further said he had been a merchant. It was not usual to make such entries of deposites of cash.

Defendants counsel then offered and read the deposition of Henry L. Rutgers in which he testified (in substance) that he was well acquainted with Walter Veitch during his life. He held the office of book keeper in the Union Bank of Florida. He is dead. That he (witness) is well acquainted with said Veitch's hand writing and that the entry in the annexed Bank Book marked A., of the 13th March, 1838, is in the hand writing of said Veitch. This entry is on page 9, and is as follows: "March 13th, 1838, cash $550." That the Bank Book referred to is the regular pass book of the defendants with the Union Bank. That the pass books are generally in the hands of the depositors. When a deposite is made if the book is handed to the Teller he makes the entry; if not, when the book is written up or balanced the book keeper makes the entry from the books of the bank. I do not think (said the witness) that the entries were always made on the pass book at the time of depositing, for on page five you will perceive that the entries ran thus: 66 April, May, March and April, 1837, which show conclusively that the entries were not always made in the pass book at the time of depositing but afterwards when the bank book was written up or balanced. The witness said further that there was no other entry on the books of the bank on the 13th March, 1838, to the credit of defendants.

The defendants then offered and read the entry in pass book A above referred to in said deposition thus "1838, March 13th, cash $550." The defendants counsel then offered the admission in relation to the two accounts referred to by William C. Miller in his deposition, one for $332 20-100 and the other $181.13. That the former was paid in February, 1838, and the latter in July of the same year. Here the evidence closed and we deem it proper to say that we have made this full statement of it, not so much because we deemed it necessary to a decision of the questions presented for our consideration as for the satisfaction of the parties and especially of the plaintiffs in error and their counsel who brought this case up and so zealously and ably argued it here, and because he assumed the position in argument though he has not assigned it as error: "If we admit the testimony of William C. Miller it proves that the witness' own money and not that of the plaintiff's was paid to the defendants, and in a sum different from the accounts of John and Elizabeth Miller, and that to enable the plaintiff to recover he must prove that it was his own money that was paid."

It seemed proper therefore that we should set out the evidence very much at length in order that by a comparison of the whole it might be seen whether that is the correct view of the matter or not; for notwiithstanding it might seem from the testimony of William C. Miller himself that the money paid was his own, yet that might be explained by other parts of the testimony and the money shown to be that of his principles (John and Elizabeth Miller.) And here we may be permitted to remark, "*en passant*," that if the money was his own, he shows himself in regard to it a most disinterested witness, as he comes to testify most strongly against his own interest, and it can hardly be supposed that if the money had been his own he would thus without objection have yielded all claims to it in favor of his brother's estate, and it is difficult too to account for the question by John Miller to the witness, "Why he had not paid Darius Williams," but upon the supposition that he (the witness) had funds of

Darius Williams and John A. Craig, vs. John C. McGehee, Administrator.

67 John Miller in his hands wherewith to pay his accounts due Williams. And if it had been otherwise, and William C. Miller paid his own money, it would have been quite natural that some explanation should have taken place between them on the subject when William C. Miller told his brother that he had paid the account of Williams against him. Had it been clearly and conclusively shown by undoubted and unrebutted proof that the money paid to the defendants was the money of the witness William C. Miller, it would perhaps have been our duty to reverse this judgment for that cause, although it was not assigned for error, for the rule of law upon this subject as stated by counsel for the plaintiff's in error, seems to be well sustained by authority. Moore vs. Pyrke, 11 East. Reps. 52. Archbold's *Nisi Prius*, 186. Bradshaw *vs.* Bradshaw, 11 Law Journal, 5.

The count for money paid cannot be maintained, (said Parke, J., Power *vs.* Butcher, 10 B. & C., 310,) without proving actual payment.

But it has not been thus shown; and in regard to this question, as well as of all others that arise out of the discrepancies and seeming contradictions in the testimony, it is sufficient to observe, that they were matters peculiarly proper for the consideration and decision of the jury to whom they were submitted, and whose verdict upon them should not be lightly disturbed by this court.

We proceed, therefore, to the errors assigned, or rather *the error.*

The only question presented by the assignment of errors for our consideration, to-wit: was the witness, William C. Miller, when he testified in the cause interested therein, or in the event thereof? being embraced in the first error assigned.

It is contended that the plaintiff had refused to conduct the suit and that in consequence thereof the witness had assumed the payment of the costs, but it does not appear that he had entered into any specific engagement with any one, or made any stipulation by which he was legally bound to pay them. There is no proof that he had spoken to any body on the subject except William Budd the Clerk of the court and he does not say that William C. Miller made any direct or express promise even to him, to pay them. His language is 'William C. Miller the witness stated verbally that he would pay the expenses of the suit meaning the costs of the court as he understood.' This does not import any specific engagement. If any such had been made with Mr. Budd it is presumable that he would have
68 understood the terms of it more definitely. Nor is there any evidence that the plaintiff had refused to conduct the suit, on the contrary the evidence appears to show pretty clearly that he was prosecuting it. Mr. Budd states that the suit had been revived and costs incurred before the statement was made by William C. Miller that he would pay the expenses and the record shows that he continued to prosecute it. The statement of the witness Miller to Mr. Budd seems therefore to have been made under a misapprehension of the facts in relation to that matter, and the attorneys for the plaintiff state expressly that he, William C. Miller, entered into no engagement with them to pay attorney's fees or *any other expenses,* and was not bound for any part. And it must be recollected that upon his cross examination he was expressly asked "are you not interested in the event of this suit," and that he answered "I do not believe myself to be legally interested in the suit." In reply to another question however he said "I have for the benefit of the estate of John Miller assumed the expenses although I do not consider myself legally bound for them."[2] He was evidently referring to what he had said in the hearing of Mr. Budd, for he states almost word for word what Mr. Budd testified that he had said upon that occasion. That he took the correct view of his legal rights so far as they are disclosed by the record in relation to this matter we have no doubt, and if any obligation rested upon him to pay, it was a mere honorary or moral one which did not render him incompetent, since the court can never know whether the obligation thus set up as a ground of incompetency has any real existence in the mind of the witness. Bent *vs.* Baker, 42 Law Lib. page, 99. 4 Sergent & Rawle, 226. Gilpin *vs.* Vincent, 9 John. 220. Moore *vs.* Hitchcock, 4 Wendell, 297. Such an obligation is in general of a nature so uncertain and variable, that it cannot safely be recognized in courts of justice as a motive for conduct, and besides where the sense of honor is so strong and binding as to influence a witness against his interest, it must be unnecessary to reject him, as the same principle which would induce him to pay the costs would oblige him in giving his evidence, to speak only the truth. 1 Phillip's Ev. 54.

The tendency of the present age, is to allow objections to be taken rather to the credibility than to the competency, and competency is always presumed until the contrary is established. 2 Stevens, Nisi Pr. 1727. The ends of justice are most effectually attained by a full and complete investigation of the subject in dispute, and unless the objection to the witness is strictly a legal objection he 69
will be admitted to give evidence. 1 Phillip's Ev. 54. It is not an objection to the competency of a witness that he has wishes or a strong bias on the subject matter of the suit, or that he expects some benefit from the result of the trial. 1 Phill. Ev. 47. Stewart *vs.* Kip., 5 John. Reps. 256. Such circumstances may influence his mind and affect his credibility, they are therefore open to observation and ought to be carefully weighed by the jury, who are to determine what dependence they can place upon his testimony, but they will not render him incompetent. Miles *vs.* O'Hara, 1 Sergeant and Rawle 32. Boulder *vs.* Herbert, 17 Sergeant & Rawle, 312.—Griswold *vs.* Ledwick, 1 Wendell 126. So far therefore as regards any liability to the payment of costs in this case arising from the supposed asumption of, or agreement by the witness, William C. Miller, to pay them, there is nothing to affect his competency.

But it is insisted by the attorney for the plaintiff in error on the argument of this cause that if William C. Miller had the money of his principal and paid it, a recovery in this case would entitle him to a credit, with his principal, but he was equally entitled in that case to the credit without such recovery. It was the payment of the money that entitled him to the credit and not the recovery.

It was also suggested that if he paid his own money a recovery in this suit would also entitle him to such credit, to which (if he paid it on the request of John Miller) the same answer may be given, but if he paid it voluntarily without such request he would not have any legal claim on John Miller or his estate for the amount, for one man cannot thus make another his debtor against his will or without his consent. Stokes *vs.* Lewis, 1 Term Rep. 20. 1 Saund. Reps. 264, n. Per Lord Kenyon, Exall *vs.* Partridge, 8 Term Reps., 310.—Cummings *vs.* Forrester, 1 Maule and Sel. 500. "No man can by a voluntary payment of the debt of another make himself that mans creditor and recover from him the amount of the debt so paid."—Lord Kenyon, Chief Justice, Child *vs.* Morley, 8 Term Rep., 613. Lightfoot *vs.* Creed, 8 Taunt. 268, (4 Eng. C. L. 100.)

But with respect to both these matters it is proper to remark that this transaction occurred in 1838 more than seven years before the deposition of the said Wiliam C. Miller above mentioned was taken, and that if he ever had any claim upon or right to a credit with the said John Miller, or if said John Miller had any claim on him on account of the money alleged by the witness, William C. Miller, to have been paid to the defendants in this case, such claims were barred 7
by the statute of limitation at the expiration of five years from the time when the payment was made, and consequently the interest of the witness at the time when his deposition was taken was not that certain, present, vested interest, which we have seen is necssary to render a witness incompetent, but had by lapse of time become *remote, contingent,* and of a doubtful nature—an interest which goes to the credit of the witness, and not to his competency. 1 Greenleaf's Evidence 458. Dudley *vs.* Balles, 24 Wendell's Reps., 357 to 370 (and authorities there cited,) Cutter *vs.* Rathburn, 3 Hill's N. Y. Reps. 577 to 281. Even if it were doubtful upon the cases say the Court in 24 Wendell 371, and in 3 Hill 581, we ought to decide in favor of the competency.

And besides if money has been overpaid by a servant or agent or paid by mistake, he is a competent witness for his principal in an action to recover it back. 1 Phillip's Ev. 129—130. Martin *vs.* Howell, 1 Strange 647. Baker *vs.* Macrae, 3 Camp. 144. United States Bank *vs.* Stearnes, 15 Wendell 314. Franklin Bank *vs.* Freeman, 16 Pick. 528, 529, 534. 2 John. Reps. 189. 1 John C. 408.

It is (said the Court in the case of Stafford Bank *vs.* Cornell, 1 N. Hamp. Rep., 192,) the constant practice to admit agents to be witnesses for their principals without a release although their evidence may tend to discharge themselves.

Again it has been contended that "Wm. C. Miller's testimony if admitted was overbalanced by the testimony of Pettus, the entry of Rouquie, the pass books, the evidence of John Miller in paying the account of Elizabeth Miller after being informed of the pretended payment of Wm. C. Miller, and by the inconsistency of Miller's testimony with the circumstances arising in the case and his improbable explanation of the loss of the accounts and receipts." All these we repeat were matters for the jury to whom they were submitted, and are not matters proper for the investigation and determination of this court, and we could not determine them without invading the undeniable and exclusive prerogative of the jury, viz: The right of deciding on all matters of fact as to which contradictory evidence may be adduced. 7 Harr. and John. 294.

Upon a full and thorough examination of the record and proceedings in this case, we are of opinion that they contain no error.

The judgment of the Court below is therefore affirmed.

Per curiam.

DARIUS WILLIAMS AND JOHN A. CRAIG, *vs.* ELIZABETH MILLER.

Error to the Jefferson Circuit Court.

Per Curiam:—This case depends to a certain extent upon the same principles involved in the case of Darius Williams and John A. Craig *vs.* John C. McGehee, administrator, &c., of John Miller deceased, which has just now been decided. It was argued and submitted together with that case, and it was understood would share the same fate.

The judgment of the court below is therefore affirmed.

JOHN DOE, ON DEMISE OF FLORENTIO COMMYNS, ET AL., *vs.* WILLIAM K. LATIMER, TENANT, &C.

Where a *concession* of land in 1817 by the Spanish authorities of West Florida was made "subject to the conditions prescribed in the regulations of 17th July, 1799"—and the decree of concession concluded with an order "that the land be surveyed and marked by the surveyor, to be submitted to the superior authority—costs to be taxed"—and no further steps appeared to have been taken to comply with the conditions or to complete the grant, anterior to the cession of the Floridas by Spain to the United States—Held, that such concession is not evidence of title.

A government or individual who makes a grant of land upon a condition precedent, may waive or dispense with a compliance therewith, so long as it, or he holds the revision; but when it, or he conveys that reversionary interest, the right to do so ceases.

A grant of land, by the description of "the tract of land at the point of the Flag Staff," and without any further designation, to give a place of beginning for a survey, is void, for being so uncertain that locality cannot be given to the land.

Writ of Error to Escambia Circuit Court.

The case is stated in the opinion of the court.

72 *Anderson*, for plaintiff in error:

The evidence proposed to be offered to the jury, and which the court below ruled out, was opposed upon the following grounds:

1. The incapacity of Masot, the Governor of West Florida, to make a valid grant.

To this objection it is replied, that the Supreme Court of the U. S. have decided in the cases of Sanlard, (4 Peters Rep.) Arredondo, (6 Peters Rep.,) Clark (8 Peters Rep.,) Mitchell, 9 (Peters Rep.,) and others, that upon the production of a grant the presumption of law arises that there was full authority to make it, unless the contrary be shown. By the comity of nations the tribunals of all countries are to presume that every public officer of a foreign government acts within the legitimate sphere of his duty till the contrary be shown.

In the absence of the Intendant, the Governor was the highest officer.

Intendant Cabannos left the country in 1815, and there was no officer of that grade in West Florida afterwards. The grant in question was made in 1817. The authority quoted from 8th Peters is not applicable to the then condition of West Florida. As proof of this, see testimony of Caro as to 81 grants made by Gov. Masot, having been confirmed by the U. S. Commissioners.

Grants made by the Governors of East Florida in the absence of higher authority, acknowledged as sufficient. U. S. *vs.* Perchman, 7 Peters. U. S. *vs.* Fernandez, 10 Peters. U. S. *vs.* Lequi, 10 P. R. U. S. *vs.* Chaires, 10 Peters. U. S. *vs.* Leton, 10 Peters.

2. The evidence was opposed on the ground that the grant wanted *finality*, and was only preliminary to a complete title.

This objection is met by the terms of the grant itself. Governor Masot says: "The 800 arpens of land *are hereby granted* to the said Francisco Rocheblave," &c. The word *hereby* imports that the act then done by the Governor conveyed a consummate title.

See the evidence of Caro as to similar grants, and the cases above cited as to similar grants in East Florida.

3. The evidence was opposed on the ground that the grant wanted sufficient certainty.

The tract of land in question is designated in the papers as "The tract commonly known by (as) the Point of the Flag Staff." It might have been made sufficiently certain by other evidence, if the 73
rejected evidence had gone to the jury as a foundation. The lessors might have proved possession in their ancestors. Though 800 arpens are sued for, and the whole might not have been recovered for want of a survey. The plaintiff in ejectment might recover a *part* of what is described in his declaration.

Lessee of Patton *vs.* Cooper, 1 Cook's Rep., 133. The right of possession to the point of the Flag Staff, is distinct from the right of possession to 800 arpens of land—the former needed no survey to be rendered certain. It was error to deprive the plaintiff of the additional evidence.

4. It is objected in the arguments of defendant's counsel, that there was no evidence of a compliance with the regulations of Morales.

It is only necessary to reply to this, that the question does not arise upon the exceptions, it was a question for the jury.

5. It is objected lastly that the evidence of Rocheblave's title was not evidence of the title of the lessors.

It is not pretended that it was in itself—it was offered as a link in the chain. Francisco Rocheblave was the ancestor of the lessors as would have been proved to the jury, had not the plaintiff been arrested in making out his case by the court in rejecting the foundation of his title.

Yonge, for defendant in error:

I. That the court properly ruled out the answer of Caro to question as stated in the first exception, as well for the reason there stated to wit: That it was not the best evidence of which the case in its nature was susceptible, (Greenleaf's Evidence, 93,) as for the further reason that it was immaterial to the issue, if nothing did appear upon the records of his office that showed that the Spanish Authorities did not require the performance of conditions of land grants, that fact was not material to the issue. And it was immaterial for two reasons. *First.* The absence of such record would not prove that they did not require performance of such conditions, for there was no reason *that the records* of *his office*, should show anything about it. And *secondly*, it was immaterial, because if the Spanish Authorities chose in their munificence to dispense with the performance of conditions of such grants. it was as a boon to the grantee. The United States by their treaty with Spain contracted that "all 74
grants of land made before the 24th January, 1818, by his Catholic Majesty or by his lawful authorities in said territories ceded by his Majesty, shall be ratified and confirmed to the persons in possession of them to the same extent, that the same grants *would be valid*, if the territories had remained under the dominion of his Catholic Majesty." It is clear that this and all conditional grants would not have been valid under the dominion of his Catholic Majesty, until the conditions had been performed or dispensed with, and the United States did not agree to dispense with conditions.

II. In ruling that the paper writing purporting to be a grant from Governor Masot to Rocheblave, should not be permitted to go to the jury as evidence of title, the court decided rightly for the following reasons:

1st. That the grant, if grant it be, is void for uncertainty. 4 Bacon's Abridgement, Title Grant.

It is essential to the validity of a grant, that the thing granted be so described as to be capable of being distinguished from other things of the same kind, or be capable of being ascertained by extraneous testimony. Buyck et al., *vs.* U. S., 15th Peters, 223, 224, 225. O'Hara's case, 15th Peters, 281, 282, 283. Delespine's case, 15th Peters, 319.

The sheriff would not know what lands to deliver into the possession of the plaintiff, should he recover judgment and obtain his writ of possession.

III. The paper purporting to be a grant, is not a grant that conveys any legal title, but is only a preliminary step towards procuring a final and complete title. See Regulations of Morales, 2 White 235, Art. 4, 15, 16, & 18.

"The word grant may comprehend both the incipient and complete title." U. S. *vs.* Clarke, 8th Peters, 450.

IV. The power of granting lands was not vested in the Governor of West Florida at the time this grant was made, but in the Intendant. United States *vs.* Clarke, 8th Peters, 451, & 452.

V. The grant is void, for the reason that the conditions which attached to it, by the operation of the regulations of Morales, under which it was made, have not been shown to have been complied with. Buyck's Case, 15 Peters, 222. O'Harra's case, 15 Peters, 281, 282.

VI. Grant void for want of survey. U. S. *vs.* Miranda, 16th Peters, 156.

VII. The title claimed is at best but an equitable one, and though it presents such a case as the court established for the purpose of adjudicating land claims growing out of Spanish grants might possibly recognize, still there is shown no legal title, and ejectment cannot be sustained on an equitable title. Swayze and wife *vs.* Burke et al., 12 Peters, 23.

VIII. No derangement of the title from the grantee to the lessor of plaintiff.

"Person who is supposed to have demised the premises must be shown to have had a legal power to demise." 12 Johns., 185.

Douglas, Chief Justice, delivered the following:

This is an action of ejectment, instituted by the plaintiffs in the Circuit Court of Escambia county, against William K. Latimer, tenant in possession, to recover a tract of land claimed under a concession alleged to have been made by Masot, Governor *pro tem* of the Province of West Florida, to one Francisco Rocheblave, on the 25th day of November, 1817. The declaration, notice, consent, rule, and plea, (upon which issue was joined,) are in the usual form. At the last November term of that court, the cause came on for trial, and the issue was submitted to a jury, who returned a verdict for the defendant, upon which verdict a judgment was duly entered, upon which this writ of error is prosecuted.

The following bill of exceptions is set out in the record, upon which all the errors complained of in this case are assigned, viz:

Be it remembered, that, on the trial of this case of John Doe, on the demise of Florentio T. Commyns *vs.* William K. Latimer, the plaintiffs offered in evidence of their title to the premises in controversy a paper writing, of which the following was proved to be a true translation, to wit:

PETITION.

To His Excellency, the Governor and sub-delegate of Royal Finance:

Francisco Rocheblave, an inhibitant of this town, with due respect, says: that being desirous to make an establishment, and knowing that the tract of land commonly known by the point of the Flag Staff is vacant, he humbly entreats your Excellency that you have the goodness to grant him eight hundred arpens in
76 the place described above, a favor which he hopes to receive from the equity of your Excellency.

[Signed] FRANCISCO ROCHEBLAVE.

Pensacola, November 13th, 1817.

DECREE.

Pensacola, *November* 24, 1817.

Let the surveyor General report whether the lands prayed for by the petitioner are vacant, and of the Royal Domain, and if being such, let this pass to the view of the Seignor Fiscal of Royal Finance.

[Signed.] MASOT.
[Countersigned.] JOSE CEVALLOS.

SURVEYOR'S REPORT.

To His Excellency, the Governor and sub-delegate:

The tract of land prayed for by the petitioner at the point of the Flag Staff is vacant, and there is no difficulty that it should be granted to him—nevertheless, your Excellency will decide as you may think proper.

[Signed.] PEDRO REGGIO.

Pensacola, November 23d, 1817.

FISCAL'S OPINION.

The Fiscal of Royal Treasury, having seen the petition of Francisco Rocheblave, praying for eight hundred arpens of land at the place indicated, and for the purpose expressed by him, the same being vacant, according to the report of the Surveyor, Pedro Reggio, says that your Excellency may, if you think proper, grant him the tract of land of eight hundred arpens in the spot designated, the Fiscal considering him provided with sufficient means for the undertaking as it required, remaining subject to the conditions prescribed in the regulations of 17th July, 1799, and that he shall not alien it to any foreigner, conformable to justice which he asked.

[Signed.] MANUEL ARMIREZ.

Pensacola, November 24, 1817.

NOTIFICATION.

On the same day we made it known to Francisco Rocheblave, which we certify.

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[Signed.] LAUSA.
[Signed.] CEVALLOS.

On the same month and year, before Jose Masot, Governor *pro tem.*, for the Province of West Florida, and sub-delegate of Royal 77
Treasury in the same, personally appeared Francisco Rocheblave, for the purpose of taking the oath required by the preceding Fiscal's opinion, and having done so in a legal manner, said that the tract of land which he solicits he wants for himself—that no foreigner has any share in his solicitation, and less will he alienate it to any such persons. He declares that the above statement is the truth under the oath he has taken and signed it with his honor, and we the assistant witnesses, to which we certify.

[Signed,] FRANCISCO ROCHEBLAVE,
DOMINGO LAUSA,
JOSE CEVALLOS.

DECREE OF CONCESSION.

Pensacola, 25*th November*, 1817.

In consequence of the report of the Surveyor appointed, that the land solicited by the petitioner is vacant, and of the Royal Domain, he having also taken the oath required by his Honor the Fiscal of Royal Treasury, the eight hundred arpens of land are hereby granted to the said Francisco Rocheblave in the spot designated. Let them be surveyed and marked out by the Surveyor, to be submitted to the superior authority. Costs to be taxed.

[Signed,] MASOT,
DOMINGO LAUSA,
JOSE CEVALLOS.

Jose E. Caro was then sworn, and said that he was well acquainted with the hand-writing of Masot, Governor, and sub-delegate of Royal Finance of West Florida, whose name is affixed to said paper writing, and of Manuel Armirez, Fiscal of the Royal Treasury, and of Cevallos and Lausa, witnesses of assistance, having often seen them write, and that he believes the signatures of the same to be genuine; but that he is not acquainted with the hand-writing of Pedro Reggio, Deputy Surveyor, never having seen him write, but that he has seen his name affixed to a great number of grants, afterwards approved by the United States Land Commissioners, and that this signature resembles all the others, and he therefore believes this to be his genuine signature. Deponent further says that Intendant Morales left in 1813, and that Cobannos was appointed in his stead, who also left here in 1815, after which time there was no officer here answering to that of Intendant. That the power to sell lots was in 1813 vested in the Cabildo, and that 78
Governor Masot made some eighty grants of land similar in form to the grant above set forth; that, at the time this grant is dated, there was no Intendant, but there was one in Havana, who ratified and confirmed two grants made by Masot for large grants of land—one of 7,000 arpens, and one for 3,500. Pedro Reggio was Deputy Surveyor, and received his appointment from the principal surveyor, who resided in Havana; that, when Morales was here, in him was vested the sole power of granting land, and this grant is in the same form with the others made by Masot.

The plaintiff further asked said witness if it was customary after 1813 for the Spanish Government to grant complete title to lands, without requiring proof of the performance of conditions of cultivation and habitation? The witness answered that there was nothing in the records of his office, that shewed that the Spanish authorities in a single instance required compliance with the conditions.

The court ruled out this answer, on the ground that the record must be produced, it being the highest evidence, to which decision the plaintiff excepts.

The court decided that the above paper writing should not be permitted to go to the jury as evidence of title, to which decision the plaintiff also excepts, and prays the court to sign and seal this bill of exceptions, which is accordingly done.

The following are the errors assigned:

First. When the plaintiff on the trial of said cause asked the witness, Joseph E. Caro, if it was customary after 1813 for the Spanish Government to grant complete titles to lands, without requiring proof of performance of conditions of cultivation and habitation; and the said witness answered, that there was nothing in the records of his office that showed that the Spanish authorities in a single instance required compliance with the conditions. The court ruled out the answer, on the ground that the record must be produced, being the highest evidence.

Second. When the plaintiff offered as evidence of title of the lessor to the premises in controversy a paper writing, of which a true translation is set forth in said plaintiff's bill of exceptions, and proved the same by the witness, Joseph E. Caro, as set forth in said bill of exceptions, the said court decided that the said paper writing should not be permitted to go to the jury.

In regard to the first error assigned, it may be remarked, that both

the question to, and the answer of the witness, appear to be wholly immaterial. There is nothing in the record to show that any application was made after the year 1813, to the Spanish authorities in the province of West Florida, by any one holding a conditional concession for a *real* or *complete title*, or that the question in any way arose whether a title would be granted without a compliance with the conditions or not, nor does it appear that the witness, Mr. Caro, kept an office in which, if there was any record evidence that the Spanish authorities had required the performance of such conditions, such evidence might be supposed to exist. Had it been shewn, however, that Mr. Caro was keeper of the Public Archives, and had charge of the records and documents left by the Spanish Government on the transfer of the province to the United States, which we think likely (from the shape of the question put to him by the plaintiff) was the fact, still the answer (which by-the-by was not at all responsive to the question) is wholly immaterial, because the question to be settled is not whether it is customary for the Spanish authorities in West Florida, after the year 1813, to require proof of cultivation and habitation before granting complete titles to land, but whether such proof was required by the laws, royal orders and regulations in force in the Province after that time on this subject.

That a government or an individual, who makes a grant of land upon a condition precedent, may waive or dispense with a compliance therewith, and convey a full, absolute and complete title without a performance of it, so long as he holds the reversion, and the interest of no one else can be in anywise prejudiced by such conveyance cannot be doubted. But when he conveys that reversionary interest to a third persons, his right to do ceases.

Here the Spanish Government had by the treaty of cession between it and the United States of the 22d of February, 1819, transferred its whole and entire interest in the public domain in the Floridas, including all such reversionary interests, to the latter. See U. S. Statutes at Large, 258. And their interests, it is apprehended, are governed by laws, ordinances and regulations referred to. The Spanish authorities of the Province of West Florida, may have had very good reasons, (or such as they may have deemed good,) for relaxing the rule or dispensing with a compliance with such conditions in individual instances, or indeed including a general class of claims which might not apply to this, and if they did, would not affect the legal question. They may have dispensed with a compliance with the conditions, because the grantee had been unfortunate, or perhaps by some act of Providence may have been rendered unable to perform them, or because after the concession was made, the grantee had rendered some important services to the Government. Governor Kindelan relaxed the rule requiring performance of such conditions in East Florida in 1815, on account of Indian hostilities, so far as to grant absolute titles to settlers who had actually built houses and improved their lands, although the *ten years* settlement (then required by the regulations of Governor White,) was not complete.—2 White's New Rec., 288. See White's regulations as to occupation and cultivation.

The relaxation of the rule by the Spanish authorities in certain cases for special reasons, would not and could not affect the general rule prescribed by the laws, ordinances, and regulations then in force.

In the case of the United States *vs.* Kingsley, 12 Peters Rep., 486, it was strongly urged in behalf of the claimant, that no instance was known of lands so decreed having reverted to the class of public lands, for the non-performance of the conditions. This is like the negative testimony offered in the case before us. Here no proof of any such current of cases appears, or is shewn to have been offered, and after the year 1815, the Intendant, the *superior authority* to whom the *process verbal* was to be sent, and who alone it would seem had the right to dispense with performance of the conditions upon which a grant was made, did not, as we are informed by the testimony of Mr. Caro, reside in the Province.

The power to grant lands was in October, 1798, reconferred on the Intendant (from whom it seems to have been for a time withdrawn,) so far as respected Louisiana and West Florida, but this order does not extend to East Florida. There it remained with the Governor. The United States *vs.* Clark, 8 Peters, 152. And nothing is shewn or even suggested to take this case out of that rule.—Whether therefore the court erred or not in ruling out this answer of the witness, Mr. Caro, it does not vary the case of the plaintiffs. They have sustained no injury by its rejection, and where a party has sustained no injury by the rejection of admissible testimony, he cannot avail himself of the mistake to reverse the judgment.—Smith *vs.* Ruecastle, 2 Halsted's Rep., 357. Overby *vs.* Paine, 3. J. J. Marsh, 717. Bosley *vs.* Chesapeake In. Co., 3 Gill and John., 450.

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We proceed therefore to the discussion of the second error assigned, 81
which we think cannot be sustained for several reasons. The document the rejection of which is assigned for error, is called a Grant, which may comprehend both the *incipient* and the complete title.—The greater number of those in Florida appear to have been of the *first* description. Many of them contained conditions, on the performance of which the right to demand a complete title depended. The United States *vs.* Clark, 8 Peters, 450. The one now under consideration is of this description. It purports to have been made by Masot Governor *pro tem*, of West Florida, and sub delegate, &c., on the 25th day of November, 1817. At that time the regulations of Morales were in full force, and were the laws of the Province of West Florida on the subject of the granting of land. Ibidem. The first article of these regulations provided that to each newly-arrived family (*a chaque famille nouvelle*) who are possessed of the necessary qualifications to be admitted among the number of cultivators of these Provinces, and who have obtained permission of the Government to establish themselves on a place which they may have chosen, there shall be granted, for once, if it is on the bank of the Mississippi, four, six or eight arpens in front on the river, by the ordinary depth of forty arpens, and if it is in any other place, the quantity which they shall be adjudged capable to cultivate, and which shall be deemed necessary for pasture of his beasts, in proportion, according to the number of which his family is composed understanding that the concession is never to exceed eight hundred arpens. 2 White's New Rec., 234.

The report of the Fiscal in the case now before us, considering the petitioner provided with sufficient means for the undertaking required, appears to have been made with an especial view to this, and to the 4th article, and the quantity of land in this concession is we see extended to the maximum allowed to be granted.

The fourth article of the regulations provides that "the new settlers who have obtained lands shall be equally obliged to clear and put into cultivation in the precise time of three years all the front of their concessions of the depth of at least two arpens in the penalty of having the lands granted *remitted to the domain*, if that condition was not complied with. 2 White's New Rec., 234, 235. In this case no proof whatever appears of a compliance with these conditions.

There were three classes of grants made in the Floridas. *First*, absolute grants in consideration of services already performed, which were made by the Governors in special cases, either in virtue 82
of special power recognized by the laws of the Indies (2 White's New Rec. 38, 40, 52) or by the authority given in particular decrees coming directly or indirectly from the sovereign, as in the case of grants conferred upon Ygnacie Salens, Don Manuel Paulin and Don Juan Perchaman by Governor Estrado of East Florida pursuant to a Royal order March 29th, 1815. 2 White's New Rec. 280. *Second.* Grants in consideration of services to be performed, and deemed specially important, for the improvement of the province. These do not seem to have grown out of any law or Royal order, but were not unfrequent for some years before the cession of Florida to the United States. Ibid. 286, 289, 290. *Third.* But the greater number of cases was that of gratuitous grants in moderate quantities for purposes of actual occupation and cultivation. To this class is applicable the general system of Spanish land law, which existed in Florida and Louisiana, and the regulations embraced under it are as clear and distinct as those of the laws of the United States. It is true the grants were gratuitous but the performance of the conditions annexed by that law, was a consideration as explicit as the payment required by our laws.

The United States *vs.* Wiggins, Arguendo, 14 Peters, 340. The regulations in regard to these grants are first found in the laws of the Indies promulgated by the King of Spain in 1682. By these laws grants were distributed by the Governors to settlers, on condition that they should take actual possession of the lands granted in three months and build upon and cultivate them, and after four years of such occupation they were entitled to hold the lands in absolute property. White's New Rec. 48, 50, 51. The *incipient* grant called a concession, was deposited in the office of the Governor's Secretary, but on proof of the necessary occupation and cultivation the seller received an absolute grant or (as it was called) a *Real title* (*a titulo de propriedad*) which was recorded in the office of the Escribano or Notary of the Province. Ibid, 282.

The quantity to be given to each settler was not prescribed by the laws of the Indies, but the Governors were directed to graduate it and it was different in different provinces. These regulations were subsequently recognized by the King of Spain in his Royal orders of 1735, 1754 and 1768. Ibid, 62, 64 & 71. The United States *vs.* Clarke, 8 Peters 450. And in the latter it is declared that, "where any shall not apply themselves in a proper manner to improve the

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83 lands allotted to them the same shall be taken from them (which I do said the King *without mercy*) and granted to others who will fulfil the conditions."

In the case of the United States *vs.* Wiggins above cited, the grant was for three hundred acres which she asked the Governor to grant her on the eastern side of the pond of St. George, as she had five children and five slaves with herself. The decree of the Governor is in the following words, viz: "The tract which the interested party solicits is granted to her without prejudice to a third party and for the security thereof let a certified copy of this instance and decree be issued to her from the secretary's office.

[Signed,] ESTRADO."

This grant it will be perceived is (like the one now under consideration,) without any express condition as to occupancy and cultivation upon the face of it, but it was made when the regulations of Governor White were in force in East Florida, which required the grantee to take possession of, and cultivate the land within six months from the date of the concession, and to continue to occupy and cultivate them for ten years to acquire the right to an absolute title. And Mr. Justice Catron who delivered the opinion of the court in that case after discussing the question as to the validity of the title paper (a certificate of Aguilar, Secretary of the Government, at the time when it bears date) says: "The next question is, does the concession convey with it the conditions *imposed by law* on those having lands given them? By the regulations of Governor White published in 1803, it was provided that all concessions without time specified, shall be *void*, if the grantees do not appear to take possession of them within the term of six months. In the concession to Mrs. Wiggins, no time is specified for the settlement, and the Government of the United States (said the court) may take advantage of the non performance of the conditions prescribed by law if the 8th article of the treaty with Spain does not provide for the omission. It stipulates that grants of land made before the 24th day of January, 1818, shall be ratified and confirmed to the persons in possession of the lands, to the same extent, that the same grants would be valid if the Territories had remained under the dominion of Spain." Ibid. 349, (and see 8 United States statutes at large 258.)

"That perfect titles (continued the court) made by Spain before the 24th day of January, 1818, within the ceded Territory are in-
84 trinsically valid and exempt from the provisions of the 8th article, is the established doctrine of this court, and needs no sanction from the legislative or judicial departments of this country.

"But there were at the date of the treaty, very many claims whose validity depended upon the performance of conditions in consideration of which the concessions had been made and which must have been performed before Spain was bound to perfect the titles.—That a Spanish concession carrying on the face of it a condition the performance of which is the consideration for the ultimate perfect title is void unless the condition has been performed in the time prescribed by the ordinances of Spain, was determined by this court after the most mature consideration, in the case of the United States *vs.* Kingsley, 12 Peters 476 to 479 which is the leading decision upon the imperfect titles called Mill Grants, and which has been followed by all others coming within the principles, there, with so much accuracy, laid down."

The concession to Mrs. Wiggins, said Mr. Justice Catron, carrying with it the conditions *incident to settlement rights*, by the ordinances and usages of Spain, a brief notice in addition to what has already been said will be taken of the regulations and ordinances, and after referring to the treaty and to an ordinance published by Governor Coppinger of East Florida, on the 25th of November, 1818. 2 White's New, Rec. 282, 282. The United States *vs.* Kingsley, 1 Peters, 481, he proceeds: "From the ordinance it appears that concessions made to foreigners for large or small portions of land, conveying their documents with them (which shall be certificates issued by the Secretary) without having cultivated or even seen the country granted to them, such concessions are of *no value or effect*, and should be considered as not made, because the abandonment has been voluntary, and that they have failed in complying with the conditions prescribed for the encouragement of population," and therefore there is no reason why they should not revert to the class of public lands making *null* titles of cession which were made to them.

This is an adjudication of one of the highest tribunals, Executive, Legislative and Judicial, of the Government under which these grants were made,—one posessing ample power over, and master of the subject and has been followed by the highest judicial tribunal of our Country in the case which we have just now cited. In that case the court, after a most full and thorough investigation and discussion of the merits of the claim of the appellee, concluded by say- 85
ing: "Ten years had been the time required for cultivation and occupation; this rule was not rigidly adhered to, but the titles were perfected in some instance where valuable improvements had been made, and the occupation had been short of ten years, the Governor taking into consideration the disturbed state of the country.—These exceptions were abatements of the general rule requiring *ten years* cultivation and occupation. As Mrs. Wiggins *never cultivated* or *occupied* the land claimed, she took no *interest* under the rule, or *any exception* made to it, and it is free from doubt that had Spain continued to govern the country *no title* could have been made to her, nor can any be claimed of the United States as successors to the rights of Spain."

We have availed ourselves very fully of this case because it was most thoroughly and elaborately discussed and examined; is a leading case as to this class of grants, and is we think a direct authority as to the concession under consideration. The decree in that case was made upon a concession which in all its essential features is precisely analogous to that of Rocheblave. It is in point too, upon the position assumed, that exceptions in the practice of the Spanish authorities as to particular grants, did not establish a rule for others, and is, we think, upon the whole decisive of this case upon the points we have been discussing. The concession to Rocheblave was made with express reference to Morales' regulations which bear date 17th July, 1799. See 2 White's New Rec., 244.

The Fiscal in his opinion said "your Excellency may if you think proper grant him the tract of land of 800 arpens in the spot he designates *remaining subject to the conditions prescribed in the regulations of 17th July*, 1799;" evidently referring to those of Morales there being no other of that date. The only difference therefore between the two concessions appears to be, that the grant to Mrs. Wiggins was to be void and held as though not made, if she did not appear to take possession and cultivate within the term of *six months* and Rocheblave was "obliged to clear and put in cultivation in the precise term of *Three Years*, all the front of his concession of the depth of at least two arpens on the penalty of having the lands granted *remitted to the domain* if this condition was not complied with." We have seen the effect of her non compliance, viz: that she took *no title* under her concession. He did not comply and the lands granted to him were *remitted* by operation of law, *to the public domain*.

But there was another condition or requirement in the concession 86
to Rocheblave to be complied with, before the grantee could claim an absolute or real title. The concession itself upon its face required that the lands, the 800 arpens, should be measured and marked out by the surveyor, to be *submitted to the Superior Authority*, the same it is presumed of which the witness Mr. Caro speaks when he says, "that at the time this grant is dated there was no Intendant, but there was one at Havana who ratified and confirmed two grants made by Macot," from which it is (we think) fairly to be inferred that after the survey and demarkation was made the whole matter was to be *submitted to the superior authority*, for its sanction, and every one at all acquainted with the practice of the Spanish provincial governments in relation to these matters is aware that it was the business of the grantee to see that his survey was made and to pay the "*costs to be taxed*," and generally they were pretty heavy. Hence the reason probably why so many tracts remained unsurveyed. The surveys were made by the public surveyors, but it was the duty of the grantee to attend and point out the lands he had selected, and if such were not the general rule, it is the one that seems to have been prescribed by Masot in this case, and the concession being so vague the survey and demarkation was necessary to sever *these lands* from the public domain, as that was not done, they remained a part of it and were at the cession transferred to the United States. This is shewn by the case of the United States *vs.* Forbes, 15 Peters 178, 183, and the United States *vs.* Miranda, 16 Peters, 160, where the case of Forbes is cited and commented on. Forbes in his petition for the land after describing it said "the survey of which I will produce as soon as the tranquility of the province enables me," &c.

And in adjudicating upon that grant the Supreme Court of the United States laid much stress upon the circumstances that he had failed to do so. The concession or grant (for these terms as used in regard to Spanish titles in Florida are synonymous) to John Forbes said the court, was for 10,000 acres in the district or bank of the river Nassau, with an order that the concession should serve him as "*a title in form*," and it was the duty of the party, said the Governor in the concession, to produce the plat and demarkation in the proper time. This is no more than the order in the concession to Rocheblave. No survey of the land granted was ever made in Forbes' case. "The duty imposed upon him (say the court) to produce the plat and demarkation in the proper time was never per-

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formed." This grant was *rejected* because it calls were two *indefinite;* a difficulty which the survey and demarkation would have avoided. In the case of the United States *vs.* Miranda (before referred to) 16 Peters, 160, the court say: "Courts of justice can only adjudge what has been granted, and declare that the lands granted by the lawful authorities of Spain are separated from the public domain. The grant now sought to be confirmed (said the court) was not so *separated by survey,* or any such *distinctive call,* as will admit of survey." And here it may not be amiss to remark that the words, shall serve him as "a title in form" in the grant to Forbes are at least equivalent to the word "hereby" in the concession to Rocheblave, which it is insisted conveyed "a consummate title," yet they were not understood by the Supreme Court as conveying any thing more than the incipient title, nor were they considered as relieving Forbes from the duty and necessity of procuring and submitting the survey.

The Court in the case of Miranda refer to the undertaking of Forbes above mentioned to produce a plat and demarkations and his failure to do so, and say, "this was a condition he assumed upon himself. The execution and return of the survey could only *sever* the land granted from the public domain. No particular land having been severed from the public domain by John Forbes his was the familiar case of one having a claim to a large section of country unlocated, &c. In such a case the government has ever been deemed to hold the fee unaffected by a vested equitable interest, until the location was made according to the law of the particular country."

In grants of land with uncertain designations, to be made in a large district of country they must have been *severed from the public domain* by a survey, or be void for want of identity. The same doctrine was held in the case of the United States *vs.* O'Hara, 15 Peters 275. The United States *vs.* Delespine, 15 Peters, 317.—Buyck *vs.* the United States, 15 Peters, 215, and the United States *vs.* Lawton et al., 5 Howard's S. C. Peps. 10.

Indeed the settled doctrine of the Supreme Court of the United States in respect to these Florida grants is, that grants of land embracing a wide extent of country, or within a large area of natural or artificial boundaries and which lands were not surveyed before the 24th of January 1818, and which are *without such designation as will give a place of beginning for a survey,* are *not* lands withdrawn
88 from the mass of vacant lands ceded to the United States in the Floridas, "and are *void* as well on *that account* as for being so uncertain that locality cannot be given to them." The United States *vs.* Miranda, 16 Peters, 160, 161.

The court most fully concurs with the Supreme Court of the United States in that opinion and considers this grant as it presents itself for their consideration, as one of that description. Rocheblave in his petition to the Governor for the land says "being desirous to make an establishment, and knowing that the tract of land commonly known by the point of the Flag Staff is vacant, &c. Here then is the description, "the tract of land commonly known by the Flag Staff." The surveyor in his report speaks of it as "the tract of land at the point of the Flag Staff." Neither of these descriptions convey any very definite idea or fix any definite point for the commencement of a survey. It seems quite probable from the description of the tract given by the grantee and they surveyor, that it had obtained the name of "the tract of land by or at the point of the Flag Staff." But what was the extent of the tract whether only 800, or whether 8000, or 8,000,000 arpens, or how it was situated, what were its boundaries, whether there was ever a flag staff upon it, or in the region of it or not, or whether there is or is not any specific starting point for a survey upon it or not, is not shewn by the grant itself, nor do the pleadings or evidence in the record inform us. It must be borne in mind that this is an action of ejectment in which the plaintiff's if they recover at all, must recover upon the strength of their own title, and not upon the weakness of that of the defendant. Runnington on ejectment, page 15. McHenry on Ejectment, page 115. Tillinghast's Adams on Ejectment, page 32.—Hodsden *vs.* Staple, 2 Term Rep., 684. Doe on the Demise of Crowe *vs.* Boldware 5 Term Rep. 110. Doe on the Demise of Haldane and Urry *vs.* Harvey, 4 Burrows Rep. 2487. Walker *vs.* Carlter. Addison's Rep., 390. 1 Smith's Leading Cases, 152.—2 Greenleaf's Evidence, page 266, Sec. 231. The plaintiffs must shew a paramount legal title in themselves or they cannnot recover. Swayze and wife *vs* Burke, 12 Peters, 12, 23.

And the defendant may set up an outstanding title in a third person as a defence, Lane *vs.* Simms Lessee, 9 Wheaton's Reps., 515. Runnington on Ejectment, 15. McHenry on Ejectment, 115.

All concessions or *incipient* Spanish grants were made without injury to a third persons. Sometimes it was so expressed in the concessions, but if it was not so expressed the exception was implied by 89
law. In the case of the United States vs. Heirs of F. M. Arrendondo and others, 13 Peters, 134, the court says. "If upon the survey it shall be found to interfere with previous grants to third parties the concession must be lessened in quantity according to the extent of the rights of such third parties."

Suppose then that this grant had been permitted to go to the jury as evidence of title and the lands called for by it, had been covered by older valid grants, it is not perceived how the defendant could have availed himself of that fact in his defence. It would seem that his right to do so would have been defeated by the vagueness of this concession; a reason sufficient of itself for its exclusion.

It is alleged, however, on behalf of the plaintiff, that this grant "might have been made sufficiently certain by other evidence, if the rejected evidence had gone to the jury as a foundation."

It is also insisted that the objection that, "there was no evidence of a compliance with the regulations of Morales," is a question "that does not arise upon the exceptions, but was a question for the jury."

This, however, as the matter is presented to us, we think a misapprehension. It would have been a question for the jury had evidence of such compliance been given in the court below. But this court cannot intend that there was any other evidence than that stated in the bill, and every bill must be considered as presenting a distinct case, which if defective in any material point, cannot be supplied by intendment. Dunlap vs. Monroe, 7 Cranch, 270.

If parol evidence to explain a deed be excepted to, the bill must state the evidence, so that the court above can decide whether it was admissible or not. Gateman *vs.* Burrows, 3 Call, 194. (King vs. Kenny, 4 Ham. 79. McDougal vs. Flemming, Ibid, 388. I United States Digest, 415, No. 96.) The court will not presume facts that do not appear on the bill. Jackson *vs.* Bellow, 2 Porter's Rep. 29. Cravens *vs.* Grant. 4 Monr., 126. Where parol evidence is excluded which might be proper when connected with a record, the bill of exceptions should state that such record was offered, otherwise it will be presumed that the parol evidence alone was offered. McDowell *vs.* Curwell, 4 Rand., 317.

In this case the concession being excluded, which according to the position assumed, might have been proper with parol evidence to show a compliance with the conditions prescribed by Morales' regulations, and to define the location (if it could be defined,) the bill of 90
exceptions should have shewn that such evidence was given or offered to be given. And where evidence not admissible in itself, but which might have become so by being connected with other evidence, is rejected by the court, and a bill of exceptions filed, the bill ought to state that such other evidence was offered, otherwise it will not be presumed. Courtenay *vs.* Commonwealth, 5 Rand., 666.

In this case it is not pretended that the grant was in itself evidence but that it was offered as a link in the chain. It ought therefore to have been shewn by the bill of exceptions that the evidence to supply the other links in the chain was offered. There is no difference (in effect) between a statement in a bill of exceptions, that certain facts were proved, and that evidence was offered of them. Reggin *vs.* Petapsco In. Co., 7 Harr. and John., 279.

The regulations of Morales which profess to be made, "That all persons who wish to obtain lands may know how to ask for them, and on what *conditions* lands can be granted," 2 White's New Rec., 234, go on to provide, Art. 15, page 238, that all concessions shall be given in the name of the King by the General Intendant of the Province, and directs that a survey shall be made, &c. And a *process verbal,* specifying the manner, &c. And in article 16 directs that the *process verbal* with a certified copy of the same shall be sent to the *Intendant* to the end that on the orignal there be delivered by the consent of the King's Attorney General, *the necessary title paper,* to which was to be annexed the certified copy of the process verbal. And if nothing further appeared this itself would shew that until all this was done, the right of the grantee was *inchoate* and *imperfect,* and that the legal title remained in the Government.

But in article 18, Morales says: "Experience proves that a great number of those who have asked for lands, think themselves the legal owners of it; those who have obtained the first decree by which the surveyor is ordered to measure and put them in possession, others after the survey has been made, have neglected to ask the *title of the property,* and such like abuses continuing for a longer time will augment the confusion and disorder which necessarily results.

"We declare that no one of those who have obtained the said decrees notwithstanding, in virtue of them the survey has taken place, and that they have been put in possession, *can be regarded as owners of the land,* until their *real titles* are delivered completed

91 with all the formalities before recited." Rocheblave had no survey, and never so far as the record shews, was ever put in possession of these lands. It is very evident, therefore, that under the Spanish Government he was not the owner of this tract of land, and we are not aware of any principle by which his right to it can have acquired any additional strength by the cession and transfer of the Floridas to the United States.

We are therefore clearly of the opinion that this concession is not evidence of title, and that it was properly ruled out by the Court below.

Hitherto we have said nothing in regard to the power of Governor Masot to make these incipient grants of land. It was not necessary to the decision of this case that we should question his general power to do so. But it may not be improper for us to remark that if this grant is to be understood (as the counsel for the claimants seem to understand it,) as embracing the land on which the flag stood, and that was a flag staff used by the Government for Naval, Military or Commercial purposes, we do most strongly question whether the making it by Governor Masot would ever have been sanctioned by the superior authorities to whom the survey and the *process verbal* were (as we have seen) to be submitted and from whom the *title paper* was to come.

Upon full and careful examination of this case, we are of opinion that there is no error in the record and proceedings of the Court below and the judgment is therefore affirmed.

Per Totam Curiam.

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92 ADMINISTRATOR AND ADMINISTRATRIX OF JOHN SMITH *vs.* JOHN C. POYTHRESS AND OTHERS.

Where notes had been given by a husband for materials and merchandise, used and employed for the benefit of the separate estate of his wife, and for her support and maintenance, and judgments had been recovered on the notes against the husband, and executions had been returned "no property found." Held, on bill filed for that purpose by these judgment creditors, that the separate estate of the wife was liable in equity for the payment of these claims.

Had the husband paid these demands, he would have been entitled to be re-imbursed out of the separate estate, and the creditors are entitled in equity to the same equity, the husband being insolvent.

APPEAL from Jackson Circuit Court.

Woodward, for Appellants.

Yonge, for Appellees.

LANCASTER, Justice.

This case comes from Jackson Circuit Court, and is a Bill in Chancery of the administrator and administratrix of John Smith, deceased, to make the settled, separate estate of Mary E. Cheeseborough, wife of William B. Cheeseborough, liable for the payment of debts contracted by William B. Cheeseborough, who was acting agent on said estate for his said wife, for supply and improvement of said estate, and which contracts were for the comfort, accommodation, and advantage of his wife, the said Mary E. Cheeseborough, and made with her assent and sanction. The debts were contracted, one with John R. Chapman, for lumber and plank appropriated in the erection of a dwelling house, carriage house, negro houses, gin house, stables, &c., on the said separate estate of his said wife, amounting to the sum of $647 69-100; and another for goods, wares, and merchandise for the benefit of his said wife, the said Mary, and for the support and maintenance of her said separate estate, with one Washington Chapman for the sum of $126 11-100. William B. Cheeseborough gave his separate notes for these two demands, which came regularly to the intestate of the complainants by assignment. Suits were brought upon them, judgment obtainerd, execu-

tion issued against the said Wm. B. Cheeseborough, and a return had 9
thereon of "no property found."

To this bill the defendants demurred and allege as ground of demurrer want of equity in the bill; that, admitting the facts in the bill as true, the parties had taken Mr. Wm. B. Cheeseborough's notes in payment, upon which suit had been brought; that, having contracted with the agent, and given him credit, they cannot hold the principal bound.

It is alleged in the bill that the lumber bought of John R. Chapman was applied in the construction of a dwelling and other houses on the trust estate, and enhanced its comfort and permanent value; that the goods bought were for the support and maintenance of said estate; that the supplies were furnished with the assent and sanction of the *cestui que trust.* It may be true in general, in commercial transactions, that where one deals with the trusts the agent, he cannot hold the principal bound. But where an estate depends on equity for its existence it should do equity.

In this case, the *cestui que trust* knows of these contracts, when made assents to and sanctions them. Her trust estate has the advantage of the one in permanent improvements and repairs, in the other of support and subsistence. She herself has the benefit of the services of her husband, who is insolvent, by appropriating his whole time and attention to her business. She is rich—he is worth nothing. She receives and enjoys the benefits of these contracts, and is now willing to evade their responsibility. Permits her husband (who she knows to be insolvent) to liquidate these demands with his own notes, and coolly says to the complainants you have elected the agent as your debtor, make what you can out of him. To tolerate such a proceeding would (it seems to the Court) assist husband and wife in cases where she has a separate estate to defraud and deceive. Let it not be said, that because the husband is bound for the support and maintenance of the wife, therefore such contracts are made by him properly for that purpose, and her estate is not responsible for them. Howsoever true it may be that the husband is bound to support and maintain his wife as a general rule, cases like the present will, as they must, form exceptions: but in any event, they can furnish no ground to justify or defend fraud. A poor husband is not bound to support his rich wife by cheating his neighbor, and she will not be permitted to aid in the deception, enjoy and thrive by the fruits of it, and disclaim all liability. If the husband had been able, and paid these demands, he would in equity be entitled to have 9
them refunded to him from the proceeds and profits of the wife's equitable estate. 7th Paige, Ch. R., 13.

With equal equity the complainants may set up the same demand against the same estate. The property was bought for the trust estate, is mainly in permanent fixtures on it, and has not been paid for. Cater *vs.* Eveleigh, 4 Des. So. Ca. E. R. 20, and 1 McCord C. R. 369.

It is therefore ordered, adjudged, and decreed by the Court, that the appeal be sustained, the judgment and decree below be reversed, the demurrer be overruled, and that the Appellees answer the bill in the Court below.

JAMES M. GILCHRIST, JUDGE, &C., *vs.* OSCAR FILYAU AND WIFE.

An action of debt cannot be sustained in this State against the heir upon the bond of the ancestor although the heir be expressly named.

Error to Gadsden Circuit Court.

This was an action of debt against Filyau and his wife, the latter being heir at law of W. D. Harrison, who had become security on the guardian bond of R. L. Harrison, guardian of Edward Mashburn, a minor. The plaintiff alleged as a breach of condition of the bond, that Robert L. Harrison, the guardian, had been removed from the office, and had failed to pay over and deliver to his successor the moneys and property received by him as guardian, &c Defendants pleaded "*non damnificatus,*" and plaintiff demurred. The Court overruled the demurrer and gave judgment for defendants.

To reverse this judgment, the plaintiff took a writ of error, and assigned for error in this Court—"that the Court below erred in overruling the demurrer of the plaintiff to the plea of the defendants."

Thompson, for Plaintiff in Error.

Carmack, for Defendant in Error.

HAWKINS, Justice:

The pleadings in the this case raise the question, can an action of debt be sustained in this State by a creditor against the heir, upon the bond of his ancestor, the heir being expressly named.

If the solution of this question is to depend solely on the common law of England without reference to our statutes, the response would clearly be in the affirmative, for the principle is too well defined and settled to require comment or the sanction of authority. By that law the obligee of a bond could sue the heir, if expressly named, or the executor at his election, and have execution of the land descended to the heir, and this action being allowed against the heir no benefit could accrue to the obligee, unless he had execution of the lands descended to the heir. If the heir was not named in the bond he was not chargeable "for by the common law only the goods and chattels of the debtor and the annual profits of the land itself, were liable to execution for debt or damages, because these being the security the creditor depended upon, they were liable in the hands of his representative or executor, as well as in the hands of the debtor himself, and hence it was, that the executor was bound to answer the debt of the testator so far as he had chattels or essets, though he was not named in the contract; but the land was not liable to execution, because it was preserved from the personal contracts and engagements of the tenant, that he might be the better able to answer the feudal duties to the lord, and therefore the land not being originally liable to the demand in the hands of the obligor, must be much less in the hands of the heir, who was not comprehended in the contract." 3 Bacon's Ab., 458-9, (F.)

In England if a man died seized in fee, the descent goes to his eldest son, and the lands are not assets in the hands of the administrator for the payment of debts. By the laws of Florida there is no such thing as primogeniture, the lands descends in parcenary, and is expressly declared assets in the hands of the administrator or executor, and after the exhaustion of the personal assets may be sold to pay debts due by the estate, besides being liable with personal property to an execution existing upon any judgment against such executor or administrator. Thompson's Digest, 202, 203.

Here we see all distinctions known to the English law between the real and personal estate, as to their being assets in the hands of 96 the executor or administrator entirely done away, subject to some modifications to be noticed hereafter. This distinction being once established, the same rights, duties, and liabilities, as to both would seem to be the necessary result and consequence. We will proceed further and point out some other of the alterations of the common law as created by our statutes. With us bond debts are of no higher dignity than simple contract debts. "All promissory notes and other instruments of writing, not under seal, being declared to have the same force and effect, as bonds and instruments under seal." Thomp. Digest, 331.

By the law of England the title to the personal property, of the intestate devolves upon the administrator, and he can sue for, and recover it against the heir, the law throwing the duty upon him of paying the debts, the personal property being assets for that purpose. The statutes of Florida give a more general and comprehensive power to the executor or administrator by extending and enlarging the fund with which the debts are to be paid. The statute of 1841, declares that, "it shall be lawful for any administrator of any deceased intestate or the executor of any deceased testator who has not power by the will of the testator, to sell real estate for the purpose of paying debts, or to make more equal distribution among the heirs, devisees, or legatees, to file a petition in the Circuit Court of the county in which letters of Administration or letters testamentary, have been granted, setting forth that the personal estate of his interestate or testator, (as he case may be,) is not sufficient for the payment of the debts of such intestate or testator, or that the real estate of such testator or intestate cannot be equally, fairly, and beneficially, divided among the heirs or devisees of such intestate or testator, without the sale of the real estate," &c. The statute then points out what proceedings shall be had upon his petition before a sale of the real estate is ordered or decreed by the court.

The law of 1833 (Thompson's Dig. 202) declares that "real estate shall be considered assets in the hands of the executor or administrator, and after the personal assets are exhausted may be sold under an order or decree of the Judge of Probate or officer discharging the functions of Ordinary or Judge of Probate. It is provided in this statute that no sale of real estate shall be made to any greater extent, than shall be necessary to supply the deficinecy of personal assets for the payment of the just and lawful debts of the deceased.

James M. Gilchrist, Judge, &c., vs. Oscar Filyau and Wife.

We cannot see as contended, that the act of 1833 is repealed by 97 the act of 1841 further than changing the mode by which the executor or administrator is enabled to sell the real estate for the payment of debts where there is a deficiency of personal assets. On the contrary we think the law of 1841 is a virtual affirmance of that part of the law of 1833 which asserts that the lands shall be assets, and we think that its provisions are even more extensive by enabling the administrator or executor to sell real estate to make *more equal distribution* among the heirs or devisees.

The object of the law of 1841 is clearly to guard more effectually the rights of the heirs by presribing a process better calculated to produce the result than had existed by the law of 1833. The Judge of the Circuit Court is substituted in lieu of the Judge of Probate, and an issue is created for the purpose of better ascertaining the necessity of a sale of the real estate, and by making all persons interested in the lands parties to the issue their rights are necessarily more cautiously guarded. With these views we must consider the acts of 1833 and 1841 *in pari materia* and the former only so far repealed as conflicts with the latter upon the principle of *leges posterioris priori abrogant.*

By our statute of descent it is declared whenever any person having title to real estate of inheritance, shall die intestate as to such estate, it shall descend in parcenary to the male and female kindred. Thomp. Dig. 188. The rule of the common law in relation to descents is thereby clearly abrogated and annulled, and we have already seen that it is in direct conflict with our statues. Although by our statutes of descents the fee is clearly in the heir so that the inheritance may remain unbroken yet it is so cast upon him subject to the debts of the intestate and I might add the dower of the widow. If the lands are assets they must carry with them the incidents of assets, and when the law declares them to be such the power to render them available necessarily follows as an incident.

The rents and profits of the lands constitute a fund for the payment of creditors, and as they must be our laws look to the executor or administrator for payment of their demands how could that fund be made available unless the estate from which it springs be rendered amenable for the debts? And the law points out the mode by which it is to be accomplished. The rents and profits are incident to the land, and it is obvious that the law intended that the whole estate should be subject to the payment of debts.

By the sixth section of the law of 1828, it is enacted that "all 98 debts and demands of *whatsoever nature* against the estate of any testator or intestate, not exhibited within the said two years, (that is, from the time of granting the letters testamentary or letter of administration,) shall forever afterwards be barred." To this is appended a proviso, that the executor or administrator shall make advertisement for four weeks, giving "notice to all creditors, legatees, and persons entitled to distribution, that their claims and demands will be barred at the expiration of the period aforesaid, unless exhibited within the same—saving, however, to married women, infants, persons of unsound mind, imprisoned, or beyond the limits of the United States, in the military or naval service thereof during war, the said term of two years after their respective disabilities shall be removed, to exhibit their respective demands to *said executors* or administrators." Thomp. Dig., 206, sec. 6.

This statute, like all statutes of limitation, must be regarded as one of repose and specifying a period after which litigation shall cease. Its terms embrace *"all debts and demands of whatsoever nature,"* specially or otherwise, and we have already seen that bond and simple contracts are placed upon the same footing.

It is asked, how by any possibility can this statute have the operation intended, if a bond creditor were permitted to come forward after the lapse of time embraced in the statute for the presentment of demands, and still render the lands liable in the hands of the heir. If so, the intention of the law would be frustrated, and it would cease to be a statute of limitations.

It may be said that the saving clause in it, allowing two years for the exhibition of demands after the removal of disabilities which might exist as to *feme coverts,* infants and others, would have the effect of prolonging the settlement of estates, and thereby defeat the object of the statute. Not so—because the law declares that no legacy or distribution shall be required of any executor or administrator until the expiration of six months from the taking out letters, &c., nor shall the executors or administrators be compelled to pay legacies or make distribution until bond and security be given by the person entitled to the same, to refund a due proportion of any debts or demands which may afterwards appear against the estate, and all cost which may be awarded on the same.

The Executor or Administrator if he has availed himself of

the security provided by law in his behalf may have recourse to it for the payment of the debts or demands presented, or at least regard it as a means of reimbursing himself in case he pays the debt or demand. The bond and security may be regarded as a substitute for the fund parted with in the way of legacy or distribution, and are expressly provided for the *refunding a due proportion of any debt or demand which may afterwards appear against the estate.* If the land distributed could be followed in the hands of the heir, such a permission would be superfluous, and we think it clear, that the demand must be made to the executor or administrator.

Pursuing the propositions of counsel, suppose the present action maintainable, the result would be that the specialty creditor would obtain an undue advantage over the simple contract creditor, he being obliged to bring his action against the executor, and we have seen that our law places them upon the same footing in every respect. Besides it would be equally injurious to the heir, for by the law of England if he pays off the bond debt creditors to the value of the land, he may plead such payment against subsequent suits and then retain the land, but by our laws it would still be subject to the simple contract creditor as assets in the hands of the executor.

If the common law remedy against the heir is restored by the act of 1841, and the lands are not assets in the lands of the administrator or executor, the remedy of the simple contract creditor is lost against the land, which would go to the heir discharged of the simple contract debts, and the order of the payment of debts as prescribed by our statute would be done away and abolished.—Thomp. Dig. 205, Sec. 2.

It cannot be said we think, that owing to the views we have taken the remedies of the bond creitors are affected, because he is compelled to sue the administrator or executor, for inasmuch as lands are assets by our law in their hands, so long as there are any, subject to the debts of the testator or intestate, the plea of *plene administravit* could not be pleaded, and if it was so pleaded, it could be rebutted by showing that there were lands of which the testator or intestate died seized, which might be the subject of sale. Lands may be deemed assets *sub modo*, or conditional assets as contended for, but still they come within the purview of the term assets, which is defined to be property in the hands of the administrator or executor, that is sufficient to make him chargeable to a creditor, legatee or party in distribution so far as such property extends. Williams on Executors, 1011.

It is clearly the duty of the executor or administrator, in case there should be a failure of personal assets, to make application for the sale of lands in the mode pointed out by law. It is not a matter with him of mere discetion. The power given is one to be exercised, and if not so exercised the plea of *plene administravit* cannot avail him, and upon a proper case made out before the Circuit Court it equally has no discretion to refuse the order or decree of sale.

We find a case in the first volume of Stewarts Alabama Reports strongly in point with the case at bar. In that case there had been judgment rendered against the administrator, and it was decided that lands descended could not by *scire facias* against the heirs, be made liable to execution. The Chief Justice who delivered the opinion of the Court remarks "In England, if a judgment had been recovered against the ancestor, the lands which were liable to execution in his lifetime may be made liable after his death by *scire facias* against the heirs and *terre tenants.* Our Statute of 1812 gives to judgments and decrees a lien on lands, tenements, &c., and directs that the clerk shall frame the execution accordingly. But for debts, &c., for which judgment has not been obtained against the ancestor, the lands cannot be made liable to execution by judgment against the personal representative. Our statutes have pointed out another mode for subjecting the lands to the payment of debts. If the personal estate be insufficient the executor or administrator shall make his report accordingly, and the land shall be sold by order of the Court. This course does not abridge the rights of creditors, for as the administrator cannot have fully administered if on a deficiency of personal estate he fails to make his report as required so that the lands may be resorted to, the remedy is more ample that at common law." The statute here alluded to by the Court is one precisely like that of 1841 with the exception that in Florida the Judge of the Circuit Court is substituted for the Judge of Probate. Indeed we believe our statute is copied from the Alabama statute, and here is a direct adjudication upon it, sustaining us in the views we have taken.

Deeming upon a due consideration of the subject, that the common law remedy in favor of the bond creditor against the heir is annulled by our statutes, we are of opinion that the judgment of the Court below should be affirmed. *Per Curiam.*

BRADFORD, EXECUTOR, OF READ, ET AL., *vs.* MARVIN & MARTIN.

A cause in Chancery cannot be brought to this court by *Writ of Error.*

Error to St. John's Circuit Court.

Motion to dismiss the writ on the ground that the cause (being in Chancery) may be brought to this court by appeal only.

Forward & Fairbanks, for the Motion.

J. & L. Branch, Contra.

BALTZELL, Justice:

This case is brought here by writ of error, and a motion is made to dismiss it on the ground that a case in Chancery may be brought to this court by appeal only.

By the common law, a suit at law, after judgment, may be removed by writ of error only to this court, whilst by the practice in cases in Chancery obtaining according to the course of the civil law, an appeal is the appropriate remedy for removing a suit in Chancery after Decree. Ward *vs.* Gregory, 7 Peters, 453. The statute law has so far made an alteration as to allow Appeals in common law cases, but we are not aware of any provision extending the writ of error to cases in Chancery. The statute in reference to Appeals and writs of error declared that "the writ of error shall issue as a matter of right," obviously leaving the writ as it then was by law and making a reference necessary to the common law to determine the character of the cases to which it was applicable. Other clauses of the statute support the conclusion that the writ was considered as inapplicable to cases in Chancery, thus the form of the bond in case of supersedeas is for "the due prosecution of the suit *in error;* and in case of the affirmance of the judgment, to pay the defendant in error the condemnation and costs," The tenth section provides that "writs of error on judgment in civil actions shall be sued out within two years from the date of said judgments."

This view is still further confirmed by the act of 11th February, 1832, entitled an act to amend an act to regulate proceedings in Chancery, which declares that a party plaintiff or defendant may appeal from a decree at any time within two years, and for a supersedeas upon an order of one of the judges, thus extending the former law providing that appeal should be taken in term time, or within ten days thereafter. Duval, 108, 138.

We are then of opinion that the writ of error may not be used as a process to remove a case in chancery to this court, and for this reason the writ must be dismissed.

FLINT RIVER STEAM BOAT COMPANY, *vs.* ROBERTS, ALLEN & CO.

Where judgment had been rendered under the peculiar provisions of the second section of an act of the General Assembly approved January 4, 1847, entitled "An act given a lien to steam boat men and others navigating the Bay and River of Apalachicola," upon the affidavit of the plaintiff, without notice to the defendants or appearance by them and without any declaration filed or assessment of damages by a jury:—Held that such judgment must be reversed notwithstanding the statute does not expressly require either a summons, appearance by or notice to defendant, or a declaration or a jury trial.

Where consequences in violation of common reason, common right and the principles of common justice arise even collaterally out of a statute, it is void protanto.

The statute above referred to is in violation of the declaration of our Constitution, "that the right of trial by jury shall forever remain inviolate," and is null and void.

Writ of Error to Franklin Circuit Court.

The facts of the case precede the opinion delivered by the Chief Justice.

W. G. Davis, for plaintiff in error, contended:

That the Judge who granted the order on which the judgment was entered, did not possess any right to exercise jurisdiction as a Judge of the Circuit Court, in the county of Franklin, on the day on which he made the order. The Constitution has given power to the Legislature to pass laws *requiring* the Judges to *alternate.* The power so given has been exercised by the Legislature by act, which

Flint River Steam Boat Company, vs. Roberts, Allen & Company.

if adhered to compels them to *preside* in turn, in each and every Circuit of the State. The act not only affirmatively requires them to officiate as the Judge of each Circuit once in two years, but expressly negatives the exercise of judicial functions by the same judge in the same Circuit oftener than once in two years.—The terms used *"shall not preside,"* are broad and comprehensive. In the present case the Judge of the Middle Circuit, according to these views, had no right under the alternating system to preside in Franklin at the time he gave the order for judgment.

The affidavit on which the order was issued was made by an agent, and this constitutes another ground for reversal. The statute being adverse to the common law, every person seeking the benefit of its provisions should be held to pursue the strict letter of the act.

The next and last objection to which I will ask the attention of the court is that the law itself is *unconstitutional.*

It is unconstitutional inasmuch as it infringes that provision of the Constitution of the U. States which provides that "in trials at common law where the amount in controversy exceeds twenty dollars the right of trial by jury shall remain inviolate." The amount in controversy exceeded twenty dollars and the remedy for the recovery of the demand necessarily must be by the course of the common law. In other words the subject matter of the controversy was within common law jurisdiction.

Such being the nature of the right to be enforced, it only remains to enquire whether the remedy provided by the Legislature, and under which the proceedings were had, does or not preserve the right of trial by jury *inviolate.*

The act authorizes the party claiming against a boat for supplies —to have judgment by *an ex* parte demand supported by affidavit.—There is no trial at all either by jury or otherwise—nor has the party an opportunity of being heard in his defense. The proceedings under the statute are similar to those by the civil law where a party is condemned for *contumacy* for not appearing after summons, &c. The difference in the proceedings are that in the cases under the statute no summons of any kind is served. Now it must be evident that where the party is condemned to pay a demand by an ex parte proceeding, the right of trial by jury is altogether unavailable to him. The remedy provided by which the defendant may have the judgment opened it is true, does secure a
4 jury trial, but it prescribes terms and conditions hard to be complied with, unusual in the course of the common law, and calculated to hinder and prevent a defendant from obtaining the benefit of a jury trial.

The law requires that the defendant shall do all that a defendant in Equity is required to do, that he shall by affidavit admit or deny the whole debt or some part, and if a part is admitted that such part shall be paid ere he be permitted to contest the remainder, and that e shall give bond to respond to the final judgment. Now it may happen that the owner of a boat is unacquainted with the facts relating to the demands, and he may be scrupulous as to the denial of the validity of a demand of which he knows *nothing.* He may not be able to give security. It is evident that all the requisitions of the statute impose conditions unknown to the common law, and that they are calculated to render the attainment of the right of jury trial less easy and more difficult. Whatever delays, hinders or obstructs a party in the pursuit or enjoyment of a right, may be truly said to *violate* such right. In order to a correct determination of what was meant by the clause of the Constitution referred to, let us refer to the trial by jury as it existed at the time of its adoption, and such as we find it was at that time, such must it continue to be considered, and in order to obey the spirit of the Constitution must be preserved to the defendant undiminished and unaltered from its pristine state, when the Federal Government was created. In all cases where the Constitution refers to rights and remedies without specifically defining in what consists the particular right, or what is the nature of the remedy, it has been decided by the Supreme Court that reference must be had to the common law as it stood at the adoption of the Constitution, to determine any question that arises on such subject. Now it may be fairly argued that whenever the mode of proceeding in trials at common law is so altered as to postpone the trial by jury to a time subsequent to the rendition of the judgment and the seizure of the defendants property, that such a course of law, being entirely different and opposite to the common law method of proceeding, is a violation of the common law, and if a violation of the law which secures a right to a party, it is a violation of that right. Any law it has been determined by the Supreme Court of the United States, which, in prescribing the remedy on contracts, so acts as to obstruct the party in pursuit of his right to recover on a contract, and renders it "hardly worth pursuing," is a law "violating the obligation of contracts." 105
Now as a carollary to such proposition of constitutional law, may we not assert that a law which materially alters—varies the mode of trial by jury, and which imposes new, greater and hard conditions, as a pre-requisite to its enjoyment, *violates* the *right* which the Constitution declared should *remain forever inviolate.* Certainly the conclusion is fair and legitimate and the premises and the reasoning are analagous and parallel. The Legislature may alter so as to increase, but it *cannot* alter so as to diminish the right. Whenever in human affairs a right which an individual member of society is so interfered with as to hinder and obstruct him in the enjoyment of the benefits which flow from its uninterrupted possession, it is said to be *violated.* Whenever an object of art, a monument raised to commemorate the great deeds of some departed hero is shorn of its fair proportions by the rude hands of man, it is said to be violated. Such examples of the *acceptation among men* in which the word is used, are cited to sustain the positions assumed, that inasmuch as the act in question hinders and obstructs a man in the employment of the right of trial by jury, such as it was when the Constitution secured it to him, and whereas by the provisions of the act, such right has been marred in its beauty of form and "curtailed of its fair proportions," has been narrowed and confined in its limits, the act itself must be considered as operating to *violate* the right.

The law in question also violates that provision of the Constitution of the United States which declares that a citizen shall not be leprived of his property except by due course of law.

The meaning of the Constitution was that the property of a man should not be taken away except by the verdict of a jury and judgment of a court and after a trial by law. It was intended to prevent confiscation and seizures by arbitrary authority, or by private hands, under pretence of doing summary justice. It therefore provides that the *due course of law* shall be followed. It inhibits the passage of a law giving an extraordinary and particular remedy to a particular individual or to a particular class of men.

The *due course of law* meant was the course which was pursued at the time the Constitution was adopted, subject to such alterations and modifications (as might be effected by the Legislature,) not inconsistent with the true spirit of the *common law,* the great original head and source of all the law known to the Constitution, or meant 106
to be defined by that instrument under the *nomen generalis.*—LAW.

I contend that the Constitution by the provision last quoted meant to prohibit the passage of a law to give any particular person or persons particular remedies by means of which they could obtain possession of the property of another, which proceeding should be different in its spirit and in its operation, from the usual and existing *"course of law,"* which should be required of other citizens, and contrary to that spirit and course of the *common law* designated by the terms employed in the section of the Constitution last quoted.

All particular and partial Legislation might be safely declared to be in violation of the spirit of the Constitution of our State, and that of the United States; but certainly such Legislation is so, which gives to one man or set of men rights not to be enjoyed by others, and rights which if enjoyed by all must be possessed and used at the expense of, and by means of, the curtailing of the rights of others. Such is the character of the act in question—it permits one set of men to proceed in a summary manner to enforce a right, whilst other men are held to the pursuit of their rights in the slow, yet steady, and sure method known to the common law, and derived from it, but simplified and perfected by the statutes of the State.

For all these reasons I contend that the act in question is unconstitutional, in violation of the express requirements of that instrument, and in violation ofthe spirit of it. To conform to the spirit of that Constitution the remedy should be analogous to the common law remedies. The tribunal which decides upon the right, should proceed acording to the distinguishing and characterizing forms, of common law courts. The party defendant should be summoned in person or by attachment of his property, and be allowed "a day in court," to be heard by himself or by attorney in his defence, he should have the right to examine the witnesses produced against him, and to produce witnesses in his own behalf, and the trial of the issues of fact should be submitted to a jury, and not decided by the Judge on the testimony of the plaintiff alone. Any other mode of proceeding (by means of which a man's property is seized, and taken out of his possession,) not being in accordance (substantially) with the requisites and characteristics before enumerated, is contrary to the spirit of the Constitution and foreign to our institutions of Government; unworthy to be practiced among a free people, where equality in all things is asserted as a fundamental principle of the

107 compact of Government, and in violation of the provision which requires the observance of all cases of the *"due course of law."*

Carmack & Baker for Defendants in Error.

In this case there are five grounds of Error assigned. We will notice them in detail:

1. It is alleged that the Judge of the Middle District granted the Fiat. And that it should have been granted by the Judge of the Western District.

To this we reply that the application may be made before "any Judge of the Circuit Court in any county in which said boat may lie." Act 1846, Thomp. Dig. 413, Sec. 2.

2. It is said that the *demand* of payment was made by an agent of plaintiff instead of the plaintiff in person and that the *affidavit* was made by an agent.

To this we reply—that having been done by an *agent*, they were in contemplation of law done by the *principal*.

3. It is alleged that there was no summons, or jury trial, or notice to the defendants, or declaration.

To this we reply that the act requires none and where the difficulty of knowing who the owners of steam boats are is considered, it would have been unreasonable in the Legislature to have required any notice to the defendants—none is required by the attachment law and none here.

The act does not require a declaration. If the defendants desire a jury trial—the act gives it to them upon their application to have it, and the act in the meantime arrests the proceedings under the Execution.

Instead of taking these proceedings in this case, the defendant waived it by giving a bond for the delivery of the boat on the day of sale.

4. The proceeding is contrary to the course of the Common Law.

To this we answer, this is no valid objection. All equity proceedings; Atachment laws; Tax sales; Admiralty cases, and summary proceedings generally, are contrary to the course of the Common Law.

5. The Record and proceedings are unconstitutional in this—they violated the 5th and 7th articles of the Constitution. See amendments.

108 To this we answer that these articles are intended solely as limitations on the exercise of power by the Government of the United States, and are not applicable to the legislation of the States. Baron *vs.* the Mayor and City Council of Baltimore, 7th Peters, 243. Livingston *vs.* the Mayor of New York, 8 Wend., 85. Colt *vs.* Eves, 12 Conn. 243.

So of the 6th amendment that secures to the accused a trial by jury in all criminal prosecutions. Murphy *vs.* People, 2 Con. 815.

But suppose that there is such a constitutional prohibition on the Legislature here as that contained in the 7th article of the Constitution of the United States. This act is not a violation of it, 8 Yerger, 444, Morford *vs.* Barnes.

DOUGLAS, Chief Justice:

This case came up by writ of error from a judgment rendered by a Judge of the Circuit Court at Chambers at Apalachicola, in Franklin county, on the fifth day of June, A. D. 1847, under the peculiar provisions of the second section of an act of the General Assembly of this State, "approved January 4th, 1847," Thompson's Digest, 414, which provides that "whenever any captain, pilot, engineer, first or second mate, fireman, deck hand, merchant, builder, material man, or any other person employed in, or for materials, goods, or supplies furnished any steamboat, lighter or other water craft navigating or running on the Apalachicola river, and bay of Apalachicola, shall have any claim for services rendered on board the same, or for provisions stores, or work and labor done, shall be desirous of collecting the same upon the said debt becoming due and refusal to pay the same upon demand made, he, she, or they may upon application to any judge of the Circuit Court in any county in which said steamboat, lighter or other water craft, may then lie, upon the same arriving at the landing, port, or place of destination to which the same had been freighted, make affidavit before the said Judge, of the amount due him, her, or them, for any labor, services or supplies by him, her or them, done and performed, or provisions or stores furnished said steamboat, or other water craft, and specify the name thereof. Whereupon the said Judge shall grant an order to the Clerk of the Circuit Court of the county where the proceedings shall have been commenced requiring said clerk to enter up judgment upon said affidavit in favor of said applicant for the amount sworn to be due; and it shall be the duty of said clerk to

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issue instanter an execution therefor against the owner or owners of 109
said steamboat, lighter, or other water craft, to be directed to the Sheriff of the County, whose duty it shall be forthwith to levy said execution upon the said steamboat, or other water craft, and advertise and sell the same under the same rules and regulations as govern Sheriff's sales in other cases. *Provided*, the said demand exceeds the sum of fifty dollars." (If said sum shall be for fifty dollars or less, then, and in that case the application shall be made to a Justice of the Peace, &c. Ibid.)

An affidavit was made before said Judge by Luther D. Roberts, agent claiming for Roberts, Allen & Co., the sum of six hundred and fifty-seven 60-100 dollars, for iron work and material furnished said Flint River Steamboat Company, to and for the use of said steamboat. Whereupon the said Judge entered the following order: "At Chambers, June 5th, 1847, upon reading the foregoing petition and affidavit annexed, it is ordered that the Clerk of the Circuit Court of Franklin county, do enter up judgment in favor of Roberts, Allen & Co., in the sum of six hundred and fifty-seven 60-100 dollars, ($657 60-100,) amount sworn to against 'The Flint River Steamboat Company,' owners of steamboat Magnolia. In witness whereof I have hereunto set my hand this day and year above written." This order officially signed by said Judge, was on the same day presented by the plaintiff to the Clerk of the Circuit Court of Franklin County for the entry of judgment as therein prescribed, and in pursuance thereof the said clerk entered up judgment as follows, viz: "It is therefore considered by the court that the plaintiffs recover against the said defendants the sum of six hundred and fifty-seven dollars and sixty cents, together with their costs by them in this behalf expended." And upon the same day an execution issued on this judgment which was levied on the said steamboat Magnolia. The steamboat was replevied until the first Monday in December, 1847, that being the first regular sale day after the said steamboat was replevied as aforesaid.

The plaintiff has assigned five several errors but we will only consider the *third* which we deem decisive of the case, and which is as follows, to wit:

"There was no summons issued and served, nor was there any evidence to show that defendant had any notice of the institution of this suit, nor was there any declaration filed, or any assessment of 110
damages by a jury."

The defendants in error contend that the statute above quoted does not expressly require either a summons, appearance by, or notice to the defendant, declaration or a jury trial. This is true but the defendant must have notice either actual or constructive, or no valid judgment can be entered against him. Hollingsworth *vs.* Barbour *et al.*, 4 Peters, 470. Jones *vs.* Smith, 3 N. Hamp., 108. Hart *vs.* Huckins, 6 Mass. 399. Arnold *vs.* Tourtelot, 13 Pick., 172. Heathorn *vs.* Hulin, 3 J. J. Marshal, 432. Morris *vs.* Parker, 3 Littel, 368. Stayel *vs.* Westcott, 3 Day 349.

Statutes authorizing proceedings in derogation of the common law for the recovery of debts, generally provide specially, that notice of the institution thereof be given to the defendant. It has been said that our attachment law requires no notice. It is true that it requires no notice before the seizure of the property, but it expressly requires that notice of the institution of the suit shall be *personally* served upon the defendant, or *shall be published for three months* in some newspaper of the district, and if there be no newspaper, then a written advertisement in some public place. This notice by advertisement or writing is what the books call constructive notice, and our attachment law further provides that "the court upon satisfactory proof of the service of such notice, and upon the finding of a *jury* of inquest may award judgment. It also requires a declaration and other pleadings." Thompson's Digest, 359, No. 1. Duval's Comp., 388, Sec. 14. It also provides that no attachment shall issue until the party applying therefor, his agent, or attorney, shall enter into bond with at least two good and sufficient securities, payable to the defendants, in at least double the debt or sum demanded, conditioned to pay all costs and damages the defendant may sustain in consequence of improperly suing out said attachment.—Thompson's Digest, 388, No. 4. Duval, 391, Sec. 10. Thus strictly guarded are the rights of defendants under our attachment law. The act upon which this proceeding is founded contains no such safeguards for the defendants, and does not therefore commend itself to favorable consideration. In this case it is not pretended that there was any actual notice, or indeed any other notice, but the advertisement of the sale of the steamboat by the Sheriff. It was suggested (though apparently not relied on,) that the defendant had notice by this advertisement, but this was after judgment and be-

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sides is not notice to the defendant to appear and defend his rights, but is only notice to purchasers. Constructive notice can only exist in cases coming fairly within the provisions of the statutes authorizing courts to make orders of publication, and providing that the publication when made, shall authorize the courts to enter a judgment or decree. Hollingsworth *vs.* Barbour, *et al.*, 4 Peters Rep., 466. Chief Justice Marshal in the case of Meads *vs.* Deputy Marsh., &c., 1 Brock, 388, held that "it is a principle of natural justice which courts are never at liberty to dispense with unless under the mandate of positive law that 'no man shall be condemned unheard, or without an opportunity of being heard.'" The statute under which this proceeding was commenced contains no such mandate. Although it does not expressly require, it does not prohibit the giving of notice, and if it is so framed that notice cannot consistently with its requirements be given, it may well deserve consideration whether it is not null and void, as being against the plain and obvious principles of common right. In Falconer *vs.* Montgomery and others, 4 Dall. 233, the court said: "The plainest dictates of natural justice must prescribe to every tribunal the law, that 'no man shall be condemned unheard.' It is not merely an abstract rule, or positive right, but it is the result of long experience, and of a wise attention to the feelings and disposition of human nature." And in the case of the Commonwealth *vs.* the inhabitants of Cambridge, 4 Mass., 627, it was held to be "an essential principle of natural justice that every man have an opportunity to be heard in a court of law upon every question involving his rights or interests before he is affected by any judicial decision of the question.—In the case of Commissioners of Highways *vs.* Clow and others, 15 John. 537 to 539, the judgment of the Court of Common Pleas was reversed because the decision of the Commissioners had been reversed on an *"ex parte"* hearing *without notice* to them, although by the statute under which the proceedings took place no notice was by its terms required to be given. And in Corlies *vs.* Corlies, 8 Vermont 387 to 389, the same principle is maintained.

Hart *vs.* Huckins, 6 Mass. 400, was an action of entry *sur disseisin*, the process was served by a constable, who was only authorized by statute to serve process in *personal* actions; judgment was rendered by a Justice of the Peace which was carried up to the Common Pleas where it was affirmed, but the Supreme Court reversed it, on the ground that it being a real action, the constable had no au-
12 thority to serve the process, and consequently the tenant had no legal notice, and ought not to have been called, and that the judgment rendered on his supposed default was erroneous, and in reversing the Judgment the court said: "no court is authorized to render a judgment or decree against any one, or his estate, until after due notice by service of process to appear and defend." And Hollingsworth *vs.* Barbour, *et al.*, above cited, 4 Peters, 472. Denning *vs.* Corwin, 11 Wendell's Rep. 651 and Campbell and others *vs.* Brown, 6 Howard's Reps. 111, were reversed because the defendants had no notice, either actual or constructive.

With these authorities before us so directly in point and so conclusive, we should be (we think) fully justified in reversing this judgment, were there no other objection interposed than the want of notice. But on account of the extraordinary character of this statute, we have deemed it to be our duty to notice its provisions further. It is to be observed that the judgment is required to be entered upon the affidavit of the claimant alone; the execution to issue forthwith directed (if the judgment is in the Circuit Court,) to the sheriff, if in a Justices Court, to a constable, and in either case it is made the duty of the officer forthwith to levy said execution upon the Steam Boat, or other water craft. No discretion is left with the officer; he must levy on and advertise and sell the steam boat or other water craft (unless the defendant should perchance happen to hear of the proceedings, and put in a defence under the onerous conditions imposed by the fourth section of the act) notwithstanding there might be an abundance of other property of the defendants within his reach (or even on board such steam boat or other water craft) to satisfy the execution. We see therefore that a steam boat of great value, might be seized by virtue of an execution for a debt of five dollars (or even a less sum) by a constable, or for any sum over fifty dollars by a sheriff and detained until the next sale day, and then unless replevied must absolutely be sold, notwithstanding the whole cargo of such steam boat might be the property of the defendants, and consist as it naturally would of articles capable of being separated, so that the officer would have no difficulty in levying on property in proportion to the amount of the debt claimed.

Such a state of things would we think be against common reason, common right and the principles of common justice. And in the case of Ham *vs.* McClaws, 1 Bay's Reps. 93, it was held that "statutes passed against common right, and common reason are null and void, so far as they are calculated to operate against these 113
principles. "If consequences, or those manifestly against common reason arise collaterally out of a statute, it is void *pro tanto.*" 1 Harper, 101, cited in 3 United States Digest, 482, No. 4.

But the more serious objection to this statute is, its interference with the right of trial by jury. Under this statute a judgment may be entered up for any sum upon an open account and even without an exhibition of the account or any other voucher, upon the affidavit (as we have seen) of the plaintiff himself, without, too, even the verdict of a jury.

The right of trial by jury, says Judge Story, is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. 3 Story's Comm., 638, 639, Sec. 1760. "In *Magna Charta* it is more than once insisted on, as the principal bulwark of our liberties, but especially in chap. 29, by which it is provided: That no freemen shall be hurt in either his person or property (*"nisi per legale judicium parium suorum vel per legem terrae"*) unless by lawful judgment of his peers or equals, or by the law of the land. A privilege," says Blackstone, "couched in almost the same words with that of Emperor Conrad *two hundred years before.* And it was ever esteemed in all countries a privilege of the highest and most beneficial nature." 3 Black. Comm. 271, Chap. 23. Chapter 29 of *Magna Charta* is in force in this State by virtue of the act of Nov. 6th, 1829, adopting the common law and statute laws of England, &c. Thompson's Digest, 21, Sec. 2. Duval's Comp. 357—and article 17 of the schedule and ordinance of the Constitution of this State containing this latter act amongst others in force. The Constitution, Thompson's Digest page 2, Sec. 3, declares that "the right of trial by jury shall forever remain inviolate." The act of the General Assembly under consideration has been passed since the Constitution went into operation, and the question arises therefore whether it is not in violation of the provisions of that instrument. At the time when the Constitution was adopted and when it first became operative it is very certain that the plaintiff below could not have recovered this judgment without "a trial by jury," and the act under which it was rendered wholly dispenses with a jury and expressly authorizes the Judge or Justice of the Peace (as we have seen) to render the judgment not only without a jury, but upon the affidavit of the plaintiff alone and without 114
notice to the defendant.

The Constitution says "the right of trial by jury shall forever remain inviolate," that is (as is very evident) the right shall (in all cases in which it was enjoyed when the Constitution became binding and obligatory) continue unchanged. It shall "remain inviolate." This term does not merely imply that the right of jury trial shall not be abolished or wholly denied, but that it shall not be *impaired.* The word inviolate is defined by approved *Lexicographers* to mean unhurt, uninjured, unpolluted, unbroken. Inviolate says Webster is derived from the latin word *"inviolatus"* which is defined by Ainsworth to mean, not corrupted, immaculate, unhurt, *"untouched."* From the plain and obvious meaning of these words, therefore, we conclude that the General Assembly has no power to impair, abridge, or in any degree restrict the right of trial by jury as it existed when the Constitution went into operation. It will not we think be for a moment contended that the right of trial by jury is not by this act greatly impaired, abridged and restricted. Although it is not totally denied to the defendant, yet under this act he can only have a jury trial when after judgment he may happen to obtain information of the pendency of the proceedings before the sale takes place, and then only upon condition that he swears that he does not owe the whole or some part thereof, and even then only as to the part which he swears he does not owe. Another *condition* is interposed by the act to the enjoyment of this Constitutional right with which it might in many cases be difficult, if not utterly impossible for the defendant to comply, viz: he must give bond with good security, residing in the county where such proceedings may be had, to the plaintiff in double the amount claimed conditioned for the payment of the eventual condemnation money and all costs thereon, an amount let it be recollected sustained *only* by the affidavit of the plaintiff on which the judgment is in the first instance entered and execution issued and levied.

Now it is very manifest that if the General Assembly may in the first instance dispense with "the right of trial by jury" altogether, and in the second interpose these two novel not to say dangerous and oppressive conditions, it may interpose others indefinitely. If the right in question may be denied in one kind of cases, or only allowed upon onerous conditions, it may in all cases. If it may in

115 civil cases it may in criminal cases and even where the life of the accused may depend upon the issue.

Therefore the wisdom of that clause of the Constitution which prohibits "the right of trial by jury" from being injured or even "touched" is very apparent. This act allows judgment to be entered up for any amount (no matter how much or how complicated the accounts on which the claim may be based) without any other proof than the affidavit of the claimant himself, and in this case it was actually so entered (or rather upon the affidavit of an agent) without pleadings, without notice without appearanee by the defendant and *without a jury.*

The court feel the importance of the sacred trust confided to them, of preserving the Constitution of the State unimpaired, and at the same time the delicate duty it imposes of declaring null and void any act of the General Assembly believed to be subversive of any of its provisions.

When however it is remembered with what jealous and scrupulous regard "the right of trial by jury" has ever been cherished and preserved by our Anglo Saxon ancestors, and by the Fathers of the revolution of 1776, a regard transmitted to us their descendants not only with unabated attachment, but if possible with increased interest and regard—a *Magna Charta* shielding every one in the enjoyment of life liberty and property: When these things are borne in mind and a Legislative act in its terms abridges this hallowed right, or its provisions are subversive of the principles of natural justice and against common reason and common right, the duty of the court though unpleasant and even painful, is too obvious to be doubted or denied. Such an one is the act entitled "an act giving a lien to steam boat men and others, navigating the Bay and River of Apalachicola," approved January 4th, 1847, and we are compelled to consider it to be against the letter and spirit of the Constitution of this State, unsuited to answer reasonably, rightly or justly the purposes for which it was enacted, and that it is consequently

The judgment must therefore be and the same is hereby reversed, and the cause remanded to the court below with directions to dismiss this suit.

Per Curiam.

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Where this Court is equally divided in opinion, judgment must be entered affirming the judgment of the Court below.

Where there is such division, the justices are not required to file their opinions in writing before judgment is pronounced.

The statute providing that the justices shall file their opinions "in all cases decided in said (this) Court before judgment pronounced" is only *directory.*

Motion to vacate the judgment heretofore entered in this cause in this court. The grounds of the motion are stated in the opinion.

Fraser, for the Motion.

HAWKINS, Justice:

This case was argued upon its merits at the last term of this court and submitted to it for its decision and the court being equally divided judgment of affirmance was entered and the plaintiff in error now seeks to vacate that judgment and reinstate the case upon the following grounds to wit: *First*, That the court being equally divided in opinion, no judgment could be entered affirming the judgment of the court below. *Second*, that the justices of the Supreme Court did not file their opinions in writing in this case before judgment was pronounced.

These are important questions touching the practice of this court, neither of which have before occurred in this State. Upon a very full examination of them however, they seem to present very little difficulty.

The general rule is that he who makes a motion to reverse a judgment, and takes nothing by it, is to be considered as denied, otherwise the consequence might be that the record would be here forever, and to give effect to that *denial*, a judgment of affirmance ought to be given. Bridge vs. Johnson, 5 Wendell 374. In the case of Iveson *vs.* Moore, 1 Salkeld 17, the concluding part of the case is this: The court being thus divided and *there being a former rule to stay judgment*, no judgment could be entered, but *et per curiam* if the court had been divided on the *first* motion the *plaintiff might have entered judgment*, but now this rule must stand or be discharged, and discharged it cannot be, because the court are equally divided

In 1 Ld. Raymond 495, in a note the reporter says: "In this case 117
upon one of the former motions in arrest of judgment a rule *was made that judgment should be arrested*, and now the court being divided the plaintiff could not have the rule discharged nor have judgment. *But if on the former motion the court had been divided judgment would have been entered for the plaintiff.* These cases are therefore authority in favor of the correctness of the judgment in this case. In the Exchequer Chamber it is the practice upon a division to affirm the judgment. Deighton *vs.* Greenville.

And so is the practice in the House of Lords, 1 Shower 36.—Cruise on Fines 222, Irish Edition 118. 2 Tidds' Pr. 1236. A similar decision was made in the Court of Exchequer Chamber in Ireland, in the case of Warburton *vs.* Loveland and Ivie in 1828. 1 Hudson and Brooks, Reps. 725. The same practice has obtained in the Supreme Court of the United States. See the United States *vs.* Worrell, 2 Dall. 388. 11 Wheaton Reps. 59.

The judgment of the court below must be presumed to be right until the court of dernier resort has decided otherwise. Bridge *vs.* Johnson, 5 Wendell, 372. 3 Tidds Pr. 1178. The same rule obtains in Maryland. 5 Harr. and Johnson, 284.

It is a principle of the common law that when a motion is made in a Court of Justice and the Judges are equally divided on the question, the mover takes nothing by his motion. Foot *vs.* Tracey, 1 John. Reps. 54. Iveson *vs.* Moore, 1 Salk. 17. Chapman *vs.* Lamphere, 3 Mod. 156. 1 Shower 46, in note.

As to the second point, that the court was bound in compliance with the statute to file written opinions even in case of a divided court, we have come to the conclusion that it is not requisite or necessary and that it was not the intention of the Legislature that we should do so. The statute is in these words, "The Justices of the Supreme Court shall file their opinions in all cases decided in said court, before judgment is pronounced, which shall be entered of record in the case."

The objects which the Legislature had in view in declaring that the decisions of this court should be in writing, and afterwards printed in the shape of reports appear to be these, that the citizens of the State should have the benefit of the adjudications of their highest legal tribunal, upon all questions or cases brought before it. The decisions of these questions involving as they inevitably must the rights of persons and property, including frequently the interpretation of statutes, becoming in fact rules of action to nearly or 118
quite the same extent as the statutes themselves, the importance of their promulgation must be at once apparent and readily appreciated. It seems clear, that the opinions of the justices *as a Court* are to be written and if there should not be a majority of the court agreeing on one side of the question, there can be no decision. There must be something decided before the statute applies and if the court is divided can there be in the nature of things a decision? The Lexicographers tell us that the term "decided," implies "decision, something that is unequivocal, that puts an end to doubt." Suppose the court stand opposed two to two, are there any doubts removed, is not the case left in the same situation in which it came up, leaving the questions of law involved in it as open questions and subject to future adjudication. Can the opinion of the court be cited as authority in any future controversy? Certainly not, because there is a perfect mathematical balance with no preponderance on either side.

It may be said that there is a *sub modo* decision, inasmuch as there is a judgment of the court, but at most it would appear a decision by operation of law, and not by the court, a *majority* being necessary to produce that result. Nor can we invoke the decision of the judge at *nisi prius* to be thrown in one scale or the other. The cause comes up to be tried *de novo*, with the facts already ascertained, the counsel better and more maturely prepared than in the court below, and is to be decided by a tribunal possessing all the advantages of an Appellate Court. The intention of the Legislature seems to have been to obtain the reasons which have guided and actuated the court in coming to a decision, rather than those which might have operated to produce division and disagreement. Even if we are wrong in this view of the matter, not having filed written opinions in this case, would not affect the validity of the judgment, for the statute is only directory. Statutes directing the mode of proceeding by public officers, are advisory and not essential to the validity of the proceedings themselves unless it be so expressed. 8 Vermont, R. 280. Corless *vs.* Corless, ib. 390. People vs. Allen, 6 Wendell 480. Pond *vs.* Negus, 3 Mass. 230.

Of course we have regarded the question as a purely legal one, having naught to do with inquiries based upon any supposed expediency. With these views, we are of opinion that the motion must be denied. *Per Curiam.*

BALTZELL, Justice, dissenting:

The decision of the court in this case is that there is no obligation to deliver opinions where there is an affirmance of the judgment through an equal division of the justices. In this I do not concur, conceiving that the law is imperative, and extends to and embraces both in its letter and spirit all cases disposed of. Its language is the justices "shall deliver opinions in all cases decided."

The court, however, says although there was a judgment there was no decision, and therefore the statute is inapplicable. I find no such distinction in any elementary work of the law, in any book of reports, nor in any statute nor is a citation of any such given by the court. They say Lexicographers "tell us that the term decided implies decision, something that is unequivocal, that puts an end to doubt." Admitting this, does it prove that judgment is different from decision, or are we to infer that judgment implies indecision, something that is equivocal, or that creates a doubt. A more extended reference to the same authority would have found the word decision defined to be 'determination, as of a question or doubt, *final judgment* or opinion in a case which has been under deliberation, discussion.'

Nor is this view of the court as we apprehend sustained by the text books. 1 Black. Com. 69.

Nor by the language of this court itself on repeated occasions—Miller, &c. *vs.* Hoc. "this case must be governed by the *decision* of the court in the preceding case as in the one just *decided,* the *judgment* is therefore reversed." 1 Flor., 197.

In Beatty *vs.* Ross, the Chief Justice *decided* the case and his *decision* being sustained the judgment is confirmed, &c., Ibid. 210.

In Archer *vs.* Duval's administrator by the common law *judgment* followed the *decision* on a demurrer as matter of course, &c. Ibid 203, 204, 207.

Nor by that of other courts.

The Supreme Court of the U. S. uses the two words as follows: "A judgment concludes the subject in which it is rendered and pronounces the law of the case, it puts an end to all enquiries by *deciding it.*" 3 Peters, 204.

"The decision of a Court of Record is conclusive, and whether
20 *its decision* be correct or not its *judgment,* until reversed is binding on every other court." 1 Peters, 340.

Whilst the words are used indiscriminately, in correct legal acceptation the judgment may be regarded as the formal expression of the decision spread out on the record by the clerk.

Nor is the distinction maintained in the various statutes referring to the final action of our courts.

Thus in the second section of the law of the first State Legislatures organizing the Supreme Court of the State we find these words together: "The acts of the Governor and Council now in force, and providing for regulating appeals from the judgments, or decrees, *or decisions* of the Superior Courts of the Territory to the Court of Appeals or writs of error for the review of *decisions* of said Superior Courts shall as far as applicable be in full force, and be deemed to apply to said Supreme Court."

In the 14th section of the same law "That all cases now pending in said Court of Appeals shall be transferred to said Supreme Court, and tried and *decided* therein and thereby. Laws of 1845. p. 13.

It is under this section the court took jurisdiction of the case under consideration, and from it derived their power over it. If the case is not *decided* this part of their duty would seem yet to remain.

The provision for the delivery of opinions is in this same statute. The sixth section of the law regulating the mode of suing out writs of error, and prosecuting appeals has this provision "That the said Court of Appeals may order the record of the judgment with their *decision* and determination thereon in writing duly certified to be remitted to the said Superior Court and the said *decision* and determination shall be carried into execution by the officers of the said court or the said Court of Appeals may award execution to carry into effect its *decisions* and determination." Duval, 109.

Now we can scarcely imagine authority more direct and express—the decision is to be remitted—the decision carried into effect. If the court has sent their mandate without a decision the law would seem not to have been complied with.

Again the opinion asserts that "although there was a judgment it was by operation of law *and not by the court.*" Here there is no reference to authority, and the question occurs if not made by the court, who or what other power is there that can rightfully, under

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the Constitution and laws of the State make it? All judgments are 121
by operation of law, but can the law operate to make a judgment in the absence of, or without a Court?

"The record however, does not in my judgment, sustain the allegation that the judgment was without a Court.

PHILIP FRAZER and WIFE, adm'rs, &c., *vs.* CHARLES WILEY. } January Term, 1847.

Present Hon. THOS DOUGLAS, Chief Justice, Hon. THOS. BALTZELL, Hon. GEO. S. HAWKINS, Hon. GEO. W. MACRAE, Justices.

This day came the parties by their attorneys, and the transcript of the record of the judgment aforesaid being seen and inspected, and said parties being fully heard by counsel, and the court being equally divided in opinion, it is considered by the court that the said judgment be affirmed," &c.

The question is asked as not admitting of any doubt, "Is not the case left in the same situation in which it came up leaving the questions of law involved in it as open questions, and subject to future adjudications?" Can it be the design to say, that the case is open in the Circuit Court, and to be tried there again? This would seem to be the fair inference, for the Supreme Court had refused to take farther action of it, by declaring the judgment of the former term valid We have, however, thought this scarcely possible. If yet subject to future adjudication, it must be by the Supreme Court; and if so, the question arises, why was the motion of the plaintiff to reinstate his case overruled?

Again, it is said that the opinion of the Court in such a case is not authority. With due deference this question is more appropriate for the tribunal before which the decision may hereafter be quoted. Courts do not usually attach to their opinions when delivered the estimate to be placed upon them, nor pledge themselves in advance to recognize or reject any case as authority. But why is this case not authority? As the judgment of the Circuit Court, expressing the law of the case, until reversed it is authority—when that judgment is affirmed by the Supreme Court is there a diminution of its authority? The Judge of the Circuit Court declared the law of the case, the Supreme Court affirm the judgment, thereby giving the sanction of that tribunal to the law as declared by the Court below.

A reversal obviously would have destroyed the authority of the case; but that an affirmance has this effect, is to confound and ut 122
terly annihilate the meaning and sense of terms. This would be to place the Court in the contradictory position of maintaining by their *judgment* the right of one of the parties under the law which by the qualification attached to their opinion they maintain that he is not entitled to—in other words affirm the case as to the parties, but reverse it as authority for other cases and this upon the ground that he "Court stands opposed two to two—or is divided and in such case it is said there is a perfect mathematical balance with no preponderance on either side." With due deference we cannot admit the propriety of this language, we do not admit that a Court can be divided. By law a majority of the judges is sufficient to transact business and the agreement of more than half of these will be sufficient to decide a case although this majority may be less than half the number of the judges, thus in a judicial body of twelve, seven present would be a quorum and four concurring as to a case would render the judgment though in fact constituting only one third of the judges. In a body consisting of five judges a quorum consists of three and two of these concurring render the judgment of the Court. In Legislative assemblies this is also the case. In the instances of the judicial bodies above stated the four in the one case and two in the other constitute the court, in the Legislature the majority of the quorum constitute the Legislature and this by operation of law. A concurrence of a sufficient number of judges to do business, to give judgments to decide cases then constitutes the Court and in case of concurrence with them although there may be disagreement or division amongst the judges there is no division of the Court. This is the law of its organization.

A similar law prevails in the structure and organization of Appellate Courts, and Courts of Error of the last resort, where there is an equal division of the judges. In such cases by the settled rule the judges in favor of affirmance constitute the Court, there is then by operation of law an affirmance of the judgment, a declaration by the Court that the judgment of the Court below is right and must be carried into execution. Such is the case in the House of Lords in England, Court of Errors of New York—of Maryland. In this Court also as announced in the present case and repeated again in the case of Williams and Moseley the same law prevails. In cases depending in other Courts it is a principle "where the judges are divided the mover takes nothing by his motion, *there is no judgment,*" the invari-

123 able practice of the Court of Kings Bench and of the Common Pleas being *not to give judgment* in case of a division of opinion of the judges." 1 Strange, 383.

With due deference, by not attending to this distinction the mistake has been committed of saying when the court is divided "the principles of law are not settled, the question is not decided," &c.,—"the case only is settled, not the law in this court." With great propriety this language may be applied to cases of division in the Kings Bench and Common Pleas where there is *no judgment*. Can it however apply where there is decision and a judgment rendered?

These positions as to the law not being settled, the question not decided, but only the particular case, &c., are so opposed to the principals and mode of action by which courts profess to govern as to be irreconcilable with reason and propriety. According to Blackstone "judgment is the conclusion that naturally and regularly follows from the premises of law and fact, &c., which judgment or conclusion depends not therefore on the arbitrary caprice of the judge but on the settled and invariable principles of justice." 3 Black. 396.

"It is the sentence of the law pronounced by the court upon the matter contained in the record." 3 Black. 395. "A court when it constructs a judgment forms it of certain materials which are law, these materials the court does not make and so far the judgment is not creative of law. These materials consist of the divers laws within the realm, of maxims, principals, rules, intendment and reason of the common law, report books, records and other authorities of law." Ram on Jud. 2.

If these materials are rejected in the decision of a case what substitute is to take their place? Can they give a judgment without their use, indeed rejecting them by their own admission? Is not this the giving of a judgment which is not law and therefore reversing the sense and meaning of the term? Is it not substituting the mere dixit of the judge in place of a decision based upon the settled and invariable principles of justice? Can there be a law or rule of action applicable to two parties and their rights which is not applicable to all parties and all rights of the same kind?

I will not be understood as contending that a decision of this kind is of the highest or best authority. My position is that it is authority lessened in weight by the fact that it was rendered by a
124 divided court. Ram on Judgments in speaking of "the circumstances which may lessen the value of authority," specifies cases "where the court was equally divided or were not unanimous in opinion," p. 183.

A higher authority is to be found in a case decided by the Supreme Court of Vermont and taken from Washburn's Digest. "It must be a very clear case and one unsusceptible of doubt which would lead the Supreme Court to disturb a question which had been settled in previous years even though that decision were given by a court divided in opinion." State *vs.* Bosworth, 13 Verm. 402. I insist then that there has been a decision of this case by this court and of the questions and principles of law involved in it—that it is absolute and valid as if concurred in by all the Judges—that it is the law of the case and of all other cases similarly situated until like all other authority it can be assailed by showing that it was not law.

If the case was decided the statute is applicable unless although within its letter it is not within the spirit of its provision. Nor is there a reason why an opinion should not be delivered in the case of a divided court. This involves an enquiry into the reason of judges delivering opinions at all in any case. This is given by the judges both in England and America in language of this character.

In England said Lord Kenyon it has long since been held to be the great duty of every court of justice to administer justice as well as they can between the litigating parties—another and not less material duty is to satisfy those parties that the whole case has been examined and considered. 6 T. R. 408.

Next to doing right the great object in the administration of public justice should be to give public satisfacton. 3 Black. 391.

The expressed reason of a judgment is an important ingredient in it, the reason of a resolution is more to be considered than the resolution itself. Ram 21.

Next to doing justice said Chancellor Dessassure, in a sentiment quoted with approbation by the Supreme Court of South Carolina, the greatest consolation of judges, is so to administer that justice as to satisfy the parties that the merits of their causes have been fully bought, well considered and impartially decided. 1 Hill Ch. 453.

In a recent case decided in the Court of Exchequer one of the judges said although Ld. Lyndhurst has in a great degree anticipated the judgment which I intended to deliver, the parties to the 125
cause are entitled to be satisfied by knowing the opinion of each judge and the grounds on which it is founded. Ram on Judgment, 20.

"It is not only a justice due to the public and the parties," said Lord Mansfield, "to weigh well the grounds and reasons of the judgment, but it is of great consequence to explain them with accuracy and precision in open Court, especially if the question be of a general tendency, that the law of the land may be certain and known."

It is this course of these courts that has obtained for them the tribute of the most distinguished of the jurists of America. Every person well acquainted with the contents of the English Reports must have been struck with the unbending integrity and lofty morals with which the Courts were inspired. I do not know where we could resort among all the volumes of human composition to find more constant, more tranquil and more sublime manifestations of the intrepidity of conscious rectitude. If we were to go back to the Iron times of the Tudors and follow judicial history down from the first page in Dyer, to the last page of the last reporter, we should find the higher Courts of civil judicature generally and with rare exceptions, presenting the image of the sanctity of a temple where truth and justice seem to be enthroned and personified in their decrees." 1 Kent. Com., 496.

Nor have the American Courts been wanting in this respect having earned a like deserved distinction. Did those judges however content themselves with discussion and the delivering of opinions in cases only when they were all agreed? By no means, their noblest triumphs were earned, their greatest efforts made in cases of disagreement, in cases of doubt where the highest stretch of ingenuity and talent were required to attain and develope the truth. It is there indeed discussion, debate and effort are required and wanted. "All opinions, yea errors known, read and collected," says an eminent writer, "are of main service and assistance towards the speedy attainment of what is truest. Truth arises from the collision, and from hence springs liberty which is a security from the effect of reasoning." We do not require a beacon when the channel is deep and free from impediment.

Supposing that we are mistaken in the opinion that the case was decided, that there was a Court to give judgment and that it is not open to future adjudication, we ask then if the parties even in a case so situated have not rights and the public to be satisfied how 126
and why a judgment has been so rendered?

it right in the opinion that the two judges constitute the Court does not a singular responsibility devolve upon those thus assuming the high and solemn duties of this exalted tribunal to explain satisfactorily and conclusively a judgment which they assert in opposition to the respectable authority of two of their brethren. It does seem to us in proportion to the delicacy of that position is it a duty on their part clearly and beyond all question to vindicate and sustain the propriety of their judgment.

Clear in the opinion that the construction given is against the letter as well as the spirit of the law there are other reasons no less cogent in my view against it founded in the very organization of the Court itself. This is the highest judicial tribunal of the land it is of the last resort except in very few instances, it undertakes to administer the law according to the course of the most enlightened Courts in this country and in England. They all in their action for centuries past in England and since the time of their organization in this country as we have seen, have been distinguished for the discussion, the careful and attentive examination and consideration of questions and principles. Their records are a proud monument in their favor of an adherence to truth and right and principle maintained over the occasional ascendancy of error and mistake. To their honor and glory be it spoken, there has been no ipse dixit of the judges, no mere mandate as the order or command from an executive officer; such is not and it is to be hoped never may be the mode of action of the Courts in this country. They have sustained themselves and can ever only sustain themselves by basing their decisions upon justice and right and explaining to the citizen the grounds and reasons of their decision. The opinions of the Court are the only means of communicating with the people, their protection against perversion of facts and law—against misrepresentation, against error and mistake, they are important alike to the judges, to the parties and to the people and any omission, restriction or abridgement of the duty is calculated to be alike injurious to them all.

Caleb H. Blood *vs.* Richard A. Shine.

Everything is to be presumed and every reasonable intendment made in favor of an award.

Where arbitrators agree on some of the facts, but differ with respect to others not connected with the first, there seems to be no good reason why the umpire, if he thinks proper, may not take those points on which the arbitrators agree to be as they report them, provided a re-examination is not required by the submission, or by either of the parties before he makes his award.

An award of payment of a specific sum is sufficient without directing a release from the party to whom it is to be paid.

Though an award should not in terms decide all the matters submitted to the arbitrators, yet if the thing awarded necessarily includes the other things mentioned in the submission it is sufficient.

When an award does not fix the time of payment of the sum awarded, the money is payable immediately.

Error to Leon Circuit Court where this case was tried before Judge Baltzell.

Archer, for Plaintiff in Error:

The Court erred in refusing to admit the award in evidence and in deciding that it was void upon its face.

The award of the umpire Argyle is a valid award. He adopted the statement of accounts made and agreed to by the arbitrators, and proceeded to decide the other items about which the arbitrators disagreed. Having added both the sums together, he awards the total amount to the plaintiff. This the umpire had a right to do, and had he done otherwise he would have deviated from the usual practice in such cases. See Harman *vs.* Arthur, 1 Baily, 81.

"When the arbitrators have agreed on some facts, but differ with respect to others unconnected with the first, there seems to be no good reason why the umpire, if he thinks proper, may not take those points on which the arbitrators agree to be as they report them."—By the adoption of their conclusion they become his decision. See Kyd on Award, 102. 4 Term Rep., 589. 5 Barn. & Adolphus, 488. Watson on Arbitration & Award, 64. 1 Tomlin Law Dict. 144. Bates *vs.* Cook, 9 B. & C. 407.

128 The umpire may *thus* decide the *whole controversy.* At all events no objection to the award can be made on account of adopting the partial decision of the arbitrators, unless taken before award made, which was not done in this case.

As to the form of the award in this case, it is unobjectionable.—It is plain, intelligible, and to the point, and is in much better form than it would have been if the meaning of the umpire had been attempted to be expressed in technical legal language not understood by him. As now expressed, no doubt exists as to the amount awarded, and that was the object to be attained.

The Courts favor this mode of settling differences, and do not scrutinize the form of the proceedings of a Court of arbitrators. Their common sense and practical judgment may safely be relied on to obtain a just settlement of differences submitted to them. So it appears what is the decision made by such Court between the parties it matters not what is the form. Everything is presumed in favor of an award made like this under a bond of submission, and not under the order of a Court (where the Court may and does require some attention to form) and the award is good if expressed in the form of an opinion. 4 Phillips Ev. 80.

As to the appointment by arbitrators of J. W. Argyle as umpire, it is made in accordance with the bond. But if it were not, the parties having acquiesced in the appointment would be bound by his award. The parties cannot appear before an umpire, submit their evidence, have a full hearing and after award made, object to his appointment. 4 Phillip's Ev. 80. Watson *vs.* Trower, 1 Ryan & Moody, 18.

Hagner, for Defendant in Error:

Before entering into investigation of errors assigned, I wish to lay down some principles applicable to the form of the submission in this case.

1st. I say that the scope of power and authority of the umpire is regulated by the submission, and is in this case as broad as that to the arbitrators originally. Parties may submit to umpire *all* matters, or only *such* as arbitrators differ upon. Billing's law of awards 106. 1 Comyns Dig. p. 678 at top.

Here the power to the umpire is co-extensive with that to arbitrators.

Caleb H. Blood, vs. Richard A. Shine.

The Umpire designed by the parties was an umpire to be ap- 129
pointed *of and concerning the premises,* and to be the umpire between Blood & Shine. When appointed to take place of arbitrators. Watson on awards 56—63. 2 Dallas Rep., 271.

The umpire as well as arbitrators is the Judge of the parties and he ought to be appointed according to the submission and the powers there designed should be entrusted to him. Billings law of awards, 112.

Here in the case at bar what was his appointment? *He is appointed umpire between the arbitrators* as they disagreed on two items, and power only over that disagreement is given to him. Such was his commission, *this commission was void* 112.—and all actions under it of course *null. Billing's* law of awards Kyd on awards 101, and cases cited p. 103. Tollit *vs.* Sanders, 9 Price 612, and case from year books 30 Hen. 6, cited by the Judges of Exchequer. Willis Rep. 268. Tarker *vs.* Kearny, 2 Barnard 317. 6 Harr. and John. 406. 4 Dallas Rep. 232.

Now if there was no appointment of an umpire *according to the submission* clearly the appointment made was a nullity, and it matters not if he did arbitrate on the whole causes of difference. Unless *duly* appointed to take charge of the whole, his action was void for the excess and as he could be appointed here but as umpire *of and concerning the premises,* not having been so appointed, his award was void. Void in its inception, it cannot be sustained by evidence *aliunde.* Watson on awards 115. For this reason we hold there was no error in the judgment.

The counsel for plaintiff in error insists that the courts are more lenient to awards under submission bonds than where made rules of court. Now the very reverse is the case. Courts will not on motion, where awards are rules of Court, set aside awards but leave parties to their action on the award. Watson on awards 155. 2 Dow. and Ry. 222, and also 2 B. & C. 170.

If I am right in my view of the commission here given to Argyle it is a matter of small moment to inquire whether he did adopt that the arbitrators had done. He had no such power, he was to decide the difference between the arbitrators themselves; *he never was the umpire between* the parties nor was he *umpire of and concerning* the premises in the bond mentioned.

How idle then the attempt to sustain his action by evidence *aliunde.*

But the counsel insist that the umpire may take those points de- 130
cided by the arbitrators and incorporate them with his own. The cases I have cited contradict this. 1 Baily South Carolina Rep. 81, is however cited to sustain it. By reference to it Judge Colcock it will be perceived sustains it by Mr. Kyd's opinion p. 102 and that other case Hall *vs.* Lawrence, 4 T. R. 589.

See in what low esteem this case is held, 4 Dallas Reports before cited.

Yet giving 4 T. R. 589 full power, it was in a case of rule of court, where as I have shown the courts are disinclined to set aside awards on motion, and all the court did *was to refuse to set aside on motion.*

Mr. Kyd's opinion is not sustained by either English or American authorities.

Again the award set up is void, neither expressly nor impliedly awarding a release. 1 Saunders Reports 327 [a] note 2.

The declaration is defective. In the award set up no time is fixed for the payment of the money awarded, it is then payable *on demand.* Now in such case it is very clear, a special demand must be alleged and the general averment "although often requested," &c., will not suffice. 1 Saunders Rep. 33. Kyd on awards p. 295.

The award is not *final,* it does not make an end and determination of all matters contained in the submission. Watson on awards 126.

It is not *mutual;* all things are here awarded to be performed by one party without such being in satisfaction of the matters in controversy. Watson on awards 131.

By reason of the *nullity* of the award it is plain that *Shine* cannot have the advantage intended him, as a recompense or consideration for that which he is to do to the other party *Blood.* He has no release, even if he pay. The award for this reason is void in the whole. Watson, p. 136, 2 Saunders 293 n.

Douglas, Chief Justice, delivered the following opinion:

This is an action of debt upon an arbitration bond by which the parties agreed to submit to the arbitrament and award of certain persons therein named, all and all manner of actions, cause or causes of action, bills, bonds, agreements, deeds, accounts, quarrels, controversies and demands whatsoever at any time or times theretofore,

131 had, made, brought, prosecuted, done, suffered, committed or depending, by or between the said parties or either of them, of and concerning a partnership in a certain brick yard and the profits and losses thereof, and also any and all other demands, controversies, debts and transactions whatsoever. The arbitrators to make their award on or before the sixth day of May (then) next ensuing; but if the arbitrators did not make their award on or before that day then the said abitrators (were) to appoint and umpire between the parties, &c. The arbitrators took upon themselves the burden of the arbitration and as appears investigated the transactions and accounts between the parties; stated an account and struck a balance for $1181 76 in favor of C. H. Blood, when they disagreed and appointed an umpire. In relation to which disagreement—appointment of an umpire and action of the umpire, the following entry appears as is shewn by the bill of exceptions which constitutes a part of the record in this case, next after the statement of the balance above mentioned, viz: "We the arbitrators disagree respecting C. H. Blood's account of $434 32-100 and R. A. Shine's offset of $125 and we name John W. Argyle as umpire." This is signed and sealed by all the arbitrators, dated Tallahassee, May 4th, 1844, and is succeeded by the following entry, to wit: "The umpire appointed by the arbitrators of the unsettled accounts of R. A. Shine and C. H. Blood and referred to him for settlement as per statement of the arbitrators annexed, reports the said accounts adjusted and stated as follows:

R. A. Shine, To C. H. Blood,	Dr.
To Balance as stated by the arbitrators on the 6th day of May 1844, annexed	$1181 76
To amount of C. H. Blood's account	434 32
	$1616 08
Cr.	
By Territorial Certificate signed Robert Armstrong, considered spurious	125 00
	$1491 08

This amount, one thousand four hundred and ninety one 8-100 dollars reported to the credit of and awarded to C. H. Blood.

December 7th, 1844. (Signed) John W. Argyle, umpire."

At the trial of the cause in the court below this award was of-
132 fered in evidence by the plaintiff, and was ruled out by the court on the ground that it was void and incapable of being sustained by proof *aliunde*. No other evidence being offered on either side the jury rendered a verdict for the defendant upon which judgment was entered and the plaintiff in error now seeks to reverse that judgment on the following grounds which he has assigned as error, viz:

First, The court erred in sustaining objections to the introduction of the paper writing offered in evidence by the plaintiff mentioned in the bill of exceptions.

Second, the court erred in deciding that said paper writing was void and incapable of being sustained by evidence *aliunde*.

Third, The court erred in giving judgment for the defendant.

In ruling out the paper writing we think the court erred. We do not perceive on what ground it can with propriety be declared void. It is contended on behalf of the defendant in error, that the umpire was not appointed of and concerning the premises, but it will be observed that the arbitrators in making the appointment, very properly abstained from attempting to limit his powers which they had no authority to do. They said "we name John W. Argyle as umpire." His appointment being general, his authority is to be sought for in the arbitration bond on which this suit is founded. It was therefore, precisely what the parties thought proper to make it. In the case of Tollit *vs.* Saunders, 9 Price's Exchequer Reports, 612, cited (and much relied upon) by the Attorney for the defendant in error, the arbitrators disagreed and appointed an umpire, not generally as here, not to decide between the *parties*, but to decide *between themselves*. and the court, in declaring the appointment invalid, puts its decision expressly upon that ground.

Again, it is said that the umpire adopted what the arbitrators had done, and made that a part of his award. It is true he states the same balance which the arbitrators stated. It does not however appear but that he examined the testimony and came to the same conclusion to which they had come, as to the just and correct balance. But it is insisted that he did not re-examine the testimony and that his award is for that reason null and void. Neither of these objections appear upon the face of the award, nor is there any proof in the record to sustain them. And every thing is to be presumed and every reasonable intendment made in favor of an award. Archer *vs.* Williamson, 2 Harr. & Gill, 67. Richards *vs.* Brock-
enbrough, 1 Rand. 449. Karthans *vs.* Ferrer, *et al.*, 1 Peters, 222 133
Coupland *vs.* Anderson, 2 Call 106. Fryching Canal *vs.* Frye 5 Greenl. Rep. 67.

But if the fact were as urged that the umpire did not take the account as the arbitrators stated it in their report of the matter and incorporate it into his own, we see no reasonable objection to it. The Court of Appeals of South Carolina in the case of Executors of Finney *vs.* Miller, 1 Baileys Law Reps. 81, 82, held that "where arbitrators had agreed on the facts and only differ on a single point either with respect to the law arising on those facts, or as to the extent of the recompense to be made by one party or the other, or even where they agree on some facts, but differ with respect to others unconnected with the first (which is the case before us) there seems to be no good reason why the umpire if he thinks proper, may not take those points on which the arbitrators agreed to be as they report them."

The nature of their duty (said that Court) is to make a final decision upon the whole subject in dispute, where the arbitrators cannot do it, and by adopting their opinion as far as they agree and incorporating it with his own on the other part, he effectually makes the final determination. This case was cited and the principles which it maintains were sustained in the case of Lipsey *vs.* Hughes, 2 Bailey's Law Rep. 113, in which Mr. Justice O'Neal confirming the instructions to the Jury by Mr. Justice Gantt at Union Fall Term, 1830, said that the umpire may award upon the report of the arbitrators *without* re-examining the witnesses, unless he is directed to do so by the submission, or it is afterwards required of him by one or the other of the parties before he makes his award. (Harper and Johnson, Justices, concurred.) And this is in accordance with Hall *vs.* Lawrence, 4 Term Reps. 589, where the Court refused to set aside the award of an umpire because he received the evidence from the arbitrators, without examining the witnesses, he not having been required to re-examine them before the making of his award, and with the reasoning of Mr. Kyd in his able work on Awards page 102. Saulbury *vs.* Hodson, 2 Burr. 1474. 1 Black Rep. 463.

In this case there was no such requisition upon the umpire by the submission or either of the parties, and we fully agree with the learned Judge who pronounced the opinion of the Court in the case of Executors of Finny *vs.* Miller when he says. "If the parties are suffered to lie by, and after the award is made to avail themselves 13
of these technical objections, you utterly destroy this admiral domestic forum."

It was further objected that this award is not mutual, that no release is awarded to Shine, &c. In regard to this we cannot do better than to adopt the language of Mr. Justice Trimble in delivering the opinion of the Supreme Court of the United States in the case of Karthans *vs.* Ferrer, *et al.*, 1 Peters Reps. 230.

It is deemed (he says) a sufficient answer to the objection of want of mutuality in the award, to remark, that great stress was laid in the early cases upon the mutuality of an award, but at present it is by no means considered necessary that each party should be directed to do or not to do any particular thing. Cald. on Arbi., 113. Two had submitted to an award; nothing was awarded to one party, but that all actions should cease. The Court held it a good award. Harris *vs.* Knight, 1 Levintz, 58. In Palmers case, 12 Mod. 234, one party was directed to pay money to the other, without any directions being given to the latter any way. Again it was awarded that A. should pay B. 40 shillings for trespass, Freeman 204. These respective awards were held unimpeachable. In McKinstry *vs.* Solomons, 2 John. 57 and 13 John. 27 an award of payment of a specific sum is held final and sufficient without directing a release from the party to whom it was paid. And so in Byers *vs.* Van Denson, 5 Wendell 268.

Again, it is objected that the award does not embrace all the matters submitted, but it seems to embrace all the matters shown to have been in controversy and indeed in effect to settle all. In Smith *vs.* Demarest, 3 Halstead 195, it was held that though an award should not in terms decide all the matters submitted to the arbitrators, yet if the thing awarded necessarily includes the other things and matters mentioned in the submission it is sufficient. And in Jackson ex dem. Van Alen and Van Alen *vs.* Ambler, 14 John. 96, that although an award must decide on all the questions contained in the submission, yet it must appear that the points not decided upon were actually in controversy between the parties. Now it does not appear in this case that there was any matter in controversy submitted that was not decided; and "unless they were brought forward they were not to be decided." Jackson *vs.* Van Alen, 14 John. 107. Nor is it to be intended unless it be shown. Smith *vs.* Demarest, 3 Halst. 198.

It is to be presumed that the parties brought all the matters in controversy between them before the arbitrators, and all the matters brought before them were decided. In Copeland *vs.* Anderson, 2 Call's Reps. 100 the court held that if cross suits be referred by the parties, a single award that one of them is indebted to the other in a balance of account, is sufficient to settle the whole controversy. But it is said the award does not fix the time of payment and that therefore a special request to pay was necessary. But when the award does not fix the day of payment the money is payable immediately. Inlay *vs.* Wykoof, 1 Southard 132. (cited in 1 United States Digest page 214—No. 370) and this in accordance with the general principles of the law on this subject. The case of Brett *vs.* Ming, Florida Reps. 454 and authorities there cited fully recognize and sustain these principles. We are aware that upon some of these points different views have been entertained and conflicting decisions made. That being the case we must adopt those which seem to us to be most in conformity with reason and justice and most conducive to the general good.

The Judgment of the court below must be and the same is hereby reversed, and the cause remanded to the court below for further proceedings in accordance with this opinion.

Per curiam.

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136 ISAAC W MITCHELL, *vs.* FREDERICK R. COTTEN, EXECUTOR OF JOHN W. COTTEN.

Where plaintiff's demurrer to defendants plea was overruled, and the judgment was *respondeat ouster* and the plaintiff afterwards filed a replication to the plea, the demurrer is waived thereby, and the plaintiff cannot assign for error that the court erred in overruling the demurrer.

In an action by the payee against a security on the note, the principal may be examined as a witness for defendant to prove that the note was given upon usurious considerations.

Where a note not tainted with usury has been given up and cancelled on being made the consideration of a usurious contract or note, and the usury in the latter has been established, the note cancelled may be recovered upon, as well against a surety as the principal, under the common counts.

Writ of Error to Leon Circuit Court, where this cause had been tried before Judge Baltzell.

The facts fully appear in the opinion of the Chief Justice.

Brockenbrough & Thompson, for Plaintiff in Error.

Randall & Hagner, for Defendant in Error.

DOUGLAS, Chief Justice:

This is an action of assumpsit instituted by the plaintiff in error in the Leon Circuit Court against the defendant in error as executor, &c., of John W. Cotten, deceased, to recover the sum (alleged to be) due upon a promissory note, of which the following is a copy, viz:

"On or before the first day of January next, we or either of us, promise to pay to Isaac W. Mitchell, or order, fifteen thousand nine hundred and fifty-five dollars, with ten per cent. interest from date, for value received this 2d January, 1841.

[Signed] H. DOGGETT,
J. W. COTTEN."

The declaration contains a count upon the note, the common money counts, and a count on an account stated. The defendant plead:

First, The general issue.

Second, That he did not make the note. 137

Third, Want of consideration.

Fourth, Judgment recovered by Mitchell against Doggett on the note.

Fifth and Sixth, That John W. Cotten executed the note as surety of Doggett, and that Mitchell and Doggett entered into a secret agreement, concealed from J. W. Cotten, by which Doggett was to pay a greater rate of interest than was expressed in the note.

And the 6th plea alleges that the rate of interest expressed was ten per cent. and by said secret agreement Doggett was to pay two and an half per cent. more, and that Doggett gave to Mitchell his separate note for the two and an half per cent. bearing even date with the note sued on, amounting to the sum of $398 87, payable on or before the first of January 1842, for such excess of interest over and above that secured by the note sued on.

Seventh, That John W. Cotten executed the note sued on as surety of said Henry Doggett, and that after the making of said note to wit, on the 5th day of January, 1844, the plaintiff agreed with the said Henry Doggett, without the consent or knowledge of the said John W. Cotten, and for, and in consideration of, the making and delivery by the said Doggett of his promissory note dated the 5th day of January, 1844, payable one day after date to said Mitchell (the plaintiff) or bearer, at Tallahassee, promising to pay $6,676 64, for value received with ten per cent. interest from the first of said month, which note the plaintiff received to give further day of payment during the space of one year to wit, during the year 1844.

The Eighth. Is in substance the same as the seventh only alleging the contract and agreement for further time to have been made after the note sued on was overdue, and that the consideration was paid in hand.

The Ninth, Raises the same question as the eighth.

The Tenth, Non assumpsit except as to the sum of $6676 64, and as to that sum payment.

To the plea of non assumpsit the defendant annexed a notice of special matter to be given in evidence embracing in substance the same matter as embraced in the several special pleas, setting out the charge of usury somewhat more fully and specifically, and alleging divers usurious contracts

To the 4th and 5th pleas the plaintiff demurred, and his demur- 138
rers were sustained. Upon the other pleas issues were respectively joined. It appears by the bill of exceptions which constitutes a part of the record in this case that the cause came on to be tried upon the issues joined between the parties and a jury of good and lawful men were empanneled and the plaintiff introduced the note mentioned in the declaration with the following endorsement thereon, viz: "Received the interest on the within note up to the first day of January, 1840, from the fifth day of February, 1844," and there rested his case.

The defendant then read in evidence the deposition of Henry Doggett, (one of the parties to said note) who proved in substance that the real bargain between Mitchell and himself, at the time of making the note, was that Mitchell was to receive for the loan of the said money 12 1-2 per cent. That he made and delivered to said Mitchell his promissory note for the sum of $398 87, that the consideration thereof was two and a half per cent. additional interest on the note for which Cotten was surety. That he gave to Isaac W. Mitchell his promissory note dated 5th January, 1844, payable one day after date for $6,676 64 bearing interest at the rate of ten per cent, and he thinks exhibit C. a copy. That the consideration of said note was interest on the note for which Cotten was surety as the following statement, which is copied from a statement in Mitchell's hand writing, will show:

15,955 05
2 1-2c

398 87, and interest on do. at 12 1-2 per cent compounded to the 1st of January 1844, 507 06, interest to 1st January, 1842, at ten per cent 1,595 50.

Interest to January, 1843:	1,755 05
	438 75
	449 73
Interest to 1st January, 1844:	1,930 56
	$6,676 65

That the amount of interest secured to be paid to Isaac W. Mitchell is $6,676 65, which is evidenced by his note for the amount dated 5th January, 1844.

That at the making of said note of $15,955 00, there was a contract made by Mitchell and himself, that he, Doggett, over and above the interest mentioned in the note, should pay to Mitchell the fur-

ther rate of 2 1-2 per cent additional interest. That no money has been actually paid for the said interest, but is secured to be paid by his note of 6,676 65, before referred to.

On his cross examination he further proved that himself and J. W. Cotten, on or about the 1st of January, 1839, gave a note for $13,186 00 to Isaac W. Mitchell, that J. W. Cotten was equally bound with him, but as surety; the consideration of $13,186 00 was the indebtedness of witness to one Flake for land. There was no usury in said note of $13,186 00 or in the note to Flake. That note was taken up by substituting the note of $15,955. J. W. Cotten signed both notes and was bound with witness as surety—both notes expressed, on the face of them, to carry ten per cent interest. The usury he says began when he executed the note for $15,955, with Cotten as surety and his note for $398 87. This note was for usury, the excess of interest for the forbearance of the large note.

The defendant then offered Lawrence O'B. Branch as a witness who testified as follows, to wit: that the original papers filed, marked A. B. C. D. E. F. G. H. were original papers placed in his hands by H. Doggett. The paper marked D. witness believes contains the genuine signature of H. Doggett across said paper; that he likewise believes the signature on the paper A. to be Doggett's signature, so also the signature on papers B. he believes to be the remains of the signature of said Doggett and John W. Cotten, that he is acquainted with their hand writing, &c.

The defendant then offered George K. Walker and Charles G. English as witnesses to prove certain papers marked C. D. E. F. G. H. I. none of which are deemed very material to the present enquiry except the following, viz:

[D.] On or before the first day of January next, we or either of us promise to pay Isaac W. Mitchell, or order, thirteen thousand one hundred and eighty-six dollars, for value received, with ten per cent interest from date, the 1st January, 1839. [The words "Paid—H. Doggett," written across the face.]

[E.] On or before the first day of January next, I promise to pay Isaac W. Mitchell, or order, three hundred and ninety-eight dollars and eighty-seven cents for value received this 2nd day of January, 1841.

One day after date, I promise to pay Isaac W. Mitchell or bearer, at Tallahassee, six thousand six hundred and seventy-six dollars and
140 sixty-four cents for value received, with ten per cent interest from the first of the present month, this fifth day of January, 1844.

[Signed.] H. Doggett, [seal.]

Which the witnesses testify are in the hand writing, in words and figures, of the plaintiff except the signatures.

James H. T. Lorimer was also introduced to prove the papers marked A. and B.

[A.] One day after date we jointly and severally promise to pay William Flake or bearer five thousand and sixteen dollars, for value received.

January 1, 1838. H. Doggett.
Endorsed, D.
January 1st, 1838.

Received of the within note four hundred and thirteen dollars and fifty-five cents.

Received of the within note one thousand three hundred and sixty-nine dollars and 11-100.

January 1st, 1838.

[B.] On or before the first day of January, 1839, we jointly and severally promise to pay William Flake or bearer, eight thousand three hundred and thirty-three dollars, with interest from the 13th day of December, eighteen hundred and thirty-six, for value received. H. Dogg
January 1, 1838. J. W.

Are in the hand writing of one Doctor Flake; he said he had seen Flake write, and believed the papers were in his hand writing—he further said he heard Flake say he intended to sell two notes to plaintiff, and afterward heard Mitchell say he had bought them. He once had a conversation with plaintiff in which he stated that whatever may be said as to the small note he (plaintiff) held against Doggett, no one could say there was any usury in the large one. The small note, Mr. Lorimer understood, was for interest on the large one. Defendant then offered said papers marked A. B. C. D. E. F. G. H. and I., as evidencce, which plaintiff's counsel objected to, but were overruled.

Plaintiff then gave in evidence the following letter of John W. Cotten proving first the hand writing by Jacob Elliott a lawful and competent witness.

Cotton Land, near Tallahassee, Florida, 25th Nov., 1844.

Dr. Mitchell, *Dear Sir*:—I write to ask the favor of you to

do me the kindness to inform me as early as convenient the amount 14
of Col. Harry Doggett's indebtedness to you for which I am his security. Please let me know the amount principal and interest, either up to the 1st next month, or 1st day of January. It is now near eight years since I became Col. Doggett's security for this money, and it has been some years since I signed the note you now hold, and I learn he has not paid the first cent on it since I signed it last with him. I think it is time he was paying it. I have been his security and waited patiently for him to pay you, till I begin to think patience is no longer a virtue. If a man of Col. Doggett's estate cannot pay a debt of that amount in eight years it is hard to tell how long a time it would require. He is now good I expect and I say to you that unless Col. Doggett give you other security to satisfy you and release me, I wish you to proceed *forthwith* to make your money out of Col. Doggett's estate. I have no wish to have Col. D. pushed, and my permitting the note to run so long is I think satisfactory proof of that fact. But one thing is certain, I must have my name off that note if I can get it off. I would be very glad to see you. It is but little out of your way to come to my *Cabin* on your way from Thomasville to Tallahassee. Come and spend a night with me or longer time. I would be much pleased to see you at my house and we could go and see Col. Doggett, who resides within 3 miles of me, and I think some satisfactory arrangement might be made. I have no doubt he could give you other names fully as good, or better than mine. You were so kind as to tell me in the last conversation we had upon this subject, that when ever I desired it you would proceed to collect your debt, and I now say, that unless Col. Doggett will make some arrangement satisfactory to you, by which the present note you hold can be destroyed, and I relieved from all responsibility by his paying or renewing the note with other securities, I shall certainly wish you to proceed as *quick as possible to collect your money from Col. Doggett*, for I acknowledge to you I am somewhat uneasy about it. I have a wife and three children dependent on me who have stronger claims than any other person on me, and with good fortune and health, I have no fear but I can always support them comfortably and decently, and I do not wish them brought to penury and want by my imprudence, nor by having to pay other persons debts. I believe him to be an honest and honorable man and willing to pay his debts and if so he can do it for he has about 225 negroes, 3000 to 4000 acres of as fine land as any in the country with a large quantity of stock, 1
&c., besides the present crop, which I suppose will be 600 bales (or more) cotton and some corn to sell. But notwithstanding all this I think you will agree with me that eight years is long enough to be security to any one man *for the same debt*, and more particularly, when the debt is constantly growing larger. I owe but little myself and am anxious to be relieved from any responsibility for the debts of others, for 'tis about as much as I can do these times to make a decent competency by industry and prudence, without having others to work for. An early answer will greatly oblige, dear sir, Very respectfully yours most ob't

J. W. COTTEN.

Addressed and postmarked,
For Dr. Isaac W. Mitchell,
Thomasville, Geo.
Tallahassee, Flor., Dec. 3. Paid 10.

He then gave in evidence the original præcipe ordering suit *vs.* Doggett & Cotten (which abated against Cotten by his death) to prove the date of the commencement of said suit, to wit: "Isaac W. Mitchell *vs.* Henry Doggett and John W. Cotten. Action of trespass on the case upon promises. Damages $32,000. Issue writ returnable to next term, January 7th, 1845.

BROCKENBROUGH, P. Q.

To Clerk of Leon Superior Court."
Endorsed, "Filed January 8, 1845.
N. P. B., D. C."

No further or other testimony was introduced on either side and the cause having been fully argued, the court instructed the jury as follows, to wit: "That the plaintiff did not ask a recovery upon the special count on the note, having conceded that he could not recover thereon, but had sought to recover upon the money counts. Conceding that the plaintiff could not recover against the defendant on the note as security to Henry Doggett, the court had no difficulty in charging the jury that he could not recover on the money counts. The contract declared upon was manifestly a contract of suretyship, admitted by the parties in the pleadings in the case and to which evidence has been adduced on both sides as well by the plaintiff as the defendant. In such case any concealment from the surety, any withholding from him of the material part of the principal contract would render the engagement of suretyship a nullity. It was void.

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There was no valid contract whatever. Now if the contract of 3
suretyship is gone what remains against Cotten. He bought no land of Mitchell nor of Flake. He borrowed no money but was surety only of Doggett. His contract is a contract of suretyship and nothing else. If his liability is not fixed on that, he is altogether discharged. The plaintiff cannot fall back on the old note, for that was given up and cancelled, that note was extinguished and it is here produced as the property of Doggett in whose possession it is. Cotten cannot be held bound for any original consideration, because it is shown that he was always surety. No consideration moved between Mitchell and the defendant. He became Doggett's surety because of his friendly feelings for Doggett. In this view the existence or non-existence of usury on the note sued on, has nothing to do with the defence set up, except so far as the contract as known to Cotten may have been changed in that respect between Doggett and Mitchell, and if the jury believe such change was made without the knowledge or consent of Cotten, then the law declares the contract of suretyship void and the plaintiff cannot recover on the note, and not recovering on the note, he cannot recover on the money counts.

The Plaintiff's counsel then moved the court to instruct the jury as follows, to wit:

First, That the plaintiff may recover the consideration given for any usurious note or security on the money counts, provided there is no usury in the consideration itself.

Second, If it is conceded here or proved or believed by the jury from the evidence that the note of the 1st January, 1839, contained no usury and was a valid contract in all respects and was the consideration of the subsequent usurious contract,, there is no law to prevent the recovery of that debt of 1839, or any portion thereof under the money counts.

Third, That our statute only avoids the interest on a usurious contract and has nothing to do with interest or principal of a prior contract between the same parties, though such contract may be used as the consideration for a usurious contract.

Fourth, The interest of an original valid contract is no more affected by a subsequent usurious contract than the principal, and the latter is not affected.

Fifth, Two joint and several makers of a negotiable promissory note, are both principals and stand upon the same footing towards a 4
bona fide holder, and the law presumes him bona fide until the reverse be shown.

Sixth, The party setting up fraud, concealment, or giving time without consent of surety, or other matter in discharge of surety, must prove his allegations in discharge of himself.

Seventh, If the party surety had proved any different contract for interest on the last note than appeared upon the face of the instrument signed by the party, and the principal was to pay 2 1-2 or more per cent more than the surety was bound for, and such arrangement was concealed from the surety, yet that would not prevent the plaintiff from recovering on the original consideration.

Eighth, That both Cotten being bound in the first instance and the giving of the note with the usurious premium being a subsequent and distinct transaction although the note declared on or any part thereof might be void, the pre-existing debt may be recovered on the money counts.

Ninth, That if the jury are satisfied that 12 1-2 per cent was taken or agreed to be taken by Mitchell and a new note taken which included all interest for which Cotten was then bound and this was endorsed on Cotten's note this was for the advantage of Cotten and he is responsible on the note.

Tenth, By our law if the jury find usury they can only deduct interest from the time usury commences.

Eleventh, That when a party recovers on the money counts it is upon the original consideration, not the old notes or cancelled notes, or any other evidence of debt or securities, but the debt itself due precisely as if no note had ever been given; and where two or more are jointly, validly bound, the law implies that the consideration passed to both of them.

All and singular of which several instructions from one to eleven inclusive the court refused to give; and thereupon instructed the jury "that the plaintiff was not entitled to recover," to which several overrulings as hereinbefore set forth, and refusal to give the instructions prayed, and the instructions given, the plaintiff by his Counsel excepted, and prayed that this his bill of exceptions might be signed and sealed by the court which was done.

The jury returned a verdict for the defendant upon which judgment was entered, and the plaintiff in error now seeks to reverse that judgment upon the following grounds to wit:

First, The Court erred in overruling the plaintiff's demurrer to 145
the defendants sixth plea.

Second, The Court erred in admitting the testimony of Henry Doggett taken under commission (being his answers to 8th, 9th, 12th, 14th and 15th interrogatories) to be read in evidence to the jury against the objections of the plaintiff.

Third, The Court below erred in the instructions given by the Judge to the jury.

Fourth, The Court below erred in the refusal of the Judge to instruct the jury as prayed by the plaintiff's counsel.

As to the first error assigned, viz: That the Court erred in overruling the plaintiff's demurrer to the defendants sixth plea, it is sufficient to observe, that the judgment upon said demurrer was *respondent ouster,* and that the plaintiff (as appears by the record) answered over by filing his replication to that plea and thereby waived the demurrer thereto. On overruling a demurrer if the demurrant resorts to ulterior pleadings on the same point the demurrer is waived: Burdet *vs.* Burdet, 2 A. K. Marsh, 143. Morrison *vs.* Morrison, 3 Stewart's Reps. 144. Breese, 19.

The same doctrine was maintained by this court in the case of Mitchell *vs.* Executor of Chaires at the present term. A decision overruling a demurrer cannot be revised, if afterward it is withdrawn and issue joined to the country. Acre *vs.* Ross, 3 Stewart, 288. Trigg *vs.* Shields, Hardin 168. A plaintiff cannot demur and reply to the plea, Riley and another *vs.* Harkness, 2 Blackf. 34. Harris *vs.* Weaver, 1 Blackf. 77 (and authorities there cited) Stephens on Pl. 296.

The second error assigned, viz: That the court erred in admitting the testimony of Henry Doggett, &c., is attended with more difficulty. This objection arises under the provisions of the 4th Section of the act of February 12th, 1833, "regulating the rate of interest," Duval's Comp. 79. Thompson's Digest, 235, No. 5, which declares "that in all cases whatsoever, whenever any suit or, action shall be brought in any court of record in this State, touching or concerning any usurious bond, specialty, promise or agreement, the borrower or party to any such usurious bond, specialty, promise or agreement, from whom such higher rate of interest is or shall be taken, shall be a good and sufficient witness to give evidence of such offence. Provided, that if any person against whom such evidence is offered to be given, will deny upon oath to be administered in open court, the truth of what *such witness offers* 146
to swear against him, then such evidence shall not be admitted." Of the reason which induced the Legislature to make this provision we are not advised. No preamble is annexed to inform us. It probably grew out of the distressing conflict of opinion as to the competency of parties to written instruments when called as witnesses for the defendant. In Walton *vs.* Shelly, 1 Term Reps. 300, it was laid down by Lord Mansfield as a general rule of evidence that a party shall not be received as a witness for the purpose of invalidating an instrument to which he had set his hand, and although this case was (in Jordaine *vs.* Lashbrooke, 7 Term Reps. 601,) only ten years after its promulgation, entirely overruled by Lord Kenyon at the head of the court by which, under the influence of Lord Mansfield, it had been originally pronounced, it has been followed by the Supreme Court of the United States and the courts of several of the States, while it has been laid aside or never recognized as law in a large majority of the States of the Union, as appears by authorities collected in the notes to the case of Bent against Baker, 2 Smith's Leading Cases, 87, 88, and 1 Greenleaf's Evidence, 430, in note.

The rule laid down in Walton and Shelly is broad enough to comprehend all instruments of writing of whatsoever description, yet except so far as it may be comprised in the common law doctrine of estoppel, it has been every where decided to apply only to those instruments negotiable in their character. Pleasants *vs.* Pemberton, 2 Dall. 196. Morris *vs.* Shippen, 2 Binney 165. McFerror *vs.* Powers, 1 Sergt. and Rawle 107. Bragg *vs.* Phoenix In. Company, 3 Wash. C. C. Reps. 5. Loker *vs.* Haynes, 11 Mass. 498.

And in order that the rule should take effect, the instrument must not only be negotiable *but actually have been negotiated.* 1 Green. Ev. 430, Sec. 385. 2 Smith's Leading Cases, 87, 88. If the suit be between the original parties, a witness may give evidence tending to invalidate a bill or note on which the action is brought, although his name is thereunto affixed, and thus one of the two joint makers of a promissory note is a competent witness for the other to all intents, in a suit on the note wherein the payee is plaintiff. Fox *vs.* Whiting, 16 Mass. 120. This suit having been brought by the payee both of the note of 1839 and that of the second day of January 1841, and neither of them having been negotiated, it is evident that the witness would have been competent upon general principles

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147 under the restrictions imposed by the courts which have adopted the rule of Walton *vs.* Shelly, and being thus competent the question occurs does the Statute narrow the rule as to the admission of the testimony. That the reason before referred to may have had weight with the Legislature in the enactment of this provision we have no doubt. We think however that the intention was not to abridge but to enlarge the rule of evidence so as to let in the testimony of a party to the suit, if he were the borrower or party to the usurious bond, &c.

To him the Statute gives a privilege not conferred by the Common law. But in order to avail himself of it he must come into open court and "offer to swear," and then if the person against whom such evidenee is offered to be given, will there deny upon oath the truth of what such witness offers to swear against him, then such evidence shall not be admitted. The terms "the witness offers to swear," "evidence offered to be given," import a voluntary swearing by one who cannot be compelled to testify, and while the Statute confers upon a party to the suit this privilege when he happens to be a party to the usurious bond, &c., we cannot suppose that the Legislature intended to abridge the common law right of a party to the suit, to the testimony of a witness who is not a party to the suit, but who may have been a party to such usurious bond, &c., or to prevent the defendant in such a case from availing himself of the statutory mode of taking his testimony by deposition.

On the contrary, we think the act is intended to prevent such testimony from being excluded. The provisions of the second section of the act seem to favor this construction, and any other would involve the absurdity that while the Statute expressly extends the rule so as to admit the testimony of a party to the suit in his own behalf, when the party against whom such tesimony may be offered will not on oath deny what such witness offers to swear, it would narrow the rule so as to put it effectually in the power of the party to shut out the testimony of a witness otherwise in all respects competent, by thus denying what his antagonist might offer to prove by him. We are of opinion therefore that there was no error in admitting the testimony of Doggett. At all events the plaintiff has no cause to complain. He had the full benefit of a cross examination and besides, it does not appear that he was in court ready (if the witness had been there) to deny on oath the testimony he gave.

The plaintiff at the trial of the cause in the court below abandoned
148 the first count of his declaration which (as we have seen) was upon the note of the 2nd of January, 1841, and sought to recover only the original consideration, and the first and most important question presented for our consideration is whether he is entitled to recover at all. It is contended on behalf of the defendant that his contract was that of surety only, and that he was absolutely discharged by the agreement of the 2nd of January, 1841, above set forth, and that if he was not discharged by that agreement, there was no consideration moving from the plaintiff to him. That the original consideration of the contract was the price of land bought by Doggett of Flake, and the plaintiff having abandoned the note set out in the first count of his declaration cannot recover. The position that Cotten was surety is fully sustained by the pleadings and proofs in the case. But it does not we think follow that he was therefore discharged.

The rule undoubtedly is that a surety is not to be held beyond the precise terms of his contract. That the creditor has no right to increase his risk without his consent. But in Tudor *vs.* Goodloe, 1 B. Monroe's Rep. 324 as cited in 2 Vez. Jun. 540 in note by Charles Sumner, it was held that "a promise by the principal to pay usurious interest in future for forbearance (the precise case before us) is *void* and does not operate to exonerate a surety;" and this is in accordance with general principles. The drawer of a bill of exchange is as much a surety as the endorser of a promissory note. Arundle Bank *vs.* Gable, Chitty on Bills, 239 note, was an action by the endorsee against the drawer of a bill. The defence was that when the bill became due the acceptor applied to the holder for time and this was granted on condition that the interest should be allowed him. The plaintiff had a verdict and a motion for new trial was denied. The court said that as *no fresh security* was taken from the acceptor, the agreement to wait *without consideration* did not discharge the drawer because the acceptor might notwithstanding such agreement be sued at any moment and the understanding that interest should be paid by the acceptor makes no difference. Ch. Justice Best in the case of Philpot *vs.* Briant, 4 Bing. Reps. 717 vouches for the correctness of the case of the Arundle Bank *vs.* Gable, and very distinctly reiterates the same principle. Philpot was holder of a bill of exchange and brought his action against the drawer who defended on the ground that time had been given to the defendant's executrix without the *knowledge* or consent of the drawer. The holder promised to delay a reasonable time provided the interest was paid, and pursuant to this agreement interest was paid out of 1
the *private income* of the acceptor's executrix. Still it was held in that case that the drawer who was declared to have the character of surety was not discharged by the delay. And to the same effect is the case of Fulton and Matthews *vs.* Wedge, 15 John. Reps. 433. Where a security which is given on a loan of money is void at its creation, no subsequent agreement of the borrower to pay usurious interest or premium for the further forbearance of the loan, will invalidate the original security. But the *subsequent usurious premium will be void.* Crane *vs.* Hubbell, 7 Paige's Reps. 413. Mitchell *vs.* Doggett, 1 Florida Reps. 374, 376, 377.

Where a note not tainted with usury has been *given up* and *cancelled* on being made the consideration of a usurious contract or note, which latter has been avoided as usurious: Held that the note cancelled on the consideration of this may be recovered upon under the common counts. Edgdell *vs.* Stanford, 6 Vermont Reps. 551. This is upon the ground that the latter contract is void and therefore does not supercede the former. So where a note is given in renewal of a former note and a premium or interest above seven per cent is exacted for the renewal (the Supreme Court of New York held that) the note was usurious and *void,* although a separate note (as in this case) was given for the premium, but that the old note was not thereby affected or destroyed. Swartwout *vs.* Payne, 19 Johns. Reps. 294.

The principle to be extracted from these cases is, that the usurious contract being *utterly void,* does not extinguish or affect the original valid contract. In other words that a *non entity* cannot extinguish an entity, and the case of Robinson *vs.* Bland, 2 Burrow 1077 is founded on the same principle. That was a suit on a bill of exchange, the consideration of which was partly money lost at play and partly money lent to play with. The former being a gaming debt was void. The latter not. Part of the consideration for which the bill was given being void, the whole bill was declared void, but the plaintiff was allowed to recover for the money lent. And the same doctrine is laid down by Burge on Surety where he treats of novation at page 167. He says "There must be two valid subsisting obligations, the one to be extinguished, and the other to be substituted for it. Hence if at the time of the new obligation, the former constituted no debt, or if on the other hand, the *new obligation was void* there was no novation." The effect of novation is that the prior obligation together with its accessions and privileges 1
is destroyed, but novation will not take place if the second obligation be void. Ibidem 171. It is contended on behalf of the defendant in error that the contract in this case (although void as to Cotten) was valid as to Doggett, for say his counsel, recovery has been had upon it, alluding doubtless to the case of Mitchell *vs.* Doggett before referred to. In that case, however, the precise point we have been here discussing was not presented, but on reference to that case it will be found that the declaration (as in this case) contained a special count upon the note and the usual money counts. 1 Florida Reps. 365. And at page 375 the court said that the note of 1839 was clearly upon a good and valid consideration, and if that note had been sued on we are not prepared to say but it would have remained unaffected by any subsequent usurious contract. And at page 377 the court cited with approbation and *italicized* the following remarks of Judge Spencer in the case of Swartwout *vs.* Payne above cited. "But it is equally certain that if on receiving the new security a new rate of interest above seven per cent was received for forbearance, the new securities are void by the statute, and in this view it is immaterial whether the illegal interest was reserved and made payable by a distinct note or was incorporated into one note. They are considered as one assurance, *are all void* into whatsoever hands they may come." "The note (said Judge Spencer) being a nullity according to the case of Markle *vs.* Hatfield, 2 John. 455, the plaintiff had a right to sue on the original contract." Thus indicating very clearly the views it entertained of the state of the contract, and of the rights of the plaintiff in regard to it. We cannot recognize the distinction taken for the defendant in error that the new contract was void as to the surety, and valid as to the principal, but consider them both as standing on the same ground in relation to that matter.

If the new contract was good as to Doggett it could only have been so for the original consideration and any interest that may have accrued thereon before the usurious contract was made, and if good to that extent against Doggett, it was to the same extent good against Cotten. We therefore proceed to enquire whether the plaintiff is entitled to recover in this action upon the original consideration of that contract; and upon this point we should deem the case of Mitchell *vs.* Doggett before cited, as conclusive, but for some objections which have been presented in this case, which were not presented

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in that. And one is, that there was no consideration moving from Mitchell to Cotten. As to this we remark, that the words, "for value received" in the note of 1839 (as well as in that of 1841, both of which were) offered in evidence, import a consideration. Mandeville *vs.* Welsh, 5 Wheat. 277, 4 Peter's Cond. Reps. 645, and authorities there cited. But besides this the evidence in the case shows that the notes of Doggett and Cotten to Flake transferred to Mitchell, were given up by the latter and cancelled, and the note of 1839, for $13,185 (which was valid,) was substituted for them—a transaction which we think was a good consideration to both Doggett and Cotten. The extended credit given was surely a valid consideration to Doggett the principal, and whatsoever is a good consideration to support the promise to the prmcipal, will sustain the promise to the surety. Hughes *vs.* Wheeler, 8 Cowen, 83. Pritchell et al, *vs.* the People, 1 Gilman Rep. 530. Leonard *vs.* Vredenburg, 8 John. 29. The United States *vs.* Linn, 15 Peters 290. In this last case the court say: "There was no necessity for any consideration passing directly between the plaintiffs and the sureties. The consideration which supported the contract of Linn (the principal) support that of his sureties."

"The whole being one entire and original contract and not collateral on the part of the sureties, the consideration received by Linn was sufficient to support the contract on the part of his sureties." And 8 John. Reps. 37. Cro. Eliz. 137 and 3 Burr. 1886 are cited. Here the undertaking of the surety was direct *not* collateral.—Much stress was laid by the Counsel for the defendant in error, at the argument of this case, upon the fact that the note of $13,186 was given up when those of the 2d of January, 1841, were taken by the plaintiff. It is said that it was cancelled, destroyed, and that the plaintiff cannot now rely upon it. But in Olcott *vs.* Rathburn, 5 Wendell 492, the court held that "the mere giving up a note is no satisfaction of it. It is not an act which of itself affects the validity of the note. It seems (continued the court) from the case of Russell *vs.* Hackley, 6 Term Rep. 12, that it was the common practice in London to give up a bill of exchange upon receiving a check on a Bank therefor, and it does not appear objectionable so far as the acceptor is concerned. The maker of a promissory note stands in the relation of an acceptor of a bill of exchange. There can be no doubt that a note thus parted with is given up under the expectation that the check will prove to be a satisfaction, but this does not settle the question."

When a creditor receives a note or check for his debt, he expects confidently that the note or check will turn out to be a satisfaction of his demand, yet if such note or check is dishonored he may sue on the original debt, and is not concluded by his receipt, and 1 Cowen 290, 9 John. R. 310 are cited. The endorsee of a note may in New York recover on the common money counts in an action against the maker, although the evidence shows no money transaction between them, but the plaintiff is suing as the mere agent of the party in interest. Olcott *vs.* Rathburn, 5 Wendell 490. And in Massachusetts it is held that an endorsee of a note may maintain an action for money had and received against the maker, though the maker signed it merely for the accommodation of the payee and receive *neither money or any other consideration* for signing it.—Cole *vs.* Cushing, 8 Pick. 48.

Another objection yet remains to be noticed. It is that the original notes to Flake were for land and therefore the plaintiff cannot recover in this case on the common counts. But the notes to Flake, it seems evident, were intended to be and were extinguished by the transaction above mentioned, and the note of 1839 is the consideration of that of 2nd January, 1841, which proved to be tainted with usury. The consideration is clearly shown by Cotten's letter set out in the record. If however, land is to be deemed the consideration of the note of 1839, because it was the consideration of the Flake notes, (but we do not so deem it) still there are not wanting authorities which go far to show that the plaintiff may recover on the common counts. In the case of Dearborn, Treasurer, &c., *vs.* Parks, 5 Greenl. Reps. 81, it was held that "where one undertakes to pay the debt of another and by the same act also to pay his own debt, which was the motive of the promise, this is not such an undertaking to pay the debt of another as is within the statute of frauds, and therefore it is not necessary that it should be in writing, and though the consideration of such promise *was land*, yet the party to whom the debt was to be paid may recover the amount in an action for money had and received." This must have been upon the principle that the price of the land was money in the hands of the purchaser and the court in that case said, "If the defendant did not actually receive money, he received that for which he agreed to pay a certain sum of money, part of which was appropriated in 153
his hands to pay the plaintiff, and Floyd *vs.* Day, 3 Mass. Reps. 403, and Randall *vs.* Rich, 11 Mass. Reps. 498 are in point. In the last case (which was assumpsit for money had and received) the court say "although land is taken, it is taken at money's worth and the debt which might have been exacted in money at all events, has been discharged. This is sufficient to support this doctrine." But Mitchell bought of Flake the notes of Doggett and Cotten (and in the absence of proof to the contrary must be presumed to have paid money for them) after which he gave up to Doggett these notes of Doggett and Cotten, and took therefor a new note signed by both, given them further time within which to pay. May not this be considered in substance and effect as a loan of the money to Doggett, or as money had and received by him to the use of the plaintiff for the payment of which Cotten was surety? Doggett it is to be presumed understood it as a loan. In his answer to the 8th interrogatory he says: "The real bargain between Mitchell and myself at the time of making said note (the note of $15,955,) was that Mitchell was to receive *for the loan of said money* 12 1-2 per cent," and if Doggett at this time understood the arrangement as *a loan of money* it may reasonably be suposed that the parties so understood the matter when the note for $13,186 was made. It is worthy of remark here, that there is nothing in the record to show that at the time of this transaction Mitchell knew that Cotten was a mere surety on and not a principal in these notes, or that he (Mitchell) was ever informed that the notes to Flake were given for the price of land bought by Doggett. The consideration to Doggett (is as we have seen) a sufficient consideration to Cotten. Mitchell again gives up this last note to Doggett and takes a note signed by both Doggett and Cotten which was proved to be usurious. Is there any reason in justice or equity why he should not recover the original consideration (so far as it is not affected by the usury) under the common counts? We think not and that the law does not forbid it. In Clark *vs.* Martin, 2 Lord Raym. 758, Holt, Ch. Justice, expressed his disapprobation of declaring on promissory notes before the statute (of Ann) as if they were within the custom of merchants and assigned as a reason "beause there was so easy a method as to declare upon a general *indebitatus assumpsit for money lent.*" The same he says is laid down in 12 Mod. 380, and 1 Burr, 1525.—Lord Mansfield says: "I do not find it any where disputed that an
action upon an *indebitatus assumpsit* generally for *money lent* may 154
be brought on a note payable to one *or order*," and it was so holden in Smith *vs.* Kendall, 6 Term Reps. 123. The notes to Flake which were taken up when the note of 1839 was given were negotiable. In Beardsley *vs.* Root, 11 John. 523, Van Ness, Justice, in delivering opinion of the court remarks that the general rule indisputably is that money had and received cannot be supported unless the defendant has actually received money. It has however (he says) been held in the English Courts that taking negotiable paper is equivalent to a receipt of money and although we have never sanctioned that doctrine by any express decision yet in the case of Cummings *vs.* Hackley, 8 John. 206, the court seem to intimate their approbation of it. And on reference to that case we find it sustains him as to the action of the Supreme Court of New York. And Pickerel *vs.* Banks, 13 East. 20, and Fox *vs.* Cutworth, 4 Bing. 179, sustain him as to the English Courts. Tatlock *vs.* Harris, 3 Term Reps. 174, was an action by the endorsee of a bill payable to a fictitious payee against the acceptor who was also one of the drawers. The declaration contained counts for money paid and money had and received. It appeared upon the evidence that the defendant was indebted to one of the endorsers, and sent him this bill for which he was credited in account, and that the plaintiff paid that endorser the value of the bill, and upon demurrer to evidence the court held that the plaintiff was entitled to recover under the counts for money paid, and money had and received, and he had judgment accordingly. And Vere *vs.* Lewis, Ibid. 182, was a similar action to that of Tatlock *vs.* Harris, except that the defendant was not one of the drawers and there was *no evidence* that he *received any value for the bill.* In neither of these cases had the defendant actually received any money of the plaintiffs and a numerous class of cases involving the same principle might be cited, but these are deemed sufficient.

In the case of Hughes *vs.* Wheeler, 8 Cowen Reps. 81, 84, the question was whether the plaintiff was entitled to recover under the common counts the amount of the original note, for which the note declared on (and which was proved to be usurious) was given. The objection made to the recovery was that the note itself having been destroyed by the parties did not exist and could not be used as evidence of money had and received by the defendant and the evidence showing that it was given for the debt of a third person, there was

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no cause of action against the defendant prior to and independent of the giving of the note (the precise objection made to such recovery in this case.) But the Court said "the destruction of the note was a matter of no importance. The note on which the suit was brought having proved to be usurious, the plaintiff resorted, as he had a right to do, to the consideration of the note so far as it was not affected by the usury. What was that consideration. It was the old note which was not attempted to be impeached, but which on the contrary was shown to have been given for a legal consideration and a premium of five dollars for forbearance. That a promissory note is evidence of money had and received by the maker from the payee and may be used as such upon the money counts is admitted. It is then in principle the common case of an action for money had and received, &c., supported by proof of a promissory note which is shown to have been destroyed by accident or misapprehension. which does not amount to a legal satisfaction of it."

Another objection to the recovery of the plaintiff on the common counts (in that case) was that the old note was not given for a pecuniary consideration, and the defendant below had offered to show that the note was given for the debt of a third person, which debt was not for money, but for land sold by the plaintiff to him. The evidence was excluded and the objection overruled. On error brought, Sutherland, Justice, thought in this the Court erred, but Savage, Chief Justice, and Woodworth, Justice, held the note to be conclusive, and the judgment was affirmed. This case is directly in point in many respects. The note (as in the case under consideration) had been given up and cancelled. The note taken in its place proved to be usurious. The note given up and destroyed was given for the debt of a *third* person, which debt was *for land*. Here the debt was Doggett's and originally for land, and Cotten was Doggett's surety, not only on the last note, but on the notes to Flake, and the note of 1839 was submitted for the Flake notes.

We fully recognize the rule asserted by Lord Ellenborough cited by counsel for the defendant in error, that "the contract of a surety is *strictissime juris,*' and that he cannot be held beyond the precise terms of his agreement, as laid down by the authorities generally. Nor has the case of Wells *vs.* Girling, 8 Taunton, 737, cited on behalf of defendant in error in which it was held by the Court of Common Pleas in England "that an action cannot be supported upon the money counts, against one of the makers of a promissory note who signed it as a surety for the other maker." escaped our attention, but finding the principles it asserts opposed by a number of American cases decided by Courts for whose opinions we have the highest respect, we doubt its correctness. And moreover the Court in that case based its decision mainly upon the fact that the proofs showed that "there was no antecedent debt." Had it been otherwise (as in the case at bar) we believe from the language used by Chief Justice Dallas in that case, the decision would have been different. We therefore see no reason why, in this case, the surety should not be held according to the precise terms of his agreement (except so far as the usury may effect his liability to pay interest) and we hold him no further. On the contrary we declare the contract, by which it was attempted to hold even his principal further, in that regard null and void. If the views that we have taken of this case be correct (and from the best consideration that we have been able to give it, we believe them to be so,) the Judge erred in his instructions to the jury that "plaintiff could not recover on the money counts," that "there was no valid contract whatever—that the plaintiff cannot fall back on the old note—that the existence or non existence of usury on the note sued on has nothing to do with the defence set up, except so far as the contract as known to Cotten may have been changed in that respect between Doggett and Mitchell—that the plaintiff cannot resort to the money counts, and that he is not entitled to recover," and in refusing to give the first, sixth, eighth, and tenth instructions as prayed by the counsel for the plaintiff, and the seventh so far as it asked the Court to instruct the jury that the plaintiff could recover the original consideration.—And the judgment must therefore be reversed, and the cause remanded for further proceedings.

But inasmuch as it very clearly appears, from the testimony in the case, as disclosed by the bill of exceptions, that on the second day of January, A. D., 1841, an agreement was entered into by and between the plaintiff in error, (who was also plaintiff below) and the said Doggett, by which the latter engaged to pay interest at the rate of two and one half per cent beyond the then legal rate of interest for the forbearance of the debt of $15,955 in the first count of the declaration mentioned, the contract was consequently, from that time tainted with usury, and the interest on the same is thereby rendered entirely void, according to the principles decided and settled in the case of Mitchell against Doggett at the last term (before cited) which we have again examined and with which we are well satisfied. And consequently the defendant cannot be charged with any interest since the said second day of January, A. D., 1841. For notwithstanding the plaintiff at the trial of this cause in the court below abandoned the first count of his declaration, and rested his case upon the common counts, yet the usurious note being there, in bold relief staring us in the face, and the evidence in the case most conclusively proving the usurious contract upon which it was made and delivered to the plaintiff, we cannot lose sight of or disregard it, or place him in a better condition in regard to the defendant, whose testator was only a surety than that in which he was placed at the past term in his suit against Doggett the principal, for the amount of this same identical debt, except so far as the proof us to the time of the commencement of the usury in this case may differ from the testimony in that case in relation to this matter. To do so would put it in the power of a party at all times by getting a surety to his usurious contract to avoid the statute to the extent at least of the legal rate of interest.

The fourth section of the act above cited "regulating interest," Thompson's Digest 235, No. 4. Duval's Comp. 79, sec. 2, provides "That when any note, notes, bond or bonds, shall be upon or on account of any usurious contract, the interest on the same shall be *void* and the obligor or obligors forever exonerated from the payment of the same." It is not the usurious interest merely, but the entire interest which may have accrued after the date of the usurious contract from the payment of which the obligor is exonerated.—Now Cotten was a party to this note of $15,955 on which the usurious interest was (by the agreement between the plaintiff (Mitchell) and Doggett) to be paid. He was one of the obligors. The usurious interest it is true, was secured by a separate note which was not signed by Cotten, but was signed by Doggett, and it has already been decided in the case of Mitchell *vs.* Doggett that they are *one assurance.* This $15,955 includes the $13,186 the sum secured to be paid by the note of 1839; and the usurious interest was to be paid on the whole sum. The interest on the whole was therefore void by this usurious agreement, from the time when the usury by that agreement commenced, which Doggett expressly says was on the 2d of January, 1841. But this is not all. The 7th section of the same act made it the duty of the Judges of the Superior Courts to charge the Grand Juries of their respective counties, &c., to present all and every person who should violate the provisions of this act, &c., and on every presentment it was made the duty of the District Attorney to prosecute the party presented, for the *amount of interest* by this act forfeited, either in an action of debt in the name of the Territory, or upon information filed, and these duties now devolve upon the Judges and Solicitors of the respective counties of this State. To render judgment for the interest therefore would be to enable the plaintiff to recover money forfeited to the State upon a penal statute, and for the recovery of which it would seem to be the duty of the Judge of the proper Circuit, to charge the Grand Jury to present him. The act of 14th March, 1844, sec. 2, pamphlet laws, page 53, amending that act is equally penal and very forcibly illustrates the settled policy of the State on this subject. See Thompson's Digest, page 234, 235, No. 2. With the statutory provision before us we feel ourselves precluded from allowing more to be recovered (in such a case as this) than the amount of the original debt that may be proved with legal interest thereon up to the time when the usurious contract was made.

We have looked into the other instructions asked by the plaintiff below and deem it proper to say that the second appears too broad. It should have excepted all the interest since the said second day of January, 1841. The third and fourth seem to be objectionable for similar reasons. The fifth was calculated to mislead the jury who from the testimony in the case were the proper judges of the question (if it were at all material) whether Cotten was a surety or a principal. The ninth and eleventh (with the exception of the last clause of the latter which might with propriety have been given) seem to embrace only abstract propositions with which the jury had nothing to do.

The judgment is reversed and the cause remanded to the court below for further proceedings in accordance with this opinion.

Per Curiam.

David Brown, vs. Joseph F. C. Harley.

David Brown, *vs.* Joseph F. C. Harley.

A *scire facias* to revive a judgment is not an original but a judicial writ, founded on some matter of record to enforce execution of it, and properly speaking it is only the continuation of an action.

In *scire facias* upon judgment a declaration is not necessary.

It is a presumption of law that every thing done in a Court of record is *regularly* done, unless the contrary appear upon appeal or writ of error.

In *scrie facias* before the Circuit Courts of the State to revive a judgment rendered in a Superior Court of the Territory, a suggestion to the Superior Court in these words 'and now in behalf of the said Joseph F. C. Harley it hath been understood in the said court that although the judgment thereof is given, yet execution for, &c., remains to be made, &c., furnishes no warrant or authority for any proceedings in the *Circuit* Court.

The judgment in this case being for a specific sum in damages as prayed in the writ and for cost is erroneous. The judgment should have been "Let execution issue according to the force and effect of the judgment aforesaid by default of D. B. defendant."

Writ of Error to Leon Circuit Court.

The action below was by *scire facias*, to revive a judgment rendered in the late Leon Superior (Territorial) Court on 21st November, 1842, in favor of Joseph F. C. Harley, and against David Brown, for $1,483. The *scire facias* is in these words:

"THE STATE OF FLORIDA,

To the Sheriff of Leon county—Greeting:

Whereas at a Superior Court of the Middle District of the Territory of Florida for the county of Leon, begun and held at the Court House in the City of Tallahassee, on Monday the 14th day of November, 1842, and continued till and after Monday the 21st November, 1842, a certain Joseph F. C. Harley, on the said 21st November, 1842, by the consideration of said court, recovered against one David Brown a judgment for the sum of fourteen hundred and eighty-three dollars, the damages which the said Joseph F. C. Harley had sustained by occasion of the non-performance of certain promises and assumptions by the said David Brown to the said Joseph F. C. Harley lately made, and his costs by him about his suit in that behalf expended, as appears of record. And now on behalf of the said Joseph F. C. Harley, it hath been understood
60 in the said court, that although the judgment thereof is given, yet execution for the damages and costs aforesaid still remains to be made for him—wherefore the said Joseph F. C. Harley hath besought that a proper remedy be granted in this behalf. You are, therefore, hereby commanded that you make known to the said David Brown, that he be and appear before the Circuit Court of the Middle Circuit of the State of Florida for Leon county, at the Court House in the City of Tallahassee, on the fourth Monday of the present month—that is to say, on the 27th day of April, A. D. 1846, to show, if he hath or can say any thing for himself, why the said Joseph F. C. Harley ought not to have his execution against him for the damages and costs aforesaid, according to the force and effect of the recovery aforesaid, if he, the said David Brown, shall think fit; and further to do and receive what the said court shall then and there consider concerning him in this behalf, and have then and there this writ. Witness," &c.

This writ was served, and at the appearance term, (May, 1846,) the defendant moved the court for a rule upon the plaintiff to file a declaration in this case, on or before the first day of the next term; and upon default, that the action be dismissed, according to the Rules and Practice of the court. This rule was refused, the *scire facias* being deemed a sufficient declaration in practice, if the plaintiff wished to rely upon it as such.

At the November term, 1846, (the defendant having filed no plea,) the following judgment was rendered: "This day came the plaintiff by his attorneys, and the defendant having filed no plea herein, and having been duly warned and not appearing, on motion of the plaintiff by his attorneys, it is considered by the court, that the said plaintiff may have execution against the defendant for fourteen hundred and eighty three dollars, the damages and the costs in the writ aforesaid specified; and, also, that the plaintiff recover against the said defendant his costs, by him expended in suing forth and prosecuting this writ, and the said defendant in mercy, &c."

To reverse this judgment, the defendant prosecuted his writ of error in this court, upon the following assignment of errors:

I. That the court erred in refusing to require the plaintiff Joseph F. C. Harley to file a declaration in *scire facias* in this case, as is shown in bill of exceptions.

II. That the court erred in requiring defendant to plead to the 161
writ of *scire facias* as a declaration.

III. That the court erred in giving Judgment for plaintiff below upon the said writ of *scire facias*, because the said writ of scire *facias* is altogether irregular and insufficient in this:—

1st. That said *scire facias* doth not allege that the judgment set forth was regularly rendered.

2nd. That said *scire facias* doth not allege that suggestion hath been made to Leon Circuit Court, which issued said writ, that execution remains to be made, but alleges that suggestion of that fact hath been made to Leon Superior Court—which suggestion to Leon Superior Court could not be legal ground for issuing the writ from Leon Circuit Court, nor warrant the issuing of such writ of *scire facias*, nor make the same legal and valid.

3rd. That it doth not appear by said *scire facias* that Leon Circuit Court had any rightful power to issue said writ—for it is not shown, nor suggested, *either* that said Leon Circuit Court rendered said judgment, or that the record of said judgment now remains in the court which issued said writ of *scire facias*.

IV. That the court erred in ordering execution to issue, it not appearing to said Leon Circuit Court of record that no execution hath issued on said judgment.

V. That the said writ doth not show authority or power in Leon Circuit Court to issue execution.

VI. That in the judgment rendered on the 13th day of November, 1846, 'that the said plaintiff may have execution against the defendant for fourteen hundred and eighty-three dollars, the damages and the costs in the writ aforesaid specified,' &c., is erroneous. The said executions not being awarded "according to the full force and effect of the recovery" in said writ mentioned, but awarded for damages as of the date of 13th Nov., 1846.

VII. That the plaintiff was not entitled to cost, and there is error in said judgment in awarding; also, "that the plaintiff re-"cover against the said defendant his costs by him expended in "suing forth and prosecuting this writ."

Randall & Hagner, for Plaintiff in Error:

The defendant in error sued out of Leon Circuit Court a writ of *scire facias quare executionem non* against plaintiff in error. At the return of the writ, the defendant below insisted that the plaintiff 162
in this action should file a declaration according to the rules and practice of the court, or else at second term the suit should stand dismissed. 15 and 16 Rules adopted by the Supreme Court, January 1846.

Also sec. 20, Judiciary act, 94 of Duval's.

The court refused to require a declaration, but on the contrary required defendant to plead to the writ as a declaration.

We assign this as error.

Scire facias is considered at law an action in the nature of a new original. 2 Saunders Rep., 71, note 4. 6 Johnston's Rep., 106. 9 Connecticut Rep., 392.

It may be released by a release of all actions. Co. Litt. 290.

Scire facias to revive a judgment after a year and a day. 2 Saunder's Rep., 72d, and note 3.

In England the plaintiff files his declaration in *scire facias* of whatever character as in any other action. 2 Tidd's Prac., 1129. 2 Saunder's Rep., 72, n. 2 Chitty Arch. Pract., 835. See Tidd's Appendix of Forms—Declaration in *scire facias* to have execution. Issue and judgment thereon p. 515.

Our laws have made no alteration whatever in this respect.—*Scire facias* is an action here in Florida just as in England.

In New York they made a change by express statute. See 18 Wendell, p. 526.

By 2 Revised Stat., of N. Y., 579, the plaintiff may require the defendant to plead to writ of *scire facias*. In Virginia a practice has grown up to dispense with such declaration. See Robinson's Prac., 584.

"By the Virginia practice the declaration is dispensed with."

We submit that no such practice obtains in Florida, and no Legislative action has wrought a change. A declaration should have been filed in this action as in all others according to the rules of court.

Courts may rescind their rules, or may in establishing them reserve the exercise of discretion for particular cases; but a rule without such qualification must be applied to all cases that fall within it until it is rescinded. Thompson *vs.* Hatch, 3 Pick., 512. Wall *vs.* Wall, 2 Har. and Gill, 79.

But suppose the court not to have erred in dispensing with a declaration, was there not error in the judgment rendered by default?

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163 We insist that this writ of *scire facias* is not sufficient whereon to ground the judgment.

A writ of *scire facias* to revive a judgment can only issue from the court having the record on which it was founded; and the writ itself embody every requisite to the exercise of the power asked for. 2 Tidd's Prac., 1105. 1 Ld. Raymond's Reps. 216. 2 Saunder's Rep. 72, n.

Also 23 Pickering, 110. 2 Pennington, 529. 7 Mass., 340.—9 Mass., 520.

Here the writ does not only *not* state the record to be within the court to which he applies, but even the suggestion on which the proceeding is founded is made in another court, to wit, Leon Superior Court.

Scire facias is granted partly upon a record and partly upon suggestion, without which no proceeding could be had upon the record. 2 Institutes, 470. 8 Bacon's Abrid., 598.

Now the suggestion made here was made in Leon Superior Court—so declared—and surely that suggestion there, cannot warrant a proceeding in another tribunal, to whom no such requisite information is declared to have been given.

It did not appear to the court that no declaration had issued, nor does the writ show any authority in the court to award execution of the judgment.

Again it is a principle as well established in practice as it is consonant to reason, that the judgment must be that execution be had of the original judgment to which nothing can be added. This is the prayer and it is answered *"fiat"—let it be done.*

The authorities are clear: 8 Bacon's Abrid., 627. 1 Pennington's Rep., 73. 2 Pennington's Rep., 529. Tidd's Appendix, 515—576, sec. 146.

Now the damages awarded here are in the nature of a new judgment, as of the date of 13th Nov., 1846.

Again, costs are awarded to the plaintiff. By reason of his own laches he had failed to sue out execution, and on the principle of *"vol unti non fit injuria,"* the common law allowed no costs in such a case. The Stat. 8 and 9, W. 3, Ch. 11, Sec. 3, gave costs to plaintiff, obtaining judgment on an award of execution after plea pleaded, or demurrer joined thereon."

But cost were not allowed in England on default until 3 and 4
164 William 4th, (1833-4) Ch. 42. See 2 Chitty's Arch. Prac., 835. 2 Tidd's Prac., 1132.

Scire facias is not amendable; but the proper way is for the plaintiff to move to quash it. 1 Hiller *vs.* Frost, 1 Str. Rep., 405. Impey's Prac., 528.

Long & Walker, for Defendant in Error.

LANCASTER, Justice, delivered the following opinion:

This case comes by writ of error from Leon Circuit Court. It is a *scire facias* to revive a judgment rendered by the Superior Court of Leon county in the year 1842.

The first error assigned alleges that the court erred in refusing to require the plaintiff Jos. F. C. Harley to file a declaration in this case, as appears by the bill of exceptions.

It appears by the record, that on calling the case on the appearance docket the defendant by his attorney moved the Court for a rule on the plaintiff to file a declaration in this case on or before the first day of the next succeeding term, and upon default of such declaration filed that the suit shall be dismissed according to the rules and practice of the court. Which rule was refused, *scire facias* being deemed a sufficient declaration in practice if plaintiff chose to rely upon it as such. The same to be pleaded or demurred to as a regular declaration. To which opinion and ruling of the court defendant excepted, which was signed, sealed and made part of the record.

The rule of the court referred to in the defendant's motion for a declaration is in the words following "all declarations must be filed on or before the first day of the term, and if not filed by the first day of the term thereafter, the suit shall be dismissed." This rule can only have reference to the cases where, by the statute, declarations are required to be filed. The act of Assembly which bears on the question is as follows: "In all actions brought to any of the Circuit Courts of this State, whether the same be commenced by *original process* against the person or against the estate of the defendant, it shall be the duty of the plaintiff or his attorney to file with the clerk his declaration on or before the first day of the term to which his action is made returnable," &c. Tho. Dig. 330, sec. 1 The case then in which a declaration is required by the statute is in actions commenced by original process against the person or es- 1
tate of the defendant. Original process against the person is declared to be a capias or summons *ad respondendum.* Act. Nov. 23, 1828. Tho. Dig. 321, sec. 1. Against the estate, is provided by attachment. Act Feb. 15th, 1834. Tho. Dig. 367, sec. 1. In all actions therefore brought by summons against the person, or attachment against the estate, the plaintiff is required to file a declaration by the statutes, and the rule of the court must be construed with reference to the statutes in the use of the terms "all declarations."

This is a case of *scire facias* to revive a judgment and is not an original but a judicial writ, founded on some matter of record, to enforce execution of it, and properly speaking is only the continuation of an action. A step leading to the execution of a judgment tion of an action. A step leading to the execution of a judgment already obtained and enforcing the original demand for which the action was brought. It creates nothing anew, but may be said to reanimate that which before had existence, but whose vital powers and faculties are as it were suspended, and without its salutary interference would be lost. 2 Sellon's Prac. 187—8. Yet it may properly be called to action because a release of all actions, or executions is a good plea in bar to *scire facias.* 2 Sellon Prac. 187. Nevertheless it is not an original process. The statute does not absolutely require a declaration in *scire facias* to revive a judgment. It is therefore mere matter of practice whether it should be required or not. In England as well as in many of the States of the Union, the custom of declaring on *scire facias* is believed to exist. In Virginia, Kentucky, Tennessee and some other States, the practice appears to be to plead to the writ. No evil attends this practice, every defence which could be made by way of plea, or demurrer to a declaration may also be made to the writ, and unless it contains all the allegations and averments necessary to a valid declaration will be held bad on demurrer. The practice is convenient, because it waives the necessity of a formal declaration and prevents repetition on the record. The form of a declaration in *scire facias* on judgment is nothing more than a repetition of the writ, with a prayer for execution. The writ cites the defendant to shew cause why execution shall not issue. It may be considered substantially in the nature of a prayer for execution. 2 Sellon's p. 51. No practice has yet been established by the Supreme Court, and it is understood it has differed in the various Circuits. It is thought under the considerations hereinbefore expressed that in *scire facias* upon judgment a declaration is not necessary, and not required by law, and 1
that the court did not err in refusing to grant a rule on plaintiff for a declaration as moved by defendants attorney.

The second error assigned is: The court erred in requiring the defendant to plead to the writ of *scire facias* as a declaration.

For the reasons before set forth this assignment of error is considered by the court not well taken, and is overruled.

The 3d error assigned alleges the writ of *scire facias* to be altogether irregular and insufficient, because, firstly, it does not allege the judgment set forth was regularly rendered. Secondly, that the writ of *scire facias* doth not allege that suggestion hath been made to Leon Circuit Court that execution remains to be made, but alleges the suggestion of that fact hath been made to Leon Superior Court, which cannot be legal ground to warrant the issuing the writ from Leon Circuit Court, nor make the same legal and valid. And thirdly, it doth not appear by the writ of *scire facias* that Leon Circuit Court had any rightful power to issue said writ, for it is not shewn or suggested that Leon Circuit Court either rendered the judgment, or that the record of said judgment now remains in said Circuit Court from which the writ issued.

As to the first ground set forth in third assignment of error it is stated in the writ "at a Superior Court of the Middle district of Florida, for the county of Leon, begun and held at the Court House in the city of Tallahassee on Monday the 14th day of November, 1842, and continued till and after Monday the 21st November, 1842, a certain Joseph F. C. Harley on the said 21st November, 1842, by the consideration of said court recovered against one David Brown a judgment for," &c.

The existence of the Superior Courts under the Territorial Government of Florida, their powers as courts of general jurisdiction, and the transfer of all causes civil and criminal pending in the Superior Courts to the Circuit Courts, for the counties in which such cases may be so pending, together with all papers connected therewith or relating thereto, are parts of the legal and judicial history of the country of which the courts will take notice, as well also as the authority vested in the Circuit Courts, to proceed in all such causes. The Superior Court which rendered the judgment was a court of record of general jurisdiction. It is alleged in the writ as before set forth that the plaintiff by the consideration of said court, recovered against the defendant a judgment, &c. It is a presump-

tion of law, that everything done in a court of record of general jurisdiction, is rightly and *regularly* done, unless the contrary appear upon appeal or writ of error, the allegation that judgment was regularly rendered is unnecessary.

The second ground of objection set forth in the third assignment of errors appears to have more weight. After reciting the judgment given in the Superior Court the writ of *scire facias* goes on further to state "and now on behalf of the said Joseph F. C. Harley it hath been understood in the said court that although the judgment thereof is given, yet execution for, &c., remains to be made, &c."

To what court is suggestion made, that execution remains to be made of the judgment? Most clearly to Leon Superior Court—a court having no existence at the time the suggestion was made, which could then issue no writ whatever, and a suggestion, too, which could furnish no warrant or authority for any proceeding in the Circuit Court. If a declaration had been filed in this case, and had alleged a suggestion to the Superior Court, that execution remained to be made, it would be bad on demurrer, because such a suggestion would not authorize the Circuit Court to order execution. It might be amended by the writ if there was any thing to amend by, but in this case the writ is as bad as the declaration would be. The judgment (rendered in this case) was by default. It was incumbent on the plaintiff to proceed on a valid writ. A majority of the court think the writ is defective.

The judgment is not a judgment for execution, but for a specific sum in damages as prayed in the writ, and for costs also in this proceeding. This is clearly error.

The judgment should have been, "Let execution issue, according to the force, form, and effect of the judgment aforesaid, by default of the said D. B., defendant." 2 Sellon's Practice, 50.

The judgment of the court below is therefore reversed, and the writ dismissed without prejudice to any future action of the plaintiff on his original judgment.

8 BALTZELL, Justice, dissenting:

The objection which has occasioned the reversal of the judgment and dismissal of the writ in this case is to the words 'the said court' which are construed to mean the Superior Court. The precedent in Chitty will be found to be as follows: And now on behalf of the said A. B. in our said court before us, we have been informed, &c.' The variance would seem to be in the use of the word *the* for *our*, whilst the substitution of the latter in the writ would have obviated the difficulty.

We are at a loss, however, for the rule that confines the construction of an instrument to one word or a part of a sentence. The cardinal rule for construing all instruments is that the whole is to be viewed and compared in all its parts, so that every part of it may be made consistent and effectual. In case of difficulty in the construction, there certainly is greater reason for rejecting a word as repugnant and insensible, than for a disregard of the remainder of the sentence, or of the writing. In the case under consideration there would be no unusual stretch in construing the words *"the said"* to refer to the Circuit Courts even if Superior had been the antecedent. Courts are not tied down to the grammar of sentences or writings as to their construction, but will control even the literal terms, if they contravene the main purpose and object. One of the rules is that a construction is to be avoided which will defeat the instrument —*ut res magis valent quam pereat*. So also a construction which is against reason, is to be avoided. Now the Superior Court is admitted not to have been in existence, so that there could have been no thought of application to it any more than if the name of a dead man had been used.

But looking to the entire sentence we submit, with deference, that every difficulty is avoided. After the quotation of the court "yet execution for the damages still remains to be made," &c., it continues, "wherefore the said Harley hath *besought* that a *proper remedy* be granted in this behalf."

Of whom was this asked—to whom was the application made? Most clearly the Circuit Court as the very writ itself shews in commanding the party to appear in the Circuit Court and shew cause, &c.

Admitting that there was a mistake as alleged, the inquiry arises was it material, the Court say it was, and that a demurrer would lie

David Brown, vs. Joseph F. C. Harley.

for such defect. We do not so understand the law. It is a *suggestion*, not an allegation that is complained of, a suggestion to the wrong court. Now we propose to show that this suggestion was not necessary, and that the allegation 'that execution still remains' was sufficient without it to sustain the writ. 169

"A writ of *scire facias* to revive a judgment, may issue of course at any time within seven years from the date of the judgment without application to the court." Tidd's Prac., 1156.

A *scire facias* on a judgment after a year and a day states the judgment recovered by plaintiff, and the court in which it was obtained. It then states that although judgment be thereupon given yet execution of the debt, &c., still remains to be made. 2 Tidd. 1157.

The test is whether plaintiff would be required to prove the suggestion, or defendant could put it in issue or controvert it. Most clearly not. It was then matter not of substance but of form, and might be rejected as surplusage. 1 Chitty, 232.

Whilst we think the decision clearly against general principles we hold it to be against statutory provisions also. Referring to the record we find the *proecipe* to this effect.

"JOSEPH F. C. HARLEY, *vs.* DAVID BROWN, } In Leon Circuit Court.

The Clerk will isue a *scire facias* to revive the judgment which was rendered in the above case on the 21st of Nov., 1842, dated April 4, 1846."

It was not then the fault of the plaintiff that the word *the* was put in place of *our* in the writ, or that a mistake was made. Now the Supreme Court has held in the case of the Union Bank of Florida, *vs.* Edwards, the English statutes of Jeofails in force. 1 Florida Rep., 153.

One of these provides that "no process shall be annulled or discontinued for the misprison of the Clerks in writing one syllable, or letter, or word too much or too little, but as soon as the mistake is perceived it shall be amended in due form. And the justice before whom the record is made, or shall be depending by way of error, or otherwise, may amend the same as well after as before judgment in the same manner as they might have done by the above statute, before judgment."

"So the court may amend whatever to them seemeth to be the misprison of the Clerks in any record, process, word, plea, warrant or at- 170
torney, writ, panel, or return, which may for the time be before them so that no judgment shall be reversed by reason of such misprison." 8 H. 6, C. 12. 9 H. 5, C. 4. 2 Arch. Prac., 1115.

"The courts have power of amending a *scire facias* for any misprison of the Clerks by Stat. 8 H. 6, C. 12, already mentioned, that statute expressly including writs." 2 Arch. Prac., 1133.

"Although the omissions, variances and defects, by 16 and 17 Car. are required to be amended, the benefit of the act is attained by the court overlooking the exception." 2 Tidd, 960. 2 Strange, 1011.

But again the ordinary process for the commencement of a suit is by way of summons to answer in an action on the case of trespass, &c. Now although this gives him not the slightest information of the nature of the charge against him, it has yet been held sufficient by the courts for centuries. Can it be that greater precision, more definite allegation is required at the end, after a party has obtained his judgment for leave to issue his execution? There is no reason indeed why on mere motion and notice to the defendant a plaintiff should not have this permission without putting him to the expense of a new suit and a requisition of strictly formal allegations and suggestions.

The course of the courts of the present day everywhere (and such has been hitherto that of this court,) has been to relax and to discountenance objections of mere form. In this case the defendant appeared by attorney, and took a rule on the plaintiff to file a declaration, this shews that he was not misled by the suggestion of the wrong court, this of itself was sufficient to cover any defect of the writ. Nor is there a pretext that he has any defence or valid objection to the application.

For these reasons I hold that the judgment of the Circuit Court should have been affirmed, and have to express my regret that a suitor after two years of fruitless toil and effort to get leave from the court to have execution in a case of admitted right on a judgment, without any fault of his, with all the expense of this court, and the court below, has his suit dismissed, and is to be subjected to the expense, trouble and delay, of another suit before he obtains his rights.

171 JOHN G. CAMP *vs.* W. D. MOSELEY, AND MARTHA ANN MANLY, AND HIRAM MANLY, IN RIGHT OF HIS WIFE, ADMINISTRATORS AND ADMINISTRATRIX, *de bonis non*, OF SAMUEL PARKHILL, DECEASED.

The officer will be protected in the execution of process emanating from a court of general jurisdiction, provided that it appears on the face of the process that the court has jurisdiction of the *subject matter*. The officer in such case need not show that there is a judgment, but may justify under the *writ* alone.

Where the *subject matter* of the suit is within the jurisdiction of the court, but the want of jurisdiction is as the person or place, unless the want jurisdiction appear on the process to the officer who executes it, he is not a trespasser—contrary, when the *subject matter* is not within the jurisdiction of the court.

The technicalities incident to estoppels are graudually giving way to considerations of reason and practical utility, and the courts at the present day seem disposed to give force and efficacy to a doctrine which is based upon principles of justice and the purest morality.

Where one was present when a levy is made by the officer, and did not deny the right of the officer to make such levy, but furnished a list of property to be levied on, attended the sale and took an active part assisting the officer, advised bystanders to bid, and disapproved the forbidding of the sale by another: Held—that, although it appeared that such conduct was not fraudulently or willfully intended to deceive the officer, the party so conducting himself is *estopped* from afterwards alleging that the officer was a trespasser.

The acts and admissions of one of several administrators, which amount to an *estoppel* against him, bind the whole.

The effect of an *estopped*, whether legal or equitable, is the exclusion of evidence, and its existence must always be a question of law for the court, and not of fact for the jury.

Writ of Error to Leon Circuit Court.

William D. Moseley and Martha Ann Manly, administrator and administratrix *de bonis non* of Samuel Parkhill, and Hiram Manly, in right of his wife, (said Martha,) administrator *de bonis non*, at the Spring Term (1846) of Leon Circuit Court, instituted an action of trespass against John G. Camp, for seizing a large number (180) of slaves.

The declaration alleged the slaves to be the property of the plain-
172 tiffs in their representative character—that they were seized and taken by defendant and by him detained for a long time, and that thereby the plaintiffs were hindered and prevented from cultivating and keeping in preservation three several plantations, and were deprived of the use and benefit of the slaves, and were prevented from enjoying the profits, benefits, and advantages of their labor and services, and were put to great expense in regaining the possession of the slaves. The plaintiffs laid their damages at $50,000.

The defendant pleaded "not guilty," with privilege (by consent) to give in evidence under that plea the process on which he relied for justification.

At the trial of Jabez B. Bull, Richard A. Shine, and David C. Wilson, three of the jurors so summoned as aforesaid good and lawful men were objected to by the plaintiffs' attorneys, for cause then and there shown, to wit: that the said Bull and the said Wilson were stockholders and directors in the Union Bank of Florida; and the said Shine was objected to for cause, viz: that the said Shine was a purchaser at the sale of the property of Parkhill's estate, seized and sold under an execution issued in the suit of the Union Bank of Florida *vs.* Parkhill's administrators, which execution was in the hands of and sale made by John G. Camp, Marshal of Middle Florida, and under which defendant justified the alleged trespass. These objections to the said jurors on behalf of the plaintiffs by their attorneys were sustained by the court, to which decision and ruling of the court the defendant by his counsel excepted.

The plaintiffs offered Benjamin W. Gause a witness, who proved that he was appraiser of the property of the estate of Samuel Parkhill, deceased, and appraised these negroes at the instance of plaintiffs in the fall of 1844, or spring of 1845, and the negroes afterwards went into the possession of plaintiffs. Before the sale by the Marshal a part of the negroes were hired by plaintiffs to witness, and were delivered up to the Marshal, who informed him that he took them by a precept of the court—estimates the value of the hires at $20 each—knows of sale by Marshal and here the plaintiffs rested their case.

The defendant then offered in evidence a certain execution issued from the late Superior Court of Leon county, Territory of Florida, at the suit of the Union Bank *vs.* Hiram Manly and Martha Ann

Manly, administrators of Samuel Parkhill, deceased, which said 173
writ of *fi. fa.* is in the words of and figures following, to wit:

THE TERRITORY OF FLORIDA,

To all and singular the Marshals of said Territory—GREETING:

We command you that of the goods and chattels, slaves, lands, and tenements of Samuel Parkhill, deceased, in the hands of Martha Ann Manly, late Parkhill, and Hiram Manly, in right of his wife, said Martha Ann, administrators of Samuel Parkhill, deceased, remaining to be administered, you cause to be made the sum of ninety-four thousand one hundred and eighty-two dollars and twenty-two cents, its debt, and also twenty-seven thousand nine hundred and eighty two dollars and sixty-five cents, its interest and damages, making together the sum of one hundred and twenty-two thousand one hundred and sixty-four dollars and eighty-seven cents, which the Union Bank of Florida lately, on the first day of March, 1845, recovered in our Superior Court for the County of Leon, in the Middle District, as well for its debt as its damages occasioned by the detention of said debt, and likewise the sum of seven dollars eighty-two cents, which to the said Union Bank of Florida in the same court was adjudged for its costs by it in that behalf expanded, together with lawful interest on said damages from the rendition of said judgment till paid, and the costs of this writ, and of your proceedings hereon, and that you have the said sums of money before the Judge of our said Court at Tallahassee, when satisfied, to render the said Union Bank of Florida the sums aforesaid; and have then and there this writ.

Witness, Richard T. Birchett, Clerk of our said Court, (Seal of Court.) at Tallahassee aforesaid, this 20th day of March, A. D., 1845, and of the Independence of the United States the sixty-ninth year.

R. T. BIRCHETT, *Clerk.*

[*Endorsed:*]—Came to hand 20th March, 1845, and levied on the following slaves: Tom Gandy, Harriet, Mary Ann and Wm. Washington, Sam Cormick, Primus, Sarah, George Edmondson, George Lewis, Daniel, William Eppes, Matilda Ann, Sarah and Maria, Julia, Anthony, Molly, Patsey, Hannah, Israel, Sarah and Harriet Ann, Kealan, Jacob, York, Melinda, Squire, Queen and Eliza Ann, Rhoda, Jack, Billy, Moses, Martha, Lucinda and William, Fenton and Helina, Frank, Francis, Isaac, Richard, Juba, Toney, Becky, Jinny, Cuffy, Phillis, Chloe, Dolly, Sam, Elizabeth, Rachael, Adeline, Jane, Polly, John Robinson, Monachy, Elizabeth 174
Eddy, Bob, George, Maria Miles, Mary, Frederick, William Pryer, Louisa, William, Christina, Horace, Judy Linsey, Susan, Charley, Johnny, Mary Long, Joe, Ephraim, Ellen, Cornelia, Rachael, Jack Morgan, Mary, Toney, Sibby, William, Toney, Scipio, Peggy, Isaac, Lucy, York, Grace, Rose, Abram, James, Jones, George, York, Jr., Caroline, Morgianna, Fanny, Mary Page, Margaret, Phœbe, James, Juba, James, Frank, Margaret, Albert, Anderson, Pleasant, Edmund, David, William, Cæsar, Amy, Dick, Phillis, Richard, Israel, Ellick, Esther, Amy, Albert, Old Jack, Margaret, Homady, Pittman, Cary, James, Old Tom, Frederick Clark, Nancy Burney, John, Anna, Susan, Maria, Giles, Fanny, Martha, Ned, Francis, Barbary, Kitty Ann, Wilson, Nancy, Ben, Hercules, Hanly, Eliza, Jacob, Winney, Emily, Tom Hackley, Diana, Ellen, Amelia, Betsy Ann, Dick, Lisbon, Katy, Cyrus, Henry, Taylor, Mary Thomas, Louisa, Clarissa, Elizabeth, Anthony, Ben, Sam, Nancy Pool, Walker, Maria, Amy, Maria, Penny Davidson, George, Phil, Betty, Nelson, Selva, Matilda, Sarah Ann, Amelia, Wakala, Virginia, Charity

JOHN G. CAMP, *Marshal.*

To the introduction of which evidence the plaintiffs objected, on the ground that they were strangers to it, and required the original entry and record of judgment to accompany it; which objection, on argument had, was sustained by the court, and the defendant required to produce in evidence the said judgment; to which ruling of the court the defendant, by his counsel, excepted. The defendant then offered in evidence other executions, which were in the hands of the Marshal at the time of the trespass complained of, and upon which like proceedings were had as on the one of the Union Bank *vs.* Parkhill's administrators, already given in evidence. The pleadings and proceedings in these cases were admitted by the parties to be similar to those in the case in which the above execution issued.

The defendant then proved by Wm. G. Ponder, a competent witness, that he was present at the sale of the Parkhill slaves, under the executions of the Union Bank and others, in the Spring of 1845. Moseley was present at the sale, and advised witness to purchase. Something being said as to title, Moseley said there would be no difficulty, he thought the title good; said that he had hired a certain negro, and that he thought he would suit witness. Witness sta-

ted that the general opinion was, that all difficulty arising out of litigation about the Parkhill estate was at an end; that the judgment was legal, and there was no good objection to the sale of the property.

The defendant also proved by William Bloxham, a competent witness, that he was present at the sale of the slaves. Had a conversation with Moseley the last night after the sale. Went with James T. Archer, Esq., to the room of Moseley. Archer said he was going to write to New Orleans to have the negroes sent there stopped. Witness told Moseley what Archer said about stopping the negroes, and Moseley said he would have nothing to do with it; that he would not let them use his name. Moseley was at the sale; was acting there; objected to only one negro woman being sold; and she was replevied. Moseley bid at the sale for that negro, and run her up. When Colonel Gamble bid for any negroes, Manly asked witness to bid against him. Witness on cross examination, stated that Moseley observed, that the negro woman was replevied; that a friend of his had wanted her, and he would make somebody pay for her, and he run her up to $800. All the negroes were not sold on the first day. This negro was sold after several others.—Witness got to the ground as Mr. Thompson got off the cotton bale. Moseley was there with a paper taking down the prices and names. As Col. Gamble had bid very often, people declined to bid. Moseley said to witness that was too little, and added, "Mr. Bloxham bid upon the negroes." Witness did so and made them bring $1500 more.

The defendant also proved by Otis Fairbanks, a competent witness, that he was present at the sale of the Parkhill slaves, in May, 1845. The negroes were selling low. Witness was on one side of of a cotton bale and Moseley on the other. Moseley said, "bid, I don't want the negroes sacrificed," and said he would be glad when they were off his hands. Cross examined, stated that Moseley did not call his name, his eyes passed around, and what he said was general to the whole crowd. There were many persons present.—The remark of Moseley was in a common conversational tone. Witness bid for one or two of the negroes, but none were knocked down to him. Heard Mr. Archer forbid the sale as illegal; cannot state all the words he used; heard but one sentence; don't recollect on whose behalf he acted, but knew he was counsel for the estate.—Moseley was there. After he said, "bid, I don't want them sacrificed," the negroes sold better. Did not see Gov. Moseley there
6 when Archer made the announcement. Being re-examined, stated that, on reflection, he was satisfied that Moseley was present when Archer forbade the sale. He, (Moseley,) disapprobated Archer's act, and said he had better let them go; they never could go at a better time.

The defendant then proved by John G. Gamble, a competent witness, that he was present at a part of the sale; was not there when the first negroes were sold; saw Gov. Moseley there, had conversation with him on that day, and on the second day of sale. Gov. Moseley divided and arranged the negroes in lots; advised people to bid; said it was a good sale; he was glad of it; said his reason for separating the families, (which was contrary to the wish of witness) was, that he was determined to make them bring as much as possible; said the sale was good, and he wanted to get rid of the business. Witness heard no dissent, none whatever, to the acts of the Marshal; no objection on the ground of illegality of sale; was not there when Mr. Archer dissented. Gov. Moseley did aid the Marshal in the sale. He divided the negroes; called them up in succession as they were sold. Moseley had a list; witness also had one; we were constantly conferring; Moseley designated the lots in which they should be sold; was present at the sale of negro Ellen; is uncertain whether it was on the first or second day. Moseley objected to the sale of Ellen, stating he had intended she should be replevied; that was the ground of his objection. All the negroes were mortgaged; two hundred for the stock debt; forty odd were mortgaged to secure accommodation paper; saw Manly at the sale; had no intercourse with him. Witness bid at the sale for negroes; did so as agent for Mr. Minetzhazen, by whom he was authorized to buy one hundred negroes for him; bought for him ninety.

The defendant proved by John George Anderson, a competent witness, that he was present at the sale; but he proposed to the Marshal, Major Camp, to give a certain sum for a family of negroes. Camp referred witness to Gov. Moseley, who on application replied that the negroes must be sold separately. The Marshal refused to take the responsibility of putting them up together, without the consent of Moseley, who declined acceding to request of witness.

The defendant proved by Thomas H. Hagner, a competent witness, that R. T. Birchet was Clerk of Leon Superior Court, and John G. Camp, Marshal of Middle Florida, at the time the execution of the Union Bank, *vs.* Parkhill's administrators, issued
177 That the list given in evidence, and referred to in the endorsement on the execution was the same identical one by which the negros were sold by the Marshal, and the said list is admitted to be the one furnished the Marshal by Gov. Moseley.

The defendant then proved by Dr. John G. Gamble, a competent witness, that he was present at the sale of the Parkhill negroes, was there at the commencement, heard Mr. Archer forbid the sale *on the ground* that Mrs. Manly had not relinquished her dower in the slaves. L. A. Thompson, Esq., got up and said that had been adjudicated in the highest Court of the Territory, and that the sale was legal. M. A. Long and L. A. Thompson, competent witnesses, both depose that Mr. Archer forbade the sale only on behalf of the widow, as she claimed a right of dower in the slaves. The defendant then proved by R. T. Birchett that he was present at the sale, saw Moseley, Camp and Col. Gamble standing together conferring as to the sale, and as to putting the negroes up in parcels. Witness said he was Clerk of the Superior Court of Leon county, and that Mr. Archer filed a bill for dower on the morning of the sale, in behalf of Mrs. Manly and said he did not expect the court to grant it.—The defendant here closed his case.

The plaintiff then offered in evidence the record of the revocation of the letters of Martha Ann Manly as administratrix of Samuel Parkhill, deceased, in Leon County Court, dated the 18th March, 1844, in words and figures following, to wit:

At a Superior Court for the County of Leon, continued and held at the Court House in the City of Tallahassee, on Monday the 18th day of March, A. D. 1844, present the Honorable Samuel J. Douglas, Judge. In the matter of the estate of Samuel Parkhill, deceased:

On an appeal from an order of the County Court of Leon County revoking the administration of Martha Ann Manly, late Martha Ann Parkhill:

This cause coming on to be heard anew upon the merits, and it appearing to the satisfaction of the court that Henry Bond, Richard K. Call, George K. Walker and Benjamin W. Gause, the securities upon the official bond of the said Martha, are insufficient: It is therefore ordered that the judgment and decree of the County Court be affirmed, and that the letters of administration heretofore granted to the said Martha be and remain revoked, annulled and set aside. It is further ordered that John G. Camp, Esq., Marshal of the District of Middle Florida, do take the property of the said estate of Samuel Parkhill in his possession to remain there until the further or- 178
der and direction of the court.

To which the defendant by his counsel objected on the ground that defendant was no party to the proceeding then and there had, and that it was not proper testimony to be taken into consideration by the jury in maintainance of the issues joined on the part of plaintiff, but the court overruled the objection, and permitted the said record and evidence to be read to the jury, to which decision and ruling of the court, the defendant by his counsel excepted.

And said plaintiffs also offered in evidence the record of the 21st of March, 1844, appointing said John G. Gamble, Receiver, which record is in the words and figures following, to wit:

At a Superior Court for Leon County, continued and held at the Court House in the City of Tallahassee, on Thursday, the 21st day of March, A. D., 1844, present the Honorable Samuel J. Douglas, Judge: *In re*, Estate of Samuel Parkhill, deceased:

Ordered that John G. Gamble, Esq., of the County of Leon, be, and he is hereby appointed receiver of the Estate of Samuel Parkhill, late of Leon county, deceased, not administered by the late administratrix, until the County Court of Leon County shall appoint an administrator *de bonis non*, upon said John G. Gamble's entering into bond with two or more sufficient securities, in the sum of one hundred thousand dollars, conditioned for the faithful performance of his duties as such Receiver, and to obey the orders of this court in that behalf, said bond to be approved by this court, and it is further ordered, that upon the approval of said bond by the Judge of this court, the Marshal of this District be and he is hereby ordered and directed to deliver the possession of all the estate real and personal now in his custody, unto the said John G. Gamble, as Receiver as aforesaid and take his receipts therefor returning the same with his accounts and charges to this court to be audited as this court shall direct.

To the reading of both of which records that of the 18th of March, 1844, and that of the 21st March, 1844, the defendant by his counsel severally objected on the ground that it was not proper testimony to be read or to be taken into consideration by the jury in maintenance of the issue joined on the part of the plaintiff, but the court overruled the said several objections and permitted the said records of the 18th of March, 1844, and the 21st of March, 1844, to be read to the jury, to which decision and ruling of the court the defendant by his counsel excepted.

179 The plaintiffs further offered in evidence the written pleadings in the cause in which the Union Bank of Florida was plaintiff and Hiram Manly and Martha Ann Manly, administrators of Samuel Parkhill, deceased, were defendants, to which the defendant by his counsel objected as improper evidence to be read to the jury, or to be taken into consideration by them in maintainance of the issues joined by the plaintiffs, but the court overruled the objection and permitted the said pleadings to be read to the jury, to which decision and ruling of the court the defendant by his counsel excepted.

The plaintiffs then offered in evidence the record of the reversal of the judgment in the suit of the Union Bank of Florida plaintiff, and Hiram Manly and Martha Ann Manly, administrators of Samuel Parkhill, deceased, defendants on which judgment the execution offered in evidence by the defendant, was issued, to which the defendant by his counsel objected: 1st, because he was not a party thereto; 2d, because the reversal of the said judgment by the Supreme Court was subsequent to the trespass complained of; and lastly, because it was not proper testimony to be read to, or taken into consideration by the jury in maintainance of the issues joined on the part of the plaintiff; but the court overruled the objection and permitted the said record to be read to the jury, to which decision and ruling of the court the defendant by his counsel excepted.

The plaintiffs then offered in evidence a bill in Chancery, filed 10th April, 1845, [and praying an injunction against the sale, with the endorsement of a refusal by the court to grant the prayer,] in which William D. Moseley and his securities on his official bond, as administrator *de bonis non*, of said Parkhill, deceased, were complainants, and John G. Camp, the defendant, in this action, and others, were defendants, to which the defendant by his counsel objected, unless it was also shewn that subpœna had issued and was served on this defendant, and also because it was not proper testimony to be read to, or considered by the jury in maintenance of the issues joined by the plaintiffs in this action; but the court overruled the objection and permitted the said bill to be read to the jury, at which decision and ruling of the court the defendant by his counsel excepted.

The plaintiffs then offered in evidence the stock mortgages given by Samuel Parkhill in his life time to the Union Bank of Florida to show that the slaves levied on were mortgaged to said Bank, that the mortgages were not yet due, that the administrators of
180 Parkhill as representatives of the Estate, were trustees for the bondholders and general creditors, and entitled to the possession of the negro slaves levied on and sold, until the mortgages should fall due, and that the said mortgages were on record and notice to all the world, and that under the charter of the Unon Bank the property thus mortgaged could not be sold. To this evidence the defendant by his counsel objected, as not proper to be read or to be taken into consideration by the jury, in maintenance of the issues joined on the part of the plaintiffs, but the court overruled the objection, and permitted the same to go to the jury; to which decision and ruling of the court the defendant by his counsel excepted.

The defendant to rebut this evidence on the part of the plaintiffs, offered John G. Gamble a competent witness, who proved that the mortgages were given for stock subscribed for, by Samuel Parkhill in his life time; that the note sued on, and in judgment, was for money borrowed on the pledge of that stock; that the note given by said Parkhill for the money so borrowed, called a stock note, was overdue and the interest thereon for a long time unpaid, and was unpaid up to the time of suit instituted and judgment recovered; at the time of the sale the Unon Bank of Florida had deposited with the Clerk of Leon Superior Court by order of the Judge thereof, Territorial bonds in amount equal to the amount and sum for which the slaves were originally mortgaged, subject to the order of the Governor of Florida.

The plaintiffs then offered James T. Archer as a witness, who said he would hardly venture to speak with certainty, of what took place at the sale in May 1845, after what had been testified on the other side. But from the following *facts* he believes he did forbid the sale as illegal.

When the judgment under which the sale was made was rendered against the original administrators, there was a large number of suits pending at the same time. Witness as attorney for the estate deemed the judgment invalid and void and having it in view to contest proceedings under it, he suggested that all the suits should be placed in judgment by agreement on like pleadings and subject to all exceptions. This was acquiesced in as the record will show. After the levy witness in furtherance of his views presented the bill (referred to as filed 10th April, 1845,) in behalf of Moseley and his sureties, praying an injunction against the plaintiffs in execution and the Marshall. The application was refused. Afterwards on the

morning of the sale the witness presented a bill in open court in 181
behalf of Mrs. Manly stating her dower interest in the slaves and praying an injunction against the sale of that interest. Witness stated at the time of this last application, that this bill raised the same question as the one previously presented, that he did not expect the order to be granted, but that he made the application, that purchasers might know that their titles would be disputed.

Immediately after this witness wrote in the marshals office a written protest against the sale and handed it to Manly to read before the bystanders. Manly said witness had better make it himself.—Witness did undertake this duty. He was somewhat excited.—Knows he did object to the sale on the point of dower, and believes from his previous course, views and intentions that he stated and gave notice that the sale was illegal and that purchasers would bid at their peril.

Witness recollects that Mr. Thompson referred to the decision of the Court of Appeals and guaranteed the sale to be valid; according to the best of his recollection Governor Moseley was not present when he forbid the sale; does not recollect whether he did order subpœna on the bill shewn in evidence. In reference to conversation between Moseley and Bloxham and witness, he told Bloxham that he understood he had purchased some of the negroes, and that he (witness) would pursue them; is satisfied that the Governor never did in his presence say "his name should not be used in the proceeding against these negroes;" knows but few of the negroes; knows that plaintiffs have not got them.

This was all the testimony offered.

After argument of counsel on both sides, the court delivered to the jury the following charge and instructions, viz: The letters of administration to Manly and wife having been revoked, the court had no power to give any judgment binding on the estate. The judgment set up in this case was a nullity. That though it is the general rule, that the officer executing process issued from a court of general jurisdiction is not bound to enquire into the regularity of the proceedings, and may justify under the execution, yet the exception arises in this case from the fact of the personal knowledge of the Marshal proved, that he knew and had notice that Manly and wife were not the administrators, and this prevents him from justifying under the execution. Yet conceding that he might justify under the execution, if he had taken the property of the defendants to the execution, does that justify him in levying upon 182
property of the estate of Samuel Parkhill, in the hands of the administrators *de bonis non*, the plaintiffs in this action? The court thinks it does not. He was not commanded to disturb property in their hands. It is contended that the Marshal should have been informed by plaintiffs if their property became mingled with that of the defendants in execution. The court thinks this case cannot arise. If the Sheriff takes the goods of the wrong party, even though he have the same name, he is liable; it is the duty of the officer to ascertain the truth

In reference to the admissions of Moseley and Manly, the court admitted the evidence in all its extent, for benet of defendant. The question, however, arises, as to the effect, weight and sufficiency of this evidence. The act complained of is a trespass; if Moseley or these parties did any thing to induce the Marshal to commit this trespass, to lead him to make this levy, (for that is the trespass,) the plaintiffs could not complain. Did the Marshal go there to make the levy under this process, or did he do it at the instance of Moseley? But again, if a trespass was committed by the levy, the question is, have they waived it on the day of sale or previously? Was the delivery of the list a waiver? The position of the parties is to be considered. They might have given embarrassment to the officer, or not being able to resist, they might give him facility to complete the act. It is for the jury to inquire, if this would be a waiver of the trespass. Now as to the proceedings on the day of sale. Whether this sale was then assented to, would appears to be a question more specially for the purchasers. Were the plaintiffs bound to embarrass that proceeding? If you think they waived the trespass, it is for you to determine; if so, you would find for the defendant. If, however, the remarks made were mere statements, not to mislead Camp, not to induce him to act, then it is no waiver.—This is a question for you. The court then read to the jury the law as laid down by Judge Baldwin, Sedwick on Dam. p. 550, taken from 1 Bald. 138, as to the rule of damages in trespass, and added as the effect of the law, that the jury should put the plaintiffs where they stood as near as possible, not taking into consideration the value of the property, for which plaintiffs do not contend, but only the injury.

The Judge here closed his charge, and the defendant, by his counsel, asked the following instructions to the jury:

183 1. That where the Court has jurisdiction of the subject matter it is sufficient to justify the officer executing its process, and the officer is not bound to examine into the validity of its proceedings, or the regularity of its process.

2. That if the subject matter of the suit is within the jurisdiction of a Court of general jurisdiction, but there is a want of jurisdiction as to the person, the officer who executes process in such suit is not a trespasser, unless the want of jurisdiction appears by such process.

3. That where the Court has jurisdiction of the cause, and the process is regular on its face, the officer who levies the same is justified in such levy.

Mem.—The instructions numbered 1, 2, 3, were given by the Court as the general rule, with the qualification, that in this case the defendant, having been a party to these proceedings, must be held cognizant of the irregularity of the process.

4. That the plaintiff in the suit on which this execution issued being the mortgagee of the slaves levied on, the Marshal who proceeded at the request of the said mortgagee in whom the legal title was, is no trespasser for the levy and seizure under said execution.

5. If the jury shall believe from the evidence that William D. Moseley, one of the plaintiffs in this action, aided the Marshal, by giving him information, furnishing a list to enable said Marshal to make the levy, by assisting said Marshal on the day of sale, by encouraging persons to bid for and purchase the slaves levied on, then the said Moseley is estopped by said acts from setting up this trespass, and cannot maintain this action.

6. If the jury shall believe, from the evidence, that William D. Moseley neglected to forbid the sale of the slaves levied on, that he failed to warn the Marshal that he had levied on property to which he, Moseley, had a claim and right of possession, then such silence must be looked on as an acquiescence by said Moseley, in the acts of the officer, and he is thereby estopped and precluded from maintaining this action.

7. That a valid judgment binding the estate of a decedent may be rendered against an executor sued as administrator, or *vice versa*, unless the difference of official character be pleaded in abatement, and that when rendered against an administrator as such who is in fact executor, or against a defendant executor who is in fact administrator, yet that the judgment in either case is valid against the estate, it is binding on the estate, and may be satisfied out of it.

184 8. That if under any state of things a proceeding under execution on the judgment rendered was allowable, the Court, would assume that such a state of things did exist for the officers protection, or at least he should not be required to judge whether it did or not.

Which said instructions, numbers 4, 5, 6, 7, 8, the Court refused to give to the jury, which refusal of the Court, and to the qualification of the 1, 2 and 3 instructions prayed, and to the several points herein before excepted to, and to the charge of the Court, and the points therein ruled, the defendant by his counsel excepts, and prays this his bill of exceptions may be sealed and signed by the Judge, and made a part of the record.

THOMAS BALTZELL, [SEAL.]
Judge.

The Plaintiff in Error now seeks to reverse the judgment below upon the following assignment of errors.

1. The Court below erred in sustaining the objections to Jabez B. Bull, Richard A. Shine, and David C. Wilson, as proper, lawful, and qualified jurors to sit in this case in the Court below.

2. The Court erred in refusing to permit the execution of the Union Bank *vs.* Hiram Manly and Martha Ann Manly, administrators of Samuel Parkhill, deceased, to be read to the Jury, unless accompanied with the original entry and record of judgment.

3. In permitting the plaintiffs in the Court below to read in evidence to the jury the records of the 18th March, 1844, and the 21st March, 1844.

4. In permitting the plaintiffs to read as evidence to the jury the written pleadings in the cause in which the Union Bank of Florida was plaintiff, and Hiram Manly and Martha Ann Manly, administrators of Samuel Parkhill, deceased, were defendants, and in overruling the defendants objection to the introduction of said written pleadings as proper evidence.

5. In permitting the plaintiffs to read as evidence to the Jury the record of the reversal by the Supreme Court of Florida, of the judgment in the suit of the Union Bank of Florida, plaintiff, and Hiram Manly and Martha Ann Manly, administrators of Samuel Parkhill, deceased, defendants, and in overruling the objections to the introduction of said evidence.

6. In permitting the plaintiffs in the Court below to read in evidence to the Jury the Bill in Chancery filed 10th May, 1845, and in overruling the defendant's objection to the introduction of said Bill in 185
Chancery as evidence in the case.

7. In permitting the plaintiffs to read in evidence to the jury the mortgages executed by Samuel Parkhill in his lifetime, to the Union Bank of Florida, and in overruling the defendant's objection to the introduction of said mortgages as evidence in this case.

8. The court erred in its charge to the Jury in arguing and deciding the facts, which it is alone the province and duty of the jury to determine.

9. In refusing the 1, 2, and 3 instructions as prayed by the defendant's counsel, and in adding to the said instruction the qualification as set forth in the memorandum.

10. In refusing the 4th Instruction asked for by defendan's counsel.

11. In refusing the 5th Instruction prayed for by defendant's counsel.

12. In refusing the 6th Instruction prayed for by defendant's counsel.

13. In refusing the 7th Instruction asked for by defendant's counsel.

14. In refusing the 8th Instruction asked for by defendant's counsel.

Douglas & Hogue, for Plaintiff in Error.

I. Under the first error assigned the plaintiff's counsel will contend:—

1. That he was entitled to a jury selected, summoned, and returned, according to law; and only such objections could be made and sustained to individual jurors as are recognized by the common law or the statute laws of Florida.

2. That the objections made to the jurors, Bull, Shine, and Wilson are not such as the common law, or the statute laws of Florida recognize; *vide* Thomp. Dig., 344. 3 Black. Com., Marginal page 362.

3. *Infamy* and *interest* are the only objections at common law that the court can decide upon. If the objection be to the favor it must be tried by *triers*.

4. It is no answer to the objection to say the defendant in the court below had a jury and a fair trial. The law secures to the parties a jury selected and empanneled after certain rules and formalities, 186
and the best guarantee for fairness and impartiality is to observe the provisions and requisitions of the law and it is *error* to depart from them. 2 Va. cases, 307.

5. Any departure from the mode pointed out and prescribed by law, for the selection and empanneling of a jury, leaves the matter entirely at the discretion of the court, and is a virtual repeal of the law and the Constitution.

II. Under the 2d error assigned the plaintiff's counsel contend:—

1. That the execution under and by virtue of which the Marshal made the levy in this case, having issued from a court of general jurisdiction, he was not bound to look into the validity of the judgment, or the regularity of the proceedings. He might justify under his writ, and was not required to show an unreversed judgment.—Barker *vs.* Braham and Norwood, 3 Wilson Rep. 375—345. Gott *vs.* Mitchel, 7 Blackford Rep. 270. 5 Hayward 142. 1 Carr. and Payne, 7. 10 John. Rep. 138. 7 Law Lib. 53.

2. If it is replied that the administrators *de bonis non* are *strangers* and therefore it is necessary to show a judgment, it is answered:—1. That the privity which exists between general administrators and administrators *de bonis non*, precludes the idea of their being strangers. 8 Cowen 339—343. 2. To entitle them to the benefit of this argument, they must at the time of the levy, have been wholly *estranged* from the estate. Granwell *vs.* Sibley, Levintz part 2, page 190. 3. That all suits against administrators and executors are virtually proceedings against the estate of their intestate or testator to be administered. The estate is a fund designated by law for the payment of debts, and a judgment binds the estate until reversed, the decedent if alive could not complain if his *property* was taken on an erroneous judgment, and there is no good reason known to the law why his personal representative should be in a better condition. Parker *vs.* Amys, Lev. 26. 1 Kelly's Rep. 82.

3. Manly and wife cannot set up this defence as the judgment was against them in their representative characters, and the decision of the court overruling their plea of discharge in the former suit, was error of the court for which the Marshal cannot be made responsible. 10 Peters 476. 6 Peters S. C. Rep. 16, 17.

4. Moseley having united with Manly and wife (against whom the execution was regular) can have no better claim to maintain this action than his co-plaintiffs.

187 III. Under the third error assigned the plaintiffs counsel will contend:—

1. That the records of the 18th and 21st of March, 1844, which were given in evidence on the trial below were *res inter alias acto* the Marshal only acting as the custodian of the Court until a proper and fit person could be appointed as the representative of the estate.

2. Any knowledge he might thus obtain of the situation of the parties, he could not set up in opposition to the mandate of his writ.

3. Notwithstanding their dismissal from the estate, they may have been remitted to their former rights or have retained for the purpose of satisfying this very demand. 7 Blackford 290. 3 Wilson 345, 370.

IV. Under the fourth error assigned the plaintiff's counsel will contend:—

1. That the written pleadings in the case were *res inter alias actor*, the officer was not bound to enquire into the regularity of the proceedings, he was only bound to look to the mandate of the writ. 9 Peters Rep., 624. 3 Wilson Rep., 345, 376. 7 Blackford Rep. 270.

2. If the officer is required to judge of the regularity of the proceedings, to pass upon the ruling, and the decisions of the Court; the effect will be to make the officer an Appellate Court, and the Supreme Court will be in no better condition in this respect than the inferior Courts, and their decrees might have to undergo the like scrutiny;—nothing is better settled than where an officer is required to judge he is not liable for an error of judgment.

V. Under the fifth error assigned the plaintiff's counsel will contend:—

1. That the proceedings had in the Supreme Court in relation to the reversal of the judgment of the Union Bank *vs.* Parkhill's administrators were *res inter alias actor.*

2. That the reversal of the judgment was subsequent to the acts of the Marshal complained of as a trespass, and that said subsequent reversal does not render void those acts which were done under it while it remained unreversed. Ives *vs.* Lucas, 1 Carr. and Payne 7. 7 Blackford's Rep. 270. 3 Wilson's Rep., 345, 376 6 Peters S. C. Reps. 16, 17.

VI. Under the sixth error assigned the plaintiff's counsel will contend:—

188 1. That the filing of the Bill in Chancery, by Moseley and his securities was no notice to the Marshal unless service of usbpœna was also proved.

2. That if the Marshal had notice of the filing of the bill, and the refusal of the Court to grant the injunction, it was an additional reason why he should proceed with the levy.

3. That the evidence was no *tendency* to prove the trespass, which was the issue joined, and was therefore improperly received by the Court upon the trial in the Court below. Its effect was to embarrass the jury.

VII. Under the seventh error assigned the plaintiff's counsel will contend:—

1. That the stock note being due, and the interest thereon remaining unpaid, the slaves mortgaged were liable to seizure and sale under a judgment and execution on said stock note.

2. That a failure to pay up the interest and renew the stock note was a forfeiture of the mortgage and a breach of its conditions as contemplated by the charter of the Bank, and the receiving the mortgages in evidence to prove the Marshal a trespasser by levying on mortgaged property was error, vide the opinion of the Court of Appeals in the case of the Bank *vs.* Brown, and the Bank *vs.* Chapman.

VIII. Under the eighth error assigned the Plaintiff's counsel refers to the opinion of the Court below as set forth in the bill of exceptions.

IX. Under the ninth error assigned the Plaintiff's counsel will contend:—

1. That the nstructions numbered 1, 2, and 3, should have been given by the Court below as prayed by the defendant's counsel.

2. That the qualification added to them by the Court was not such as the law recognizes.

3. That the only distinction made by the law is in those cases in which the execution issues from a Court of *limited* jurisdiction, and *when* from a Court of *general* jurisdiction.

4. That the qualification set forth in the memorandum, did not apply as the Marshal was no *party to the proceedings*, and to test which he could not maintain an appeal or writ of error to reverse them. On these points see Jacques *vs.* Cesar, 2 Saund. Rep., 101, (y) note 2. 15 John. Rep., 155. 12 John. Rep. 267. 3 Wilson Rep., 345, 376. 2 Wilson Rep., 384. 7 Blackford Rep., 270. 5 Wend.

John G. Camp, vs. W. D. Moseley and others.

172. 10 John. Rep., 138. 9 do., 229. Strange 509, 700. Bul- 189
ler's *Nisi Prius*, 83. 2 Term Rep., 653. 6 Peters S. C. Rep., 709. 2 Peters S. C. Rep., 169. 3 Howard S. C. Rep., 762. 2 Howard's S. C. Rep., 743. 10 Peters S. C. Rep., 473.

X. Under the tenth error assigned the plaintiff's counsel will contend:—

That the mortgages having become forfeited by the non-payment of interest, and the failure to renew the stock bond, the mortgagee was entitled to enter and take possession of the slaves, and the Marshal who took possession of the slaves by virtue of an execution in favor of the mortgagee, and with consent of said mortgagee, was no trespasser, see the case of Hawkins and Philips decided at the last term of the Supreme Court.

XI. Under the eleventh error assigned the plaintiff's counsel will contend:—

1. That the acts of Moseley on the day of sale, and previous to the levy, as disclosed by the bill of exceptions taken on the trial, operates as an estoppel *"in pais,"* and precludes his setting up the acts of the Marshal as a trespasser.

2. That if Moseley be, as it is contended he was, a *stranger* to the proceedings under the execution, then his acts renders him a joint trespasser with Camp, and he cannot maintain this action. 3 Wilson, 377.

3. The acts of Moseley ratified the acts of Camp, his assent thereto was equivalent to a command to commit them. 2 Saund. Plea and Ev., Marginal page 865. 1 Forb. Eq. Book 1, Ch. 3, sec. 4. Story's Eq., page 387, note 4. 19 Wend. 557. Smith's Leading Cases on Estoppel *"in pais,"* 554. 2 Murphy's Rep., 6.

XII. Under the twelfth error assigned the plaintiff's counsel will contend:—

1. That the failure of Moseley to forbid the sale of the slaves levied on by the Marshal, to warn the Marshal that he had levied on property to which he, Moseley, had a claim and right of possession, operates as an estoppel *"in pais,"* and he cannot maintain this action.

2. That a levy on the property of an intestate in the hands of his representative is unlike a levy on the property of a *stranger*. The judgment in the former case is against the estate, and to be satisfied out of it. It is a seizure and sale of A's property to pay A's debt. In the case of a stranger it is applying his property to pay the debt of another. 5 New Hamp., 364. 1 do. 87. 3 Hara. Dig., 6115. 1 19
Term Rep., 475.

3. That the powers and rights of co-administrators over the estate of their intestate being like that of co-executors, one may release or discharge a debt against the express dissent of the other. So also may the property of the intestate be taken if found in the hands of either to satisfy a debt of the estate. In this case the judgment was against two of the co-administrators, and it was no trespass to take the property if found in the hands of either administrator.—The execution was regular as to Manly and wife, they therefore cannot maintain this action. Moseley by his acts is estopped and he cannot maintain it. 1 Wendell, 583. 1 McCord, 492. Toller on Executors, 408. 11 John. Rep., 22.

XIII. Under the thirteenth error assigned the plaintiff's counsel refers the court to Parker *vs.* Amys, Levintz 261. Granville *vs.* Sibley, Levintz, part 11, page 190.
two dollars and sixty-five cents its interest and damages, making to-
will contend:—

1. That the Marshal had no right to decide whether the judgment was rendered against Manly and wife on their old grant of administration, or as administrators *de bonis non.* That as a valid judgment might have been rendered, and one binding on the estate, had they been sued as administrators, without the joinder of Moseley or the description *"de bonis non,"* it is sufficient for his protection, and he is not required to judge whether such a state of things did exist or not. 5 Wendell, 170. Levintz 261. The case of the Marshalsea Coke's Rep., part 10. 9 John. Rep., 229. 10 John. Rep. 138.

Lastly. It may be contended that the Supreme Court of Florida has already decided this judgment to be void, *an utter nullity.* To which we answer:

1. That it was not necessary to the decision of the cause before the court.

2. That the parties themselves did not *elect* so to consider it, otherwise they would have moved to vacate it in the court below, that being the appropriate remedy to set aside a void judgment.

3. That a judgment may be absolutely void as to the *parties* to the action, yet not so in regard to the *acts* of the officer done under it, as in the cases in 7 Blackford and 3 Wilson. In these cases the court say, "though there be no judgment the officer is protected by his writ." In the case of Simms and Wise *vs.* Slacum, the Sup.

191 Ct. U. S. say, "that a judgment obtained by *fraud* will protect the officer for acts performed under it, though not the parties." 1 Cond. Sp. Ct. Rep., 541.

HAWKINS, J., delivered the following opinion:

The administrator *de bonis non* of Parkhill brought this action of trespass *vi et armis* in the Court below against Camp for seizing, taking, and leading away divers negro slaves, a hundred and eighty in number, the property of the said administrators. They allege in their declaration, besides the trespass, that these slaves were detained and kept by Camp for a long time, whereby great damage accrued to the plaintiff by the deprivation of their services, &c.—The defendant, Camp, pleaded the general issue, and justified himself for the alleged trespass, contending that he had taken the negroes by virtue and force of an execution issued from the late Superior Court of Leon County, at the suit of the Union Bank *vs.* Hiram Manly and wife, administrators of Samuel Parkhill, deceased.

The plaintiff proved by B. W. Gause, that he, Gause, had acted as appraiser of the property of the estate of Parkhill, and had appraised the negroes taken by Camp at the instance of the plaintiffs in 1844 or 1845, and that the negroes afterwards went into possession of plaintiff. Before the sale by the Marshal Camp, a part of the negroes were hired to witness by plaintiffs, and were delivered up to Camp, who informed him that he took them by a precept of the Court. Here the plaintiffs rested their cause, and the defendant offered in evidence the execution before referred to, which is in the words following:

"THE TERRITORY OF FLORIDA,

To all and singular the Marshals of said Territory—GREETING:

We command you that of the goods and chattels, slaves, lands and tenements of Samuel Parkhill, deceased, in the hands of Martha Ann Manly late Parkhill, and Hiram Manly in right of his wife said Martha Ann, administrators of Samuel Parkhill deceased, remaining to be administered, you cause to be made the sum of ninety-four thousand one hundred and eighty-two dollars and twenty-two cents its debt and also twenty-seven thousand nine hundred and eighty-two dollars and sixty-five cents its interest and damages, making together, the sum of one hundred and twenty-two thousand, one hun-
192 dred and sixty-four dollars and eighty-seven cents, which the Union Bank of Florida, lately on the first day of March, 1845, recovered in our Superior Court for the County of Leon in the Middle District, as well for its debt as its damages, occasioned by the detention of said debt, and likewise the sum of seven dollars eighty-two cents, which to the said Union Bank of Florida, in the same Court adjudged for its costs by it in that behalf expended, together with lawful interest in said damages from the rendition of said judgment till paid, and the costs of this writ, and of your proceedings hereon, and that you have the said sums of money before the Judge of our said Court at Tallahassee, when satisfied to render the said Union Bank of Florida the sums aforesaid, and have then and there this writ. Witness, Richard T. Birchett, Clerk, &c."

Upon this writ, Camp endorsed his levy on the negroes alleged by the plaintiff to have been so tortiously taken. The introduction of this writ was objected to by the plaintiffs on the ground that they were strangers to it, and required the original entry and record of judgment to accompany it. The objection was sustained by the Court. Other executions were then offered in evidence, which were in the hands of Camp, the Marshal, at the time of the trespass complained of, and upon which like proceedings were had as on the one already set out. The pleadings and proceedings in these cases were the same, by consent of counsel.

Without intending to discuss all the errors assigned, we will simply take up those which we may deem decisive of the case.

First, therefore, was it requisite and necessary that the record of the judgment upon which the execution issued should have been produced by Camp? Upon a review of the authorities, we are of opinion that the production of the writ merely was sufficient. There are several cases strongly in point as to this question, and we proceed to notice them, premising that they carry with them so high and cogent authority as to remove all doubts as to the correctness of our decision. There is a case in 5th Burrows, 2,631, which assumes the negative of this proposition, but we prefer being guided by the reason and authority of decisions to which our attention has been called, and which we now cite.

In Parsons *vs.* Loyd, 3 Wilson, R. 345, we find the law broadly laid down by Lord C. J. DeGrey, who substantially remarks: Parsons the plaintiff was illegally imprisoned under color of a writ sued out against him, which is a *mere nullity;* he has been unlawfully injured, and must have a remedy; but he has none against the 193
officer, who is not to exercise his judgment touching the validity of the process in point of law; but is obliged to obey the command of the courts of Westminister, or rather Superior Courts having general jurisdiction, and he may justify, under the writ, *although it be void.* But when the courts has no jurisdiction of the cause, the whole is *coram non judice.* And he further says an action would lie against the *party* suing out such void writ. Citing 1 Levintz 95. 1 Siderfine 272. On page 376, in the same book (Wilson R.) it is further laid down by C. J. De Grey, that a Sheriff or his officer may justify themselves by pleading the *writ only,* because *that* is sufficient for their excuse, although there *be no judgment on record* to support or warrant such writ. But if a stranger interposes and sets the Sheriff to do an execution, he must take care to find a record that warrants the writ and must plead it. So must the party himself at whose suit an execution is made. No trespass is excused but what is inevitable.

Justice Peak in the case of Ives *vs.* Lucas and Thompson, 1 C. & P., 7, holds the following language: "As long as a judgment exists, it protects those who seize property under execution issued under it. And if the judgment is set aside no action lies against the Sheriff for anything done under it, while it remained in existence.—And he further said that the setting aside the judgment did not make the Sheriff's acts void by *relation.*

In Buller's *Nisi Prius,* pages 82 and 83, it is declared that when the *subject matter* of the suit is within the jurisdiction of the court but the want of jurisdiction is as to the person or place, unless the want of jurisdiction appear on the process to the officer who executes it, he is not a trespasser; contrary, when the subject matter is not within its jurisdiction.

The same doctrine is held in Savacool *vs.* Boughton, 5 Wendell 170. Judge Marcy says: "Where the court issuing the process has *general jurisdiction,* and the process is regular on its face, the *officer* is not, though the party may be affected by an irregularity in the proceedings. Where a judgment is vacated for an irregularity the party is liable for the acts done under it; but the officer has a protection of his regular writ." Citing 1 Lev. 95. 1 Sid. 272. 1 Stange, 509.

The case just cited was decided upon the following facts as set forth in the pleadings. The plaintiff declared in trespass for assault, battery, and false imprisonment. The defendant pleaded a 194
justification, that he was a constable, by virtue of an execution issued by a Justice of the Peace, on a judgment rendered against the plaintiff, that he arrested the plaintiff and committed him to jail. The plaintiff replied *precludi non* because previous to the rendition of the judgment set forth by the defendant, the Justice who rendered the same did not issue any process for the appearance of him, the plaintiff, in the suit in which judgment was rendered, that the judgment by confession was not entered by the Justice with authority of the plaintiff, nor did the parties in the suit *appear* before the Justice and join issue pursuant to the provisions of the $50 act. To this replication the defendant demurred, and the plaintiff joined in the demurrer.

Here we see that no service of process was effected upon the party; but because the court, although one of limited jurisdiction, had jurisdiction of the subject matter, the officer who executed the process under the judgment, was held justified. And the court cites by way of sustaining its decision the very language hereinbefore set forth, as quoted from page 83 of Buller's *Nisi Prius.*

The case of Goft *vs.* Mitchell, 7 Blackford, 270, confirms this doctrine of holding the officer harmless, and extends it to a case where the Sheriff even *had notice* of the irregularity of the process. The court say: "The writ was legal upon its face, and shewed jurisdiction in the Justice. The law is that a writ having these characteristics, however irregularly issued even though there be no judgment on which to found it, is a justification to the officer acting under it. Nor did the notice given to the defendant before he completed the execution of the writ, affect his authority. He was not bound to look beyond his process. Had he seen fit to assume the responsibility of judging for himself, whether the circumstances under which the writ issued would have excused him for not obeying it, he might have done so, and perhaps the excuse would have been sufficient. But he was not bound to run the hazard."

There might be many other cases cited to shew the soundness of the proposition we have asserted; but will conclude the citations after referring to 546 Comyns Digest, vol. 6, 5th American ed.: "If the defendant justifies by judicial process out of a Superior Court it is sufficient to allege the judgment, writ of *ca. sa.* and warrant thereon to the officer. And the officer himself need not *allege the judgment,* only the writ and warrant." 3 Lev. 20. 1 Salk 109.—

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195 See also 10 John., 138. 10 Coke, 76, case of the Marshalsea, 10 Peters U. S. Rep., 476. 6 Peters, 17. 1 Levintz 95. Ib. 173.

From these authorities it would seem there is a distinction taken as to the protection afforded a party and the officer executing the process of the court, the one being supposed to act in accordance with his volition and consequently amenable for acts done voluntarily, the other from a coercion arising from, and incident to the mandate of the writ of process directed to him. The Sheriff is a ministerial officer, and no action should lie against him merely in discharge of his duty, unless he exceed that duty when he becomes liable as a party. He is protected in the execution of process emanating from a court of general jurisdiction, provided there appears on the face of the process that the court has jurisdiction of the *subject matter* (5 Wendell 170,) nor was it for Camp to decide whether the judgment rendered against Manly and wife, administrators, was erroneous or void, regular or irregular. The judicial power of a Sheriff in this country is still less than in England, and his duty is obedience to the process of the court.

This principle is illustrated in 6 Harrison and Johnson 301. The action was trespass against the Sheriff. Property was attached by him, under writs from the creditors of M. No person appeared to defend the suit, the property was condemned, *fieri facias* issued and sale. R. had notice of the service of the attachment, and at the *time of service* had notified the Sheriff of his claim to the property attached, and brought his action of trespass against the Sheriff. The court held that the Sheriff was not responsible for a *tort* which as a public officer he is bound to perform—that he acted in obedience to the mandate of the law, and it would be strange if the law whose mandate he obeyed should make him responsible for such obedience—that the party in this case had notice of the attachment and had a right to appear in court, and move to quash it. Indeed so far is this doctrine of protection to the officer carried that in 1 Levintz 95, we find that even after *judgment vacated*, the officer is excused for executing the writ, and in 3 Cranch 300, it is laid down by Judge Marshal that a judgment obtained *by fraud* will protect the officer for acts done under it, though not the parties.

It must be conceded we think that the writ in this case was legal on its face, shewing jurisdiction of the court as to the subject matter of the suit, issued from a court of general jurisdiction at a proper time and returnable in accordance with law, and it would be
196 going too far to adjudge that the Sheriff should be held responsible for any error of the court, which rendered the judgment under which execution issued. Nor can we well perceive how the Sheriff was a *party* to the proceedings had in the court, in the case of the Union Bank and the administrators of Parkhill. It is true that a Bill in Chancery is introduced in the bill of exceptions, in which bill Camp is one of the defendants, but there is no evidence that Camp had legal notice of the filing of the bill for an injunction. And supposing he had and the injunction was refused, could he not with propriety have taken the action of the court as his guide and regarded it *pro tanto* as another judicial decision, as to the regularity and legality of the judgment rendered against the administrators of Parkhill. So too with the order of the court, that the property of the estate of Parkhill be taken possession of by Camp, and that the letters of administration granted to Martha Manly be revoked. All this took place before the judgment rendered against Manly and Wife as general administrators, and though Camp may have had notice, still it would be inequitable and impolitic to have required Camp to look behind the judgment, and to hold him responsible for what was the error of the court. These proceedings too were collaterally drawn in question in the court below, and in the case of Tolmer *vs.* Thompson, 2 Peters 163, the court say: That proceedings brought before a court collaterally, "are by no means subject to all the exceptions which might be taken on a direct appeal. They well may be considered judicial proceedings; they were commenced in a court of justice, carried on under the supervising power of the court, and to receive its final ratification. The general and well settled rule of law in such cases is, that when the proceedings are collaterally drawn in question and it appears on the face of them, that the *subject matter* was within the jurisdiction of the court they are voidable only. The errors and irregularities if any exist, are to be corrected by some direct proceedings either before the same court to set them aside, or in an appellate court. If there is a *total want* of jurisdiction, the proceedings are void and a mere nullity, and confer no right and afford no justification, and may be rejected when collaterally drawn in question."

In Voorhees *vs.* the Bank of the United States, 10 Pet. 474, the court say: "If the validity of a sale under its process, can be questioned for any irregularity *preceding* the judgment, the court which assumes such power places itself in the position of that which rendered it, and deprives it of all power of regulating its own practice 197
or modes of proceedings in the progress of a cause to judgment."

The next question arising for the consideration of the Court is, should the plaintiff in the Court below have been estopped from a recovery against Camp, owing to the admissions and conduct of Moseley one of the parties. It is not the intention of the Court to go any length into the doctrine of *estoppel in pais*, which has been so ably and learnedly argued in this and another case at bar during the term, but simply to advert to some of its general principles. We find while other classes of estoppels have not received much or great favor from the Courts those *in pais* have been much extended and received a liberal, enlarged and we might add an enlightened construction. The technicalities incident to estoppels are gradually giving way to considerations of reason and practical utility, and the Courts of the present day seem disposed to give force and efficacy to a doctrine which is based upon principles of justice and the purest morality.

In the case of the Welland Canal Company *vs.* Hathaway, 8 Wendell, 483, Judge Nelson remarks that the acts and admissions of a party operate against him in the nature of estoppel "when in good conscience and honest dealing he ought not to be permitted to gainsay them." In Stevens *vs.* Baird, 9 Cowen, 274, the Constable had an execution against Benedict, and Stephens pointed out to the officer a quantity of lumber, one-fifth of which he said belonged to Benedict. On the levy being made, a receipt for the property was made by Stephens, which was afterwards sold under the execution, Baird becoming the purchaser, Stephens standing by at the sale and giving no notice of his claim to the whole property. In a suit between Stephens and a purchaser it was held that Stephens was estopped from denying that Benedict owned one-fifth part of the lumber.

In Gregg *vs.* Wells, (10 Ad. and Ellis, 90,) it was held that if the owner of the goods stand by and voluntarily allow another to treat them as his own by which means a third person is induced to purchase them *bona fide* the former cannot recover them from the purchaser. Lord Denman said in this case: "A party who *negligently* or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has assisted in deceiving." "The party is only concluded against shewing the truth, or asserting his legal rights when that would have the effect of doing a wrong through his means to some third 198
person." Hill Rep., 225.

Admissions arising from demeanor and conduct are conclusive against the party, where he has received a benefit therefrom or prejudiced another. 2 Saunders Pl. and Ev., 55. Mr. Starkie in his work on Evidence, vol. 2, 37, uses this language: "In general admissions may be presumed not only from the declarations of a party, but even from his acquiescence or silence, as for instance, when the existence of a debt or a particular right has been asserted in the presence of a party, and he has not contradicted it, such acquiescence and silence will amount *prima facie* to an admission of a debt or right. So an acquiescence and endurance where acts are done by another which if wrongfully done are encroachments and call for resistance and opposition, are evidence of a tacit admission that such acts could not be legally resisted."

Now what has been the conduct of Moseley in relation to the alleged trespass of Camp. The evidence shews that when he, Camp, proceeded to make the levy under the excution, a list of the negroes was furnished him by Moseley. There was no denial on his part as to the right of Camp to levy. There was indeed more than mere "acquiescence or silence," the furnishing the list was an affirmative act, and not merely negative—it enabled Camp to carry out the levy in thus virtually designating the slaves to be levied upon. He stands negligently by and there is a degree of negligence amounting to culpability, and allows the Marshal to make the levy, so far as appears by the testimony without protest or dissent.

It is not contended that the conduct of Moseley was fraudulent or wilfully intended to deceive Camp, but still we must in accordance with the principles laid down, ask if it was such as to produce erroneous impressions on the mind of Camp, as to his future movements in relation to the levy. There is no claim put in for the negroes by virtue of our statutes, and at the sale Moseley took an active part, assisting the Marshal, and made no dissent to the sale; but advised people to bid, and when the sale was forbade by Archer he disapprobated the act, and it appears too that the Marshal acted in accordance with the views of Moseley as to the details of the sale. Taking his whole conduct together, his acts, admissions, and declarations at the sale, it is very evident they are clearly inconsistent and at variance with the claims he now asserts. It is true the

199 levy was the trespass if any was committed, and no claim was asserted at the time; but there is direct connivance—the possession of the negroes by Camp was a continuing trespass and acquiesced in by Moseley. Ought he not now to be estopped from gainsaying his admissions, and when too he stood negligently by and allowed a person to do an act which he might not have done had he received any indication that he would be held legally responsible for that act? We think he should be, and that Camp should not be amenable as a trespasser.

The effect of an estoppel, whether legal or equitable, is the exclusion of evidence, and its existence must always be a question of law for the court, and not of fact for the jury. 2 Smith's Leading Cases, 469, citing Lewis *vs.* Carstair, 5 Watts and Sergeant, 209, and we therefore think the court erred in leaving the admissions of Moseley to the jury.

It is contended that even allowing the admissions of Moseley they cannot affect the rights of his co-administrator and administratrix. But if there are several administrators they are regarded in the light of an individual person. "They have a joint and entire interest in the effects of the intestate, which is incapable of being divided, and in case of death such interest shall vest in the survivor without any new grant from the court." 1 Williams on Executors, 591. Acts done by one of several executors or administrators relating to the delivery, sale or release of the testator's or intestate's goods are the acts of all. Wheeler *vs.* Wheeler, 9 Cowen, 34.—So two or three executors or administrators may compromise a claim and release a debtor to the estate without the concurrence and contrary to the express wish of the other. Murray *vs.* Blatchford, 1 Wendell, 583. There was formerly a distinction as to the acts and powers of administrators and executors, on the ground that the executor derived his authority from the act of the deceased, while the administrator derived his from the Ordinary, his appointment being considered in the light of an office. But these distinctions have been overruled, and now joint administrators stand upon the same footing as executors, 407 Toller on Ex. 1 McCord, 492.—We deem it unnecessary to proceed further in the consideration of the case either as to the instructions given or those refused, being satisfied that the judgment of the court below should be reversed.

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200 WYLIE BLEWITT, ADMINISTRATOR OF ARABELLA BLEWITT, DECEASED, *vs.* JAMES NICHOLSON AND WILLIAM N. AVERITT, EXECUTORS OF MALCOLM NICHOLSON, DECEASED..

A grant of administration in this State to the husband by virtue of his marital rights upon the estate of the wife, she being a non-resident at the time of her death, and dying in another State, but entitled to effects and property in this State, is valid under our laws.

Appeal from a Decree in Chancery rendered in Gadsden.

Carmack & Baker, for Appellant.

Thompson & Dupont, for Appellee.

HAWKINS, J.:

There was a bill filed in the court below by Blewitt, appellant, the administrator of his deceased wife, to recover property alleged to belong to her in the hands of the executor of her father Malcolm Nicholson.

The bill states that the said Malcom Nicholson died, leaving a will dated 18th November, 1838, and of which James Nicholson and William N. Averitt, were appointed executors, and to whom letters testamentary were duly granted. That in the year 1844, Blewitt (the appellant and complainant) intermarried with Arabella the daughter of the said testator, and that after the death of her father she removed to the State of Georgia where she resided up to the time of her death, which occurred in December, 1844.

That on 8th January, 1845, letters of administration were granted to the complainant Blewitt by the Judge of the County Court of Gadsden county, and that Arabella, together with the other children of the said Malcim Nicholson, and his widow, were devisees under the will of the said Malcolm, by which they were entitled to an equal share of the real and personal estate remaining in the hands of the said executors after the deduction of the specific legacies, and that these portions with the exceptions of such assets as have been handed over to Mary, the wife of said Malcolm, were in the hands of said executors and within the jurisdiction of the court. The bill charges that the complainant as administrator of his wife had made demand upon the said executors, requiring of them a specific per- 201 formance of the trust under the will of Malcolm Nicholson, requiring them to set apart and deliver to him the complainant, as administrator, the portion and share his late wife had been entitled to in the estate, but that they refused to do so.

It is admitted in the answer that Malcolm Nicholson died and left a will and that it was admitted to Probate as alleged in the bill, and that the respondents James Nicholson and W. N. Averitt duly qualified as executors, that Arabella, the late wife of complainant was one of the children of said Malcom Nicholson, and a beneficiary under his will. That sometime after the death of her father she went to the State of Georgia with a view of visiting her mother, who had removed to that State, and that while upon this visit she intermarried with the complainant, and for anything that the defendants knew to the contrary, continued to reside with him as his wife up to the time of her decease, which occurred about the time mentioned in the bill of complaint. That no partition or apportionment of the estate of her father had been made to her prior to her death, nor has any been made to any of the children up to the (then) present period. Without denying the grant of letters of administration to complainant, the defendants in substance contend, that if Arabella the wife of complainant, was at the time of her decease a citizen of the State of Georgia and died within its limits, then that the alleged grant of letters of administration to complainant was null and void, and conferred no right upon complainant to maintain his bill of complaint as administrator in right of his late wife, the said grant being in derogation of the Laws of the State.

To this answer there is a general replication.

It will be seen upon this statement of the pleadings thus succinctly made, that the following proposition is brought directly before the court for its decision.

Is a grant of administration valid by our law when made to the husband by virtue of his marital rights upon the estate of the wife, she being a non-resident at the time of her death and dying in another State, but entitled to property and effects within the limits of the State of Florida.

The negative of this proposition is assumed by the counsel for the appellee and it is contended that the grant of administration to Blewitt is void, because the court which made it was one of limited jurisdiction, a creature of the statutes, and if not embraced within these statutes, the act of the court in making the grant was a nul- 202 lity, and that the Judge of the County Court of Gadsden has transcended his powers in making the grant for the above reasons. There can be no doubt as asserted, that a court of limited jurisdiction must strictly pursue the authority conferred by the power creating it, and that when its jurisdiction is defined, any act transcending the limits or boundaries of that jurisdiction is void. It is proper too that these courts should be kept and restrained within the jurisdiction delegated to them. They resemble special agents, possessing certain specific powers, but when these are not exceeded their decisions are as conclusive (until reversed by an appellate and superior tribunal,) and carry with them the same force as courts of general jurisdiction.

It would of course be exceedingly improper to clothe these limited tribunals with constructive powers, or such as are not literally or virtually given them; but at the same time we must be careful not to deprive them by a too rigid or refined construction of that authority which is requisite and necessary to carry out the end and purpose of their creation, or is incident to grant of power specifically or generally conferred.

While admitting the correctness of the proposition of the counsel for the appellee in the abstract, we are compelled to deny its application to the case at bar.

It is very true as alleged, that our statutes in relation to the granting of letters of administration do not expressly *or totidem verbis* provide for the case of a person dying beyond the limits of the State, or who was a non-resident at the time of his death, and who may have been entitled to goods, chattels or lands within this State. This may or may not have been a *casus omissus,* though it no doubt was; but we think the enquiry unimportant, as we deem all cases of the nature above alluded to, fully provided for and embraced in the grant of jurisdiction to the Judges of the County Courts under our Territorial Government.

By the eighth section of the act, passed February 17th, 1833, it was enacted, that the Judge of each County Court, "shall have power either in open court or in vacation, to take the probate of wills, grant and revoke letters, testamentary, and letters of administration, appoint and displace guardians of infants, orphans, idiots, lunatics, and persons *non compos mentis,* and to make all necessary orders for issuing of process and notices. The letters testamentary or of ad-

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203 ministration so granted by the said Judge shall be issued by the Clerk and bear teste in the name of said Judge. That said Judge shall also have power to order sale and distribution in all cases according to laws of estates, testate or intestate, and shall *have and exercise general powers* as a *Judge of Probate,*" Duval's Comp., 276. By the 4th section of the law of 1828, it is enacted "That it shall be the duty of the County Courts, in the several Counties in this Territory in term time, and of the Judge of said Courts in vacation, to take proofs of all last wills and testaments, and to grant probates, letters testamentary, and letters of administration, with or without any will annexed, and to do and perform all matters and things enjoined on said Courts, or the Judges thereof in vacation, to the estates of deceased persons." Duval Comp., 168.

Let us cast an eye to the jurisdiction of the courts of ordinary in England, and we will find a strong similitude to those of the late Judges of the County Courts. In ancient times, by the English law, when a man died without making disposition of such of his goods as were testable, the King as *parens patriae* used to seize the goods of the intestate to the intent that they should be peserved for the burial of the dead, the payment of debts, and the advancement of the family. This prerogative of the King was exercised for some time by his own minister of Justice, and probably in the County Courts, besides being delegated as a franchise to many lords of manors and others who possess this right of granting administration by prescription.

This same power was afterwards granted to the prelates, who on account of their superior sanctity were conceived capable of disposing of the property most for the spiritual benefit of the deceased. The goods of the intestate being thus vested in the ordinary, as trustee, to dispose of them for pious uses, the clergy took to themselves the residue of the deceased's estate, after the *partes rationalibus* of the wife and children had been deducted, without even paying his lawful debts.

To remedy this, the statute of Westm. 2, (13 Ed. 1st, C. 19,) was passed, declaring that the ordinary should be bound to pay the debts of the intestate, as far as his goods extended. Still however, the residue after the payment of debts remained with the ordinary, and as a remedy for this evil the statute of 31st Edward 3, was passed providing that the ordinary should depute the next and most lawful friends of the deceased intestate to administer his goods, to demand
204 and recover as Executors the debts due the intestate, and to be accountable to the ordinaries as executors were. The administrators were the officers of the ordinary, appointed by him in pursuance of this statute, and their title and authority were derived from the ecclesiastical Judge by grants which are usually denominated letters of administration. 1 Williams on Ex., 236-7-8. Toller on Ex., 56. 2 Black. Com., 495.

In giving this brief sketch of the rise and history of administration, we are not to be understood as asserting that the ecclesiastical law *as such* is in force in Florida by virtue of any of our statutes, which have adopted the common law of England, and statutes of a general nature down to the 4th of July, 1776; but so far as "the law prevailing in the ecclesiastical courts on the subject of wills, executors, and administrators, was by various English statutes, and by recognition in the English Courts, part of the law of England," it would follow that it was embraced by our statutes. Preface to Swinburn on wills—cited by a member of this court on page 380, of 1st Florida Reports. There is certainly a strong analogy between the powers, duties and jurisdiction of an ordinary of England, and those conferred upon the Judges of the County Courts under the Territorial *regime,* and now appertaining to the Judges of Probate of the State. It is true that these grants of power are derived from different sources—in England all judicial power emanating from the Crown—in our Country from the people conferring it through their constitutions and statutes. This analogy as to the jurisdiction of these tribunals being established there would seem to be as much propriety in following the decisions of the ecclesiastical courts of England when applicable to the subject matter in dispute, and when not conflicting with our statutes, as those of her courts of common law.

We cannot see that there is any valid objection to the granting of letters of administration by the Judge of the County Court of Gadsden County to the complainant Blewitt. The non-residence of his wife at the time of her death is not such a disability as to prevent the granting administration. The case of *Griffith vs. Griffith,* Sayer 83, cited on page 188 of 1st Williams on Executors, decides and sustains this principle. "This was an action of debt by an administrator, and it appeared by the declaration, that her letters had been granted by the Bishop of Bristol; the defendant pleaded that the deceased died upon the high seas, out of the jurisdiction of the Bishop of Bristol, and that the letters of administration were therefore 205
void." Upon demurrer the letters were holden good, and Lee, C. J., said that the right of granting letters of administration is not founded upon the dying of an intestate within a diocese; but upon his leaving goods there." Soo too it is laid down in the same work (285, 1st Williams on Ex.:) "If the intestate was domcilied in a foreign Country, within the kings dominions out of England, and left assets in this Country, administration must be taken out here, as well as in the County of domicile." And in the case of Scarth *vs.* the Bishop of London, 1 Hagg., 625, Sir John Nicoll held that though there were some *dicta* to the effect that the bishop had no jurisdiction where the party does not *die* within his diocese, and that his death within the diocese is essentially necessary to found his jurisdiction, yet such authorities were not sufficiently clear to induce the court to overturn the established practice."

These and other cases which might be cited, establish the principle that the question of jurisdiction as to the granting administration is made to depend on the locality of the property at the time of the death of the intestate, when it occurs beyond the limits of the State, and that the grant in such a case is not null or void, but good and valid.

While our statutes are silent as to the granting of administration when the death occurs beyond the limits of the State, and only provide in such cases for the Probate of wills, still there is no restriction prohibiting such administration, and we have already given our opinion that this omission is cured by the general grant of power to the Judges of the County Courts. The words "the Judge shall have and exercise *general powers* as Judge of Probate," seem clearly to confer a plenary and general jurisdiction upon the subject of administration. The statute provides that if a person die out of the Territory (State) without property therein, but with debts due to such person by persons living in the Territory, letters testamentary or of administration, may be granted for the collection of such debts. We cannot think that the Legislature after the passage of such a law ever intended that administration should be refused in cases where there was property real and personal to be administered. It is contended however that there was design in the Legislature in not thus providing for this case, because we have a statute enabling executors and administrators who shall produce probate of wills or letters of administration authenticated under the act of Congress of 1790, shall be authorized to maintain actions in 206
the several courts of the territory, under the same rules and regulations as other plaintiffs. Duval 105. Thomp. Dig. 349. But this law was passed in 1829, a year after the law directing the granting of probate and administration, and we are informed too, that this law was passed in the first place, many years anterior to 1828, the time of its re-enactment. It is very possible that the law of 1829, was passed to remedy the omission of the law of 1828 and to a certain extent may be said to do so, but still it takes away no jurisdiction previously conferred upon the County Judge. But we think the better opinion is that the intention of the Legislatue in passing the law of 1829 was for another purpose. "It is the general doctrine of the common law (says Judge Story) recognized both in England and in this country, that no suit can be brought or maintained by any executor or administrator, or against any administrator or executor in his official capacity in the courts of any other country except that from which he derives his authority to act in virtue of the probate and letters testamentary or the letters of administration therein granted him. But if he desires to maintain any suit in any foreign country, he must obtain new letters of administration and give new security according to the general rules of law prescribed in that country before the suit is brought." Story conflict of Laws, 421-2. We think therefore that for the purpose of obviating this necessity of taking out new or ancillary letters of administration, that the law of 1829 was passed, enabling foreign executors or administrators to maintain suits directly upon complying with the requisitions of the statute.

Nor can we deem the administration granted in this case void because made to a non-resident. The statutes have not made non-residence a disqualification, and it is expressly declared, that "letters of administration shall be granted to the representatives of the intestate who apply for the same, preferring first the husband or wife."—Thompson Dig. 196. By the law of England it is no incapacity to be an administrator that the next of kin is an alien. 295 Williams on Executors. Comyns Dig., Administrator B. 6.

The letters of administration granted to complainant stand unrevoked and in full force, and unless a clear case is made out of want of jurisdiction in the officer granting them, we cannot disturb them, but must presume that all the doings of the Judge in the prem-

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207 ises, being within the scope of his jurisdiction, were *reta acta* and in accordance with law.

Per Curiam:—It is therefore ordered, adjudged and decreed, that the decree rendered in the court below be reversed, and the cause be remanded higher for further proceedings in accordance with principles of law and equity.

WILLIAM G. PONDER, APPELLANT, *vs.* WM. D. MOSELEY, MARTHA ANN MANLY, AND HIRAM MANLY *de jure uxoris*, ADMINISTRATORS. *de bonis non* OF SAMUEL PARKHILL DECEASED, APPELLEES.

To authorize the assertion that a judgment is void it must have emanated from a court of limited jurisdiction not acting within its legitimate prerogative or from a court of general jurisdiction where the parties are not actually or by legal construction before the court and subject to its jurisdiction.

Judgments of court of general jurisdiction are not considered under any circumstances as mere nullities, but as records importing absolute verity, and of binding efficacy until reversed by a competent appellate tribunal. They are voidable, not void.

The title of a purchaser at a sale under execution issued from a court of general jurisdiction, is not affected by a subsequent reversal of the judgment on which the execution was based.

B. a creditor sued M. and M. administrators of the debtor. The defendants pleaded in bar. Afterwards the letters of M. and M. were revoked; and subsequently M. and M. and *another* were appointed administrators *de bonis non*. M. and M. pleaded their dismissal in bar *quis darrien continuance*. The plaintiff replied the re-appointment of M. and M. The defendants rejoined that although reappointed with *another as* administrators *de bonis non*, a judgment had been recovered against them in their *new* character sufficient to cover the assets in their hands. The plaintiff then demurred, and judgment was rendered in favor of the plaintiff against M. and M. as administrators. Execution was issued to be levied of the goods of P., the intestate, in the hands of M. and M. as administrators. Under this execution the officer levied on the property of P., the intestate, in the hands of the administrators, *de bonis non*, and a sale was made. After the sale M. and M. sued out a writ of error from the Supreme Court, and the judgment was reversed. Held that the purchaser at this sale acquired a good title.

The doctrine of estoppel in *pais* laid down in Cotten *vs.* Williams, and Camp *vs.* Parkhill's administrators decided at this term, approved.

Appeal from Leon Circuit Court.

208 The appellees as administrators *de bonis non*, instituted an action of detinue against the appellant in Leon Circuit Court to recover sundry slaves in the possession of defendant below, alleged to be the property of Samuel Parkhill, deceased.

The declaration contains two counts in usual form—one alleging a delivery by plaintiffs and a detention after demand—the other a finding by defendant and a like detention.

The defendant pleaded three pleas:

1. *Non detinet.*
2. That the slaves were not the property of plaintiffs.
3. That plaintiffs were not lawfully possessed of the negro slaves.

Upon these the plaintiffs joined issue.

The plaintiffs to maintain the issues joined on their part, offered the following evidence and testimony.

First, It was admitted by defendant's counsel that the plaintiffs were administrators and administratrix of the estate of Samuel Parkhill left unadministered, as set forth and stated in the declaration filed herein.

The said plaintiff then introduced Thomas Brown, who being duly sworn as a witness, deposed as follows: Being shewn three paper writings, says they are appraisements of the slaves of plaintiffs intestate.

Witness was one of the appraisers to appraise the slaves of Intestate's estate; saw the slaves in these papers enumerated, exhibited as the property of said estate, on the plantation of the plaintiff's intestate. They were then in possession of one of the plaintiffs as administratrix of intestate. Does not know what became of these slaves, except from having occasionally seen some of them since. There was one slave named *Juba* there exhibited, appraised at three hundred and fifty dollars; another *Caroline*, at five hundred and fifty dollars; another *Jane*, at two hundred and fifty dollars; another *Frank*, at two hundred and fifty dollars; another *Margaret*, at two hundred dollars—this last slave was named in another and late inventory; another slave *Albert*, appraised at one hundred and fifty dollars; another, *Anderson*, at one hundred dollars; another *Pleasant*, at fifty dollars. Thinks slaves have advanced in value since that time twenty-five per centum. Does not know that he has ever seen the above named slaves since. Knows nothing personally of any sale of these slaves.

Cross examined.—Says he does not know that the slaves above 209 named are the same that are now claimed from defendant.

The said plaintiffs then offered in evidence the record, and pleading and entry of the judgment in favor of the Union Bank of Florida, against Manly and wife, administrators of Parkhill the execution issued thereon, the levy and return, or report of the sale of the slaves levied on by John G. Camp, Marshal of Middle District of Florida, to wit:

At a Superior Court for the county of Leon, continued and held at the Court House in the city of Tallahassee, on Saturday, the 1st day of March, A. D. 1845,

Present, the Honorable SAMUEL J. DOUGLAS, Judge.

Union Bank of Florida, *Plaintiff*,
vs.
Martha Ann Manly, late Parkhill, and Hiram Manly, in right of his wife Martha Ann, adm'rs of Samuel Parkhill, dec'd, *Defendants*. } In debt.

This day came the parties by their attorneys, and the plaintiff by his attorney, filed his special demurrer to the defendant's rejoinder to the plaintiff's replication filed herein to the defendant's amended plea *puis darrien continuance* filed by leave of the Court on the 24th February last, in which demurrer the defendants joined.—Whereupon the matters of law arising upon the plaintiffs' demurrer to the said rejoinder being argued, it seems to the court here, that the said rejoinder, and the matters and things therein alleged, are not sufficient in law to bar or preclude the plaintiff from having and maintaining its action aforesaid against the said defendants, therefore it is considered by the court that the said plaintiff recover against the said defendant the sum of $94,182 22-100 parcel of the debt in the declaration mentioned, and the sum of $27,982 65-100 its damages, making together the sum of one hundred and twenty-two thousand one hundred and sixty-four dollars and eighty-seven cents, and its costs by it about its suit in this behalf expended, to be levied of the goods and chattels, slaves, lands and tenements of the said intestate, Samuel Parkhill, dec'd, in the hands of the defendants to be administered, and the said defendants in mercy, &c.

THE TERRITORY OF FLORIDA,

To all and singular the Marshals of said Territory—GREETING:

We command you, that of the goods and chattels, slaves, lands tenements of Samuel Parkhill, deceased, in the hands of Martha Ann Manly, late Parkhill, and Hiram Manly, in right of his wife 210 said Martha Ann, administrator of Samuel Parkhill, dec'd, remaining to be administered, you cause to be made the sum of ninety-four thousand one hundred and eighty-two dollars and twenty-two cents, its debt, and also twenty-seven thousand nine hundred and eighty-two dollars and sixty-five cents, its interest and damages, making together the sum of one hundred and twenty-two thousand one hundred and sixty-four dollars and eighty-seven cents, which the Union Bank of Florida lately, on the first day of March, 1845, recovered in our Superior Court of the county of Leon, in the Middle District, as well for its debt as its damages occasioned by the detention of said debt, and likewise the sum of seven dollars and eighty-two cents, which to the said Union Bank of Florida, in the same court adjudged for its costs by it in that behalf expended, together with lawful interest on said damages from the rendition of said judgment till paid, and the costs of this writ and of your proceedings hereon, and that you have the said sums of money before the Judge of our said court at Tallahassee, when satisfied, to render the said Union Bank of Florida the sums aforesaid, and have then and there this writ. Witness Richard T. Birchett, Clerk of our said court, at Tallahassee aforesaid, this 20th day of March, A. D., 1845, and of the Independence of the United States the sixty-ninth year.

[SEAL.] R. T. BIRCHETT, Clerk.

This execution was levied on certain slaves of the estate, and at the sale the defendant purchased the slaves mentioned in the declaration.

Defendant by his counsel objected to the introduction thereof as evidence before the jury, but the court overruled the objection, and thereupon the same were read to the jury and the defendant by his counsel excepted.

The said plaintiff then offered in evidence two paper writings purporting to be bills of sale by John G. Camp, M., to defendant of certain slaves named in the declaration, which said writings had been obtained from defendant by notice and rule as prescribed by statute.

Know all men by these presents, that whereas, by virtue of several executions issued out of the Clerk's office of the Superior Court of the Middle District of Florida, for Leon County, wherein the Union Bank of Florida and others are plaintiffs, and the administrators of Samuel Parkhill, deceased, are defendants, I did, as Mar-

211 shal of said District levy upon the hereinafter described negro slave Caroline as the property of the said Samuel Parkhill, deceased, to satisfy said writ; and whereas, the said negro slave was by me this day exposed for sale at public auction, according to the statutes in such case made and provided, and sold to William G. Ponder for five hundred and thirty-five dollars, being the highest sum bid for the same; Now know ye, That I, John G. Camp, Marshal of said District, by virtue of the said writs of execution, and by force of the statutes in such case made and provided, in consideration of the said sum of five hundred and thirty-five dollars, to me in hand paid by William G. Ponder, the receipt whereof is hereby acknowledged, have granted, bargained, sold and transferred, and by these presents do grant, bargain, sell and transfer to the said William G. Ponder, his heirs, executors, administrators, and assigns forever, the negro slave named Caroline, and all the right and interest which the said Samuel Parkhill, deceased, had in or to the said named negro, to have and to hold the said negro unto the said William G. Ponder, his heirs, executors, administrators, and assigns, as fully as I, the said John G. Camp, as Marshall as aforesaid, under the authority aforesaid might or ought to convey and sell the same. In witness whereof, I have hereunto set my hand and affixed my seal this fifth day of May, Anno Domini, 1845, and of the Independence of the United States the sixty-ninth year.

JOHN G. CAMP, [L. S.]
Marshal.

Know all men by these presents, That whereas by virtue of sundry executions issued out of the Clerk's office of the Superior Court of the Middle District of Florida for Leon County, wherein the Union Bank of Florida and others are plaintiffs, and the administrators of Samuel Parkhill, deceased, are defendants, I did, as Marshal of said District, levy upon the hereinafter described negro slaves, to wit: Juba, Jane, Frank, Margaret, Albert, Anderson, Pleasant, as the property of the said Samuel Parkhill, deceased, to satisfy said writ; and whereas, the said negro slaves were by me this day exposed for sale at public auction, according to the statutes in such case made and provided, and sold to William G. Ponder for fifteen hundred dollars, being the highest sum bid for the same: Now know ye, That I, John G. Camp, Marshal of said district, by virtue of the said writs of execution, and by force of the statutes in such case made and provided, in consideration of the said sum of fifteen
212 hundred dollars to me in hand paid by William G. Ponder, the receipt whereof is hereby acknowledged have granted, bargained, sold and transferred, and by these presents do grant, bargain, sell and transfer to the said William G. Ponder, his heirs, executors, administrators and assigns forever, said negroes named as above, and all the rights and interest which the said Samuel Parkhill, deceased, had in or to the said named negroes, to have and to hold the said negroes unto the said William G. Ponder, his heirs, executors, administrators and assigns as fully as I, the said John G. Camp, as Marshal as aforesaid, under the authority aforesaid, might or ought to convey and sell the same. In witness whereof, I have hereunto set my hand and affixed my seal this sixth day of May, Anno Domini, 1845, and of the Independence of the United States the sixty-ninth year.

JOHN G. CAMP, [L. S.]
Marshal.

The said Plaintiffs then offered to read in evidence the entry of the Judgment of the Superior Court of the Middle District of Florida upon an appeal from an order of the County Court of Leon County removing Mrs. Martha A. Manly from the office of administratrix of Samuel Parkhill, deceased, to wit:

At a Superior Court for Leon County continued and held at the Court House in the City of Tallahassee, on Monday the 18th day of March, A. D. 1844: Present the Honorable Samuel J. Douglass, Judge.

In the matter of the Estate of Samuel Parkhill, dec'd. } On an appeal from an order of the County Court of Leon County revoking the administration of Martha Ann Manly late Martha Ann Parkhill.

This cause coming on to be heard anew upon the merits, and it appearing to the satisfaction of the court that Henry Bond, Richard K. Call, George K. Walker and Benjamin W. Gause, the securities upon the official bond of said Martha, are insufficient: It is therefore ordered that the judgment and decree of the County Court be affirmed and that the letters of administration heretofore granted to the said Martha be and remain revoked, annulled and set aside. It is further ordered that John G. Camp, Esq., Marshal of the District of Middle Florida, do take the property of the said estate of Samuel Parkhill in his possession to remain there till the further order and direction of this court.

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To the introduction of which defendant by his counsel objected, 213 but the court overruled the objection, and allowed the evidence to go to the jury, and defendant by his counsel excepted.

The said plaintiff then proved that the term, "sundry executions issued out of the Clerk's office," as stated in the bills of sale referred to and given in evidence were the following:

Execution No.	3278	in favor of	C. B. Bioren.
"	"	3279	"	George B. Pease.
"	"	3280	"	Ann Davidson.
"	"	3281	"	R. T. Birchett, assignee.
"	"	3282	"	Same.
"	"	3283	"	Richard A. Saunders.
"	"	3284	"	P. Philips.
"	"	3285	"	Moore and Monford.
"	"	3286	"	William Fisher.

All against Hiram Manly and Martha Ann Manly, administrators of Samuel Parkhill, deceased.

It was admitted by defendant's counsel that these were executions issued on the same day, and on judgments rendered at the same term, and on the same pleadings as the case of the Union Bank against Manly and wife, administrators of S. Parkhill.

The said plaintiff also introduced and read to the jury the mandate of the Supreme Court, reversing the judgment rendered in the Superior Court at the suit of the Union Bank of Florida against Martha Ann Manly and Hiram Manly, administrators of the estate of Samuel Parkhill, deceased, and the entry of this court thereon dismissing said suit.

The said plaintiffs then offered to introduce in evidence the original deeds of mortgage executed by Samuel Parkhill in his life time to the Union Bank of Florida, (nine in number,) to secure his shares of stock in said Bank, with the view of proving that the slaves in suit were embraced in said mortgages, &c., &c., to the introduction of which evidence the defendant by his counsel objected, but the court overruled the objection and the defendant excepted to the decision, and thereupon, an abstract of the said mortgages which it was agreed should stand in lieu of said original deeds, was given in evidence to the jury, to wit:

STOCK MORTGAGES.

Memorandum of Samuel Parkhill to the Union Bank of Florida: 19 March, 1835—N. E. 1-4 Sec. 3, T. 1.

E. 1-2 N. W. 1-4 Sec. 3, T. 1. 214
W. 1-2 N. W. 1-4 Sec. 2, T. 1.
S. E. 1-4 Sec. 34, T. 2, R. 2, N. & E.
E. 1-2 S. W. 1-4 Sec. 34, T. 2, R. 2, N. & E.
W. 1-2 N. E. 1-4 Sec. 34, T. 2, R. 2, N. & E.
S. W. 1-4 Sec. 35, T. 2, R. 2, N. & E.
For fifty shares. 50.

1 February, 1837.—N. W. 1-4 Sec. 31, T. 1, R. 4, N. & E.
E. 1-2 S. E. 1-4 " " " "
E. 1-2 S. E. 1-4 Sec. 36, T. 1, R. 3, N. & E.
W. 1-2 S. W. 1-4 Sec. 31, T. 1, R. 4, N. & E.
W. 1-2 S. E. 1-4 Sec. 36, T. 1, R. 3, N. & E.

Slaves—Homidy, Doll, Elias, Sarah, Hagar, Elizabeth, Sam, Johnny, Juba, Jane.

For sixty shares. 60.

(Note—The Land with 31 shares transferred to H. J. Mills.)

7 March, 1838—Remortgage of the property in the two preceding mortgages for forty-one shares. 41.

(Note—13 shares transferred to H. J. Mills.)

16 May, 1838—N. E. 1-4 Sec. 33, T. 2, R. 2, N. & E.
E. 1-2 N. W. 1-4 Sec. 33, T. 2, R. 2, N. & E.
N. W. 1-4 Sec. 34, " " "
S. E. 1-4 " 33, " " "
South 1-2 " 34, " " "
S. W. 1-4 " 35, " " "
W 1-2 N. W. 1-4. Sec. 2, T. 1, " "
N. E. 1-4 " 3, " " "
E. 1-2 N. 1-4 " " " " "

Slaves—Cæsar, York, John, Toney, Bristo, Frederick, Elias, Claibourne, Dick, Bob, Johnny, William, Old Tom, Ned, Albert, Davy, Frank, John, Sy, Lisbon, Ben, George, Wiliam, Primus Elleck, George, Jim, Toney, Horris, Toney, Cuff, York, Dick, Cuba, Amy, Grace, Abram, Rose, Malinda, Francis, Beck, Juba, Fillis, Cloe. Amy, Francis, Susannah, Little Juba, Jane, Margaret, Frank, Mahala, Julia, Louisa, Rachel, Ellen, Matilda, Caroline, Celia, Maria, Nancy, Winney, Monica, Eddy, Kitty, Fillis, Hester, Amy, Israel, Sibby, Scipio and Long Mary.

For four hundred and seventy shares. 470.

(Note—105 Shares transferred to the President of the Union Bank of Florida.)

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215 16 May, 1838.—W. 1-2 S. W. 1-4 Sec. 1, T. 2, R. 1, N. & W.
South 1-2 " 2, " " "
S. E. 1-4 " 3, " " "
W. 1-2 N. W. 1-4 " " " "
Lot 1 " 4, " " "
Lot 1 and 5, " 9, " " "
N. 1-2 " 10, " " "
S. E. 1-4 sec. 10, " " "
E. 1-2, S. W. 1-4 " " " "
Fractl. sec. 11, " " "
" sec. 14, " " "
" sec. 15, " " "
Lot 1, sec. 21, " " "
Lots 1 & 2, sec. 22, " " "

Slaves—John, William, Edmund, Wilson, Little Wilson, Pitman, Sam, Henry, Rochester, Israel, Daniel, Richard, Tom, Eliza, Polly, Nancy, Matilda, Barbara, Spottswood, Peggy, Mary, Daniel, Penny, Rachel, Emily, George, Phil, Billy, Frederick, Homady, Ned, Jack, Morgan, Anthony, Gully Jack, Tom Harkney, Tom Gonder, Sam, Homady, Primus, Isaac, John, Dolly, Sarah, Hagar, Elizabeth, Fanny, Morgianna, Martha Ann, Mary, Molly, Margaret, Diana, Ellen, Elizabeth, Sam, Sarah, for six hundred and ninety shares. 690.

(Note, 93 shares transferred to the President of the Union Bank of Florida.)

20 May, 1838—S. W. 1-4 sec. 3, T. 2, R. 1, N. & W.
E. 1-2 n. w. 1-4 " " " "
W. 1-2 n. e. 1-4 " " " "
Lot 6, sec. 4. " " "
Lots 2, 3, 6 & 7, sec. 9. " " "
Lot 8, sec. 4. " " "
For one hundred and one shares. 101.

15 May, 1838—Gabriel, William, Squire, George, Isaac, Jacob, Kealing, Jacob, Moses, York, Albert, Adeline, and child, Martha, Ann and two children, Mary and child, Clarissa, Sarah and child, Billy, Mariah and child, Francis Goodwin, Ann and child, Queen and child, Hannah and child, Eliza, Emily, Rachel, Margaret, Fenton, Roday, Jane, Kitty, Judy, Patty, Jacob, Jim, Peter, Gabriel, Dick, Daniel, Hackless, Harriett, Walker, Willy, George, Nancy,
216 B. and child, Maria and child, Patsey, Cely, Nancy Burwell, for two hundrd shares, 200

25 January, 1840—Slaves—Sy, Kitty.
For five shares, 5

29 Feb. 1840—W. 1-2 s. e. 1-4 sec. 29, T. 2, R. 3, n. & e.
S. E. 1-2 s. e. 1-4 sec. 30, " " "
S. E. 1-4 n. e. 1-4 " " " "
For eight shares, 8

		50 shares.
19 March, 1835,		
1 February, 1837 for	60 shares.	
Transfer to Mills,	31	
		29 "
	41	
7 March, 1838, for		
Transfer to Mills,	13	
		28 "
	470	
16 May, 1838, for		
Transfer to Pres't U. B.,	105	
		365 "
	690	
16 May, 1838,		
Transfer to Pres't U. B.,	93	
		597 "
		101 "
20 May, 1838,		
15 May, 1839,		200 "
25 January, 1840,		5 "
29 February, 1840,		8 "
		1383 shares.

Union Bank of Florida, 15 July, 1847.

C. G. ENGLISH,
Sol. U. B.

And the said plaintiffs here rested their cause.

The defendant by his counsel then submitted his defence to the jury, and offered as an admission agreed upon by the counsel on both sides the following statements:

"It was agreed and considered as admitted that one of the slaves purchased by Ponder applied to the plaintiff Moseley before the sale to purchase her, because she had a husband owned by Ponder, who resided in the neighborhood; Moseley said he was unable to purchase, and recommended the slave to apply to Ponder to purchase her. Accordingly the slave went over to Ponder's place, and 217
afterwards Ponder came to the Court House, and after the conversation alluded to by Ponder in his testimony in Camp's case, the negro was bid off by Ponder."

The following testimony of Ponder in Camp's case to be considered as part of the admission, to wit:

"William G. Ponder stated he was present at the sale of the Parkhill slaves under executions of Union Bank and others, in the Spring of 1845. He further stated that Moseley was present at the sale, and advised him (the witness) to purchase. Some suggestions being made as to the title, Moseley said there would be no difficulty—said he had hired the negro, and that it would suit the witness—said he thought there would be no difficulty about the property. Being cross-examined, and in answer to a question from plaintiff's counsel, said the general impression was, that all the difficulty about the property had been done away—it was supposed that the judgment was legal, and had a right to sell the property."

Also called William Bloxham, who, being duly sworn, said he was present at the sale of Parkhill's slaves made by Marshal Camp. Messrs. Manly and Moseley were present. Col. Gamble, President of the Union Bank, was bidding for slaves for Meinetzhagen, and was buying without competition, when Manly asked witness to bid against him. Witness did so, and caused the slaves bought by Col. Gamble to bring about fifteen hundred dollars more than they would have done. Moseley was present directing the sale, and arranging them in lots to be sold; for one slave, Ellen, he bid, and run her up to a large price, stating that she was to be replevied, and to be bought for Mrs. Brockenbrough. To the sale of this slave he objected, but to the sale of none others; he had a book with a list of the slaves in his hand, and stated he was desirous to keep the slaves in the little mortgage from being then sold. Was present at a conversation between Plaintiff, Moseley, and Archer, when the latter observed that he intended to stop the negroes bought at the sale, and which the purchasers intended to send for sale to New Orleans. Witness then took Plaintiff Moseley aside and stated to him that a friend of witness had bought some negroes at the sale and intended to send them for sale to New Orleans, and witness wished to know the intention of Moseley so as to advise his friend. Moseley then said that he would not lend his name to any interference with the sale, that he had felt greatly relieved thereby. When witness came up to the sale, Mr. Thompson was concluding an address to the 218
people saying that the sale was good and valid.

Cross examined, said he did not hear the sale forbid by Archer.—The place of conversation above alluded to, was in Fisher's tavern The remarks of Moseley above narrated, occurred only between witness and Moseley, and apart from Archer; at that time the slaves alluded to were near town on their way to be embarked; with respect to Manly's suggestion to witness to bid, witness had on his own mere motion bid before, but in bidding against Gamble, witness bid beyond the value under an assurance that Gamble would bid more, and with a view to increase the credit of Parkhill's estate. Ponder was not present at the conversation between Moseley and witness. Does not know whether Ponder was present when Many urged witness to bid. Witness bid off two negroes at the request of a friend, so stating at the time to the Marshal. Knows Juba and Caroline, two of the slaves named in Ponder's bill of sale, but not their present value. Cannot state the value of the hire of the slaves. Juba, for an old woman, was a good hand, and was worth from forty to seventy dollars per year; Caroline about eighty dollars, the price fluctuating and generally low. A female slave of thirteen years would hire for about thirty dollars; a girl of eleven and a boy of ten would be worth about their victuals and clothes. The witness bid for several slaves and all for Dorsey. Thinks the slaves altogether, and those bought by defendant, sold high, and for as much as they would have brought since. Witness has been sued for the negroes bought for Dorsey.

Also called *John G. Gamble,* who being duly sworn deposed—was present at the sale of the slaves by the Marshal in 1845, and took part in it. Moseley, the plaintiff in this suit, stood beside the witness, and took an active part in the sale. Moseley kept memoranda of the sales, divided the slaves into families and lots to have them sold. Moseley professed his entire satisfaction at the sale, stating that he was pleased to have the business closed. Ponder was present and bought at the ale. Moseley urged the bidding. The Marshal counselled during the course of the sale with Moseley, and sold under his instructions. By Moseley's directions the slaves were so divided as to bring the largest price. Thinks Moseley bid for Ellen, and run her up to eight hundred dollars or more, avowing that he bid for Mr. Brockenbrough. Moseley expressed to witness his satisfaction that the sale was made, as he wished to get rid of the concern.

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219 *Cross examined,* says he did not hear the sale forbid by Mr. Archer. Has heard Ponder say he bought slaves at the advice of Moseley. In the year 1834 the witness borrowed money from Ponder to unable him to go to Europe to negotiate the bonds of the Territory of Florida. This was before the Bank went into operation. Did not then or since explain the nature of the charter of the Union Bank to the defendant.

Also, called *John G. Anderson,* who being duly sworn said, was present at the sale spoken of on the first day, saw the plaintiffs Moseley and Manly present at the sale. Manly kept a list; Moseley also kept a list, and directed the sale. Witness, acting for another person, applied to have a family put up in one lot; the Marshal declined without Moseley's concurrence; Moseley refused, and required the slaves to be put up separately, that they might bring more money, and they were thus sold. Heard Moseley bid more than once at the sale, and take the general direction of the sale.—Heard all that Archer said. He got on a bale of cotton, and stated that the widow's dower had not been allowed, and for that reason, he forbid the sale.

Also called *David D. Young,* who being duly sworn, said, was present at the sale alluded to, heard, on the occasion of one of the slaves being offered, and not being run up, the plaintiff Moseley say, "bid up, bid up gentlemen, the property is not bringing half its price. The title will be good." After that the property sold better. This declaration was made to the crowd around. Many persons were present.

Cross examined, said, the declaration was made in a loud tone to those around, and might be heard at the distance of ten paces.—Heard Mr. Archer say, that so far as he represented the widow, he forbid the sale.

Also called *Edward Houstoun,* who being duly sworn said, he was present at the sale, and saw there the plaintiffs Moseley and Manly. Moseley assisted at the sale in pointing out and stating the qualities of the slaves. Manly had a list also. Did not hear Moseley bid, or advise others to bid. Heard Mr. Archer state that he claimed a title for Mrs. Manly's dower. Heard Mr. Thompson in reply say that the right of dower had been adjudicated and decided against, and that the title was good.

Also called *Medicus A. Long,* who being duly sworn said, was present several times at the sale for short periods, and at the begin-

220 ning Mr. Archer got up and forbade the sale in the right of the widow and in her behalf; that she claimed dower, and they must purchase subject to her title. He spoke in a loud tone to the crowd.—Moseley was present with a list of the slaves, directing the sale, calling up and naming the slaves, and the order and manner of the sale. Heard the instance stated by Mr. Anderson.

Also called *Otis Fairbanks,* who being duly sworn, said he was present at the sale. A few minutes before the sale, Governor Moseley stood on the steps. As the first slave was put on the stand, Mr. Archer rose and forbid the sale on account and behalf of the widow. Mr. Thompson replied, and asserted the sale was valid. On Archer's forbidding the sale Gov. Moseley by his manner and exclamation, expressed disapprobation, saying the sale had better go on, they could not be sold at a better time. After that heard Moseley say, "bid, bid, I do not wish the negroes to go for nothing." This remark seemed to be induced by the fact that just then some slaves had sold low; after it was made they sold better. Only saw Manly present and keeping a list of the sales.

Also called *Leslie A. Thompson,* who being duly sworn, said, that he was present at the sale. Before any slave was sold, Mr. Archer rose and said that on the part of the widow, he gave notice that the widow had not had her dower assigned, and that all who purchased would do so at their peril subject to the widow's dower. Witness rose to reply, and stated that a claim similar to Mrs. Manly's had been decided against, and that the title was good against her claim. Did not see Governor Moseley until the bidding commenced. Saw Moseley bid for two slaves at least; heard him say to one of the crowd, when a negro was bid off, you have made a bargain; to another he spoke and encouraged him to bid; heard him object to a family being sold entire, and at his suggestion they were sold singly.

Cross examined.—Saw Governor Moseley on the ground before the first slave was bid off. Did not hear Mr. Archer say one word about any other claim than the widow's dower,—nothing about the claim of the administrators *de bonis non.* Witness in his reply did not state anything about the Union Bank of Florida, its mortgages or interest. Did not see Manly do, or hear him say anything. Did not then notice Mr. Ponder. Witness did not before or since this suit hear him say anything about the Union Bank of Florida, mortgages, &c., &c. Went to the sale on the part of the attorney of the Bank, and with no purpose of making any statement until he 221 heard Mr. Archer's statement.

Defendant having here rested his cause, the plaintiffs offered to read in evidence a bill filed on the Equity side of the Superior Court of the Middle District of Florida, in which William D. Moseley and his sureties were complainants praying relief, &c., to wit:

To the Honorable Samuel J. Douglas, Judge of the Superior Court of the Middle District of Florida, in and for the county of Leon, in Chancery sitting: The bill of complaint of William D. Moseley, William Doggett, Green Chaires, Henry Doggett, Alexander Moseley, and William P. Moseley, respectfully represents, That complainant William D. Moseley, on or about the 23d April, 1844, was duly qualified administrator *de bonis non* jointly with Martha Ann Manly of the Estate of Samuel Parkhill deceased, left unadministered by the said Martha Ann Manly, late Martha Ann Parkhill, the former administratrix. That said Co-Complainants were and are the sureties on the bond of said administrators *de bonis non,* but were never the securities of said Martha Ann in the original administration, that a large number of slaves, all of about the value of seventy-five thousand dollars, left unadministered by said Martha, came to the possession of said William D. Moseley, administrator *de bonis non* as aforesaid, as will appear by reference to the inventory and appraisements thereof returned by said William D. Moseley to the County Court of Leon county, and signed by him and him alone, a certified copy of which will be produced, if necessary, at the trial of this cause. That on the 4th January, 1845, a judgment was rendered in Leon Superior Court against said administrators *de bonis non,* at the suit of the Union Bank of Florida, for upwards of seventy thousand dollars, to be levied of the goods and chattels, slaves, lands and tenements of said Samuel, deceased, in the hands of said administrators *de bonis non,* that said judgment remains of force against said Moseley, as administrator *de bonis non,* not satisfied or reversed as will appear by reference to the record of the proceedings therein in said court, under the statute of the Territory authorizing the foreclosing of mortgages at common law.—That the judgment aforesaid is the only judgment recovered against said administrators *de bonis non,* and that said William D. Moseley since the rendition of the same, has retained until a few days past, the property of said estate, in said inventory mentioned, to satisfy said judgment in case the same be affirmed in the appeal now pending in the Court of Appeals. That said complainant Moseley has 222 hired out the slaves of said estate for the present year to divers persons for a large sum of money, to wit: Seven thousand dollars, and upon notes secured to be paid at the end of the year. That since the rendition of said judgment and since the hiring aforesaid, the said Union Bank of Florida, John C. Monford and Kidder M. Moore, Executors of William Turner, deceased, William Fisher, Pierpont Philips, Richard T. Birchett, assignee, Ann Davidson, Richard C. Saunders, George B. Pease, Charles B. Bioren, Lot Porter, Thomas R. McClintock, have severally obtained judgments, as complainants are informed, in Leon Superior Court, on the law side thereof, for various and large sums of money against the said Martha Ann Manly and Hiram Manly, her husband, as administrators of Samuel Parkhill, deceased, by virtue of the original administration by said Martha; that said judgment creditors have sued out executions against said Manly and wife, as administrators, *"to be* levied of the goods and chattels, slaves, lands and tenements of the said Samuel Parkhill, deceased, in their hands as administrators, to be administered. That these complainants are not parties to said judgments, or sureties for said Martha, on her original administration, and are advised that they are in no wise liable for, or bound to pay said judgments or executions, and that they are in no wise responsible for any mal-administration, defaults, failures or devastavits of said Hiram and Martha, or either of them, in the management and administration of the estate of said Samuel, under the original administration. Nevertheless, these complainants expressly aver and now shew unto your Honor that the judgment creditors of Manly and wife above named, and John G. Camp, Marshal of the said Middle District, have proceeded under said executions to levy the same upon the estate of said Samuel in the hands of complainant William D. Moseley, as administrator *de bonis non,* retained to satisfy the judgment against him, and did in fact on Monday the 31st March, 1845, levy the same upon divers of said slaves then in the actual possession of the hirers of said slaves, and that they have advertised the said slaves to be sold on the first Monday in May next, to satisfy said judgments and executions against Manly and wife; and these complainants further represent that said William D. Moseley and said other administrators *de bonis non,* have not since the administration by said Moseley committed any waste or devastavit of the effects of said estate, but that said William D. Moseley being in possession of said

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223 estate, was proceeding to administer the same according to law, and to pay the judgment of the 4th January, 1845, recovered against him, if the same should be affirmed.

That unless the judgment creditors of Manly and wife, and the Marshal John G. Camp, Esq., are enjoined and restrained from proceedings so oppressive to said William D. Moseley and his said securities, and unless the said estate is protected in the hands of said William D. Moseley, administrator *de bonis non*, on the faith of which the Judgment of the 4th January, 1845, was rendered, these complainants will be compelled in effect to pay the debts of Manly and wife, for which they are in no wise bound; will be left without any assets to pay the judgment of 4th January, 1845, and will be compelled without waste or devastavit, default, or mal-administration on the part of the administrators *de bonis non*, for whom alone they are sureties, to pay out of their individual means the said judgment of the 4th January, 1845, in case the same is affirmed. All of which actings, doings and pretences, on the part of said judgment creditors, and said John G. Camp, are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of these complainants. In tender consideration whereof, and inasmuch as complainants are remediless in the premises, except in equity, where matters of this nature are properly cognizable and relievable. To the end, therefore, that the said Union Bank of Florida, Kidder M. Moore and John C. Montford, William Fisher, Pierpont Philips, Richard T. Birchett, Ann Davidson, Richard A. Saunders, Geo. B. Pease, Charles B. Bioren, Lot Porter, and Thomas R. McClintock, may, severally and respectively, under oath, full, true, direct, and perfect answer make, to all and singular the matters above set forth, and that as fully and particularly as if the same were here repeated, and they and every of them distinctly interrogated thereto; and that the said defendants above named and each of them, their and each of their agents and deputies, be perpetuallly enjoined, inhibited, and restrained from levying upon, selling, retaining, taking away, or otherwise interfering with said slaves or either of them, levied upon and advertised for sale, under and by virtue of said executions against said Manly and wife, as administrator and administratrix of the estate of Samuel Parkhill, under the original administration. That said defendants above named, and said John G. Camp, be decreed to re-deliver said slaves levied upon and advertised for sale to the several persons from whose ac-
224 tual possession they were taken, or to said William D. Moseley, or that such other and further relief be had in the premises, as to this Honorable Court shall seem meet and proper in the premises. May it please your honor, &c.

ARCHER,
Sol. for Complainants.

William D. Moseley being sworn, saith, that the matters of fact contained in the foregoing bill, as far as they are stated from his own knowledge, are true, and as to those matters stated upon information derived from others, he believes to be true.

W. D. MOSELEY.

Sworn to and subscribed before me, this 4th April, A. D., 1845.

SAM'L J. DOUGLAS. *Judge.*

Let the bill be filed—the injunction is denied.

S. J. DOUGLAS, *Judge.*

To the admission of which in evidence the said defendant by his counsel objected, but the court overruled the objection, and allowed the said bill to be read in evidence to the jury, to which decision of the court the defendant by his counsel excepted.

Also called *Francis H. Flagg*, who being duly sworn, said he was present at the beginning of the sale alluded to; heard Mr. Archer's protest. Mr. Archer protested against it as being irregular or illegal, and besides that, the widow had not her dower.

Cross examined, said, does not recollect that he said that while it was irregular or illegal, he used the terms, "besides that" the widow's dower had not been assigned. He did not express any other particular cause of irregularity. Mr. Thompson in reply said, that the question of, or the right of dower in the widow had been decided, and the title was good. Did not go there for the purpose of bidding.

Also called *Justus R. Fortune*, who being duly sworn, said, he was present at the sale; heard either Judge Manly or Mr. Archer make an objection to the sale—he does not know which.—Cannot say whether he went there to bid or not; he did in fact bid off one old negro man, but did not take possession of him; gave him up to Gov. Call.

Also called *John Daffin*, who being duly sworn, said he was present at the sale, and heard Mr. Archer get up and object to the sale and he thinks, but cannot certainly say, that the sale was illegal, as the widow had not her dower assigned her. *Cross examined*, thinks he heard the word illegal, and that the widow had not her 225
dower.

Also called *James T. Archer*, who being duly sworn, said, witness by a bill had made an application to the court on the morning of the sale for dower for the widow. Did not press it, as the same point had been decided adversely, but wished it filed as notice.—Witness wrote a notice for Manly to make, but Manly hesitated, and then witness rose, (not on a cotton bale,) and in an excited and audible voice declared that the sale was illegal, and that the widow had a claim for dower, and all persons would purchase at their peril. Witness was much excited, and does not profess to state precisely what he did say. Mr. Thompson rose then, and equally excited, declared the sale legal, &c. Witness then went on to explain his understanding as to the effect and illegality of the judgments at and ever since the time they were rendered, and he came to the sale with all those impressions on his mind, and but for the testimony of the defendant's witnesses, this witness would never have doubted that he gave utterance to those sentiments.

Cross examined, admits he was excited and agitated when he made the statement. Since the filing the bill before mentioned knows of no other action by plaintiff, Moseley, to stop the sale.

Defendant then called Doctor *John G. Gamble, Jr.*, who being duly sworn, said, was present when Mr. Archer got up, was near him. He said in terms that the widow had not released her dower, and persons were notified of the fact, and would purchase at their peril. Mr. Thompson arose, and said in reply, that the question had been settled against the claim of dower, and the title was good.

Both parties here closed their evidence.

And the cause having been fully argued by counsel on both sides, his Honor the Judge instructed the jury as follows, to wit:

1. The judgment and execution under which the slaves were sold are wholly void, and gave no authority, and no right of property passed by the sale.

2. That the judgment and execution being against administrators who had been removed from office, it is the same as if there had been no judgment nor execution.

3. That defendant must be regarded as having purchased with knowledge of the title, is affected with notice of the illegality of the sale, and stands in the position of the Union Bank, the plaintiff, in the sale, and of the administrators who had been removed, getting their title, and no other. Unless the jury shall be satisfied that the 226
administrators of Parkhill, at the time of the sale, wilfully, deliberately, and of their own free accord and consent, agreed to waive the objections to the sale, and to affirm its validity, and that purchases were mainly made on the faith of such conduct, action or admission, and not relying on the legality of the sale, or if the jury are satisfied that Ponder would have purchased without reference to any statement or conduct of the administrators at the sale, then there is no bar to the recovery of plaintiffs.

4. That if they are of opinion there was fraud on the part of the plaintiff, or a disposition to entrap, or mislead, or deceive purchasers in their action and conduct, they must find for defendant.

5. That if they find that such advice and conduct proceeded from one administrator, and not from both, that this not to be regarded as conclusive, but that the action of that administrator shall be preferred which is most favorable to the estate

6. That if they are satisfied that this admission and conduct were the effect and result of the party's convictions as to the obedience due to the decision of the court after the applications made by the party to arrest the judgment, and the sale by the officer, under the impression that the court had rightly decided, that such action and such conduct will not estop the parties from asserting their rights and interests, on discovering that the court was wrong, and the judgment and sale a nullity. That a defendant is bound to respect the decision of the constituted authorities, and this obedience, and a conduct and action consistent therewith, is not to be taken as the free act of the party, to estop him from asserting the truth afterwards.

7. That if the jury are of opinion that the action and conduct of administrators proceeded from a desire not to obstruct or thwart the action of the court, or from a disposition to prevent the injury that would arise from a sale of the negroes at a reduced price, in case the judgment and execution might turn out to be valid, and with no disposition to entrap purchasers then that such action and conduct are not wilful, and do not estop plaintiff from recovery.

8. That after the applications to the court by Moseley to arrest the sale, and in opposition to the judgment and execution, it was not the duty of the administrator, Moseley, to give notice or protest at the sale, or to take any part—that, as to the judgment, execution and sale, he must be considered as having been adjudicated

227 as no representative, or a discredited representative, and his action afterwards must be regarded as that of an individual, and not to affect the estate.

And thereupon the said defendant prayed the Court to instruct the jury in his behalf as follows, to wit:

I. That if the jury believe from the evidence that the slaves sued for went into the possession of the defendant, with the consent of the said plaintiffs, or either of them, express or implied, then that such bailment implies an agreement by defendant to redeliver upon request, and that no action can be maintained, except after demand and refusal by defendant to re-deliver.

II. That there having been no evidence whatever of a demand on defendant before suit brought for the return of this property, the plaintiffs are not entitled to recover.

III. That the plaintiffs in this action being strangers to the judgments on which the executions in evidence issued, and under which the sale by the marshal was made, are not allowed in this action as against this defendant, a purchaser at such sale, to set up that such judgment was and is void, nor to impeach the same collaterally.

IV. That to support the title of a purchaser at marshal's sale as against the defendants in execution, it is enough that he shows a judgment of a court of competent jurisdiction, and that a sale was made by virtue of an execution of the kind the statute prescribes; and to support the title of such purchaser as against the plaintiffs in this action, or strangers to that judgment upon the allegation of title in such plaintiffs, then that a sale of the property by such marshal, in the presence of such alleged owners, without objection on their part, estops the plaintiffs from impeaching the transaction on the ground of their better title.

V. That, if the jury believe from the evidence that William D. Moseley, administrator *de bonis non of* Sam. Parkhill, deceased, one of the plaintiffs, had sole possession of the negroes in controversy before the time when defendant became possessed of them, then that even if the slaves had been wrongfully taken by defendant out of his possession, the said Moseley could bring an action alone and in his individual name for the slaves, and that the said Moseley cannot defeat any defence of defendant against him alone, and in his individual capacity by joining his co-administrators and suing jointly as administrators.

VI. That if the jury believe from the evidence that the negroes
228 in controversy were offered at public sale in May, 1845, and that on that occasion the said plaintiffs, or either of them, knowing their title, stood by and did not forbid the sale, and that defendant thereupon purchased the negroes under the supposition that the title was good, then that the party so standing by and being silent will be bound by the sale, and is estopped from asserting the title in himself.

VII. That if the jury believe from the evidence that plaintiffs or either of them stood by and saw the property now sued for, sold to the defendant at public sale, as the property of another under an erroneous opinion of title, without making known their title, then that plaintiffs will not be permitted afterwards to exercise their legal rights against such defendant.

VIII. That if the jury believe from the evidence that the plaintiffs or either of them have made admissions and declarations which are clearly inconsistent with the claims they now propose to set up —that the defendant acted on the admissions and declarations so made, and that defendant will be injured by allowing the truth of such admissions and declarations to be disproved, then that the plaintiffs are estopped from setting up an adverse title.

IX. That if the jury believe from the evidence that William D. Moseley, administrator *de bonis non* of Samuel Parkhill, one of the plaintiffs in this action did heretofore and before the said sale shown in evidence, send one of the slaves in controversy to the defendant, making known to him that said slave was about to be sold recommending him to purchase such slave at the time and place where the sale afterwards took place, that he Moseley would buy the slave but for lack of means, that by reason of such recommendations and suggestions Ponder attended the sale, that at such sale upon suggestion made about the title, Moseley said there would be no difficulty, that at said sale Moseley was present giving a sanction to the sale, aiding in its execution, encouraging bidders, both by declaring values and qualities of slaves, as also by bidding for slaves himself, and that defendant purchased the slaves he bid off on the faith of such acts, understanding that he was getting a good and valid title to the slaves, then the said Moseley is estopped from setting up title in himself against said defendant and plaintiffs cannot recover.

X. That the relations which exist between the Union Bank of Florida and the estate of Parkhill have nothing to do with this suit, nor are the bond holders parties to this action, nor do these things enter into the decisions of the issues in this case.

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XI. That if the jury believe from the evidence that before and at 229
the time of the sale shown of the slaves in controversy, said Moseley the plaintiff well knew said sale was to be made under an execution which is now shown to have had no power to touch the property in question, and that yet notwithstanding Moseley allowed the sale to proceed without claiming the property as his own as administrator *de bonis non,* but declared the title proposed to be sold by the Marshal good, and that there would be no difficulty, then that such conduct of said Moseley as administrator *de bonis non,* was and is, as against the defendant a purchaser at said sale an adoption by Moseley administrator *de bonis non,* of that sale as his own, and estops him from setting up that no title passed by said sale. That such alienation is equal in effect to an original conveyance.

XII. That if the jury believe from the evidence that Moseley, one of the plaintiffs, bid for property sold at sale by the Marshal, then that such act was an encouragement to all persons present to bid at said sale, and precludes him from denying its legality.

XIII. That if the jury believe from the evidence that the declarations of Moseley, administrator *de bonis non* of Samuel Parkhill, on the day of the sale were made to the bystanders after the manner of one having authority and control, and directing the sale, then the jury have a right to consider the said sale as made by him in his character of administrator *de bonis non,* and that a good title passed to the purchaser which he cannot gainsay or resist.

XIV. That even if the plaintiffs and defendant are equally innocent, then that the rule is, that if one of two innocent parties is to suffer, he is to suffer whose first action and conduct causes the mischief, and that the purchasers at this sale are not to lose their money and their slaves, if the loss would fall upon them, either by the culpable negligence of Moseley or by his omission to assert an adversary title at a time when he knew the same.

All which said instructions the said court refused to give to the jury, but in reference to the tenth prayer for instruction, instructed and charged the jury:—

That the property in question could not be sold under execution by the Union Bank of Florida, except as a Trustee for the Bondholder, and that Ponder is not a purchaser without notice: That until the expiration of the time limited to the mortgage, the Bank cannot sell the slaves under a judgment at law for a debt of its own.

To all of which said several rulings, decisions and judgments of the 230
said court during the trial of this cause, to the instructions given to the jury and to the refusal of the said court to instruct the jury as prayed by defendant, the said defendant excepts and forasmuch as the said matters excepted to do not appear upon the records of said court, tenders this his bill of exceptions, and prays that the same may be signed, sealed, and made a part of the record.

Hagner, for Appellant:

1st. What must a purchaser at sale of Marshal show to protect his title?

1st. *An against defendant in execution.*

It is enough that he shows a judgment of a court of competent jurisdiction, and that a sale was made by virtue of an execution of the kind the statute prescribes.

1 Blackford's Rep. 210. 1 Hill's S. C. Rep. 239. 3 Scammon, 110. 4 Scammon, 370. 3 Wash. C. C. Rep. 546. 1 Overton, 236. 3 Cranch, 300. 1 Monroe's Rep., 94. 6 Har. & John., 182. 11 Gill. & John., 217. 2 Bibb's Rep. 202. 2 Bibb's Rep. 518. 6 Gill & John., 298. 8 Missouri, 257. Though reversal of the judgment the defendant shall not have restitution of the goods.

5 Coke, 99—12 Eliz. 8 Coke, 24. Cro. Eliz. 278. Cro. Jac., 246. 1 M. & S., 425.

But the value of them for which they sold.

The aforementioned cases, and 2 Saunders 101. 1 Taunton, 359. 6 Cowen, 297. 1 Washington Rep., 116. 2 Munford, 272, and 4. 3 Bacon's Abridgement, Title Error, p. 390. 6 Peters, S. C. Rep. 8. 10 Peter's S. C. Rep., 475. 1 Harris & John.,,405.

2d. *As against a stranger,* who claims title, we insist that a sale of the property by such Marshal, in the presence of such alleged owners, without objection on their part, *estops* from impeaching the transaction, on the ground of better title.

As to estoppels and laws of the same:—

Co. Littleton, 352 a.

Regarded with favor by courts at this day:—

2 Smith's Lead. Cases, 459, 460, 467. 3 Hill's N. Y. Rep., 220.

And this favor is extended to them *on principle, and as a rule of policy.*

231 Same authority last cited, 219, Cowen J. 2 Starkie on Evidence, p. 28. 1 McLean Rep. 183, 388, 390. 1 Story's Equity Jurisprudence, 387—note 4. 5 Ham. Ohio Rep. 124.

Acts of estoppel. 1st. Standing by and giving a sort of sanction to the sale.

6 Adol. & Ellis, 474.

In that case Lord Denham uses this language:

"But the rule of law is clear, that, when one by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time; and the plaintiff in this case might have parted with his interest in the property, by verbal gift or sale, without any of the formalities, which throw technical obstacles in the way of legal evidence. And we think his conduct in standing by and giving a kind of sanction to the proceedings under the execution, was a fact of such a nature, that the opinion of the jury, &c., ought to have been taken, whether he had not, in point of fact, ceased to be the owner."

And the same Judge, in the case of Gregg *vs.* Wells, 10 Adolph. & Ellis, 90, says:

"Picard *vs.* Sears was in my mind at the time of the trial, and the principle in that case may be stated *even more broadly,* than it is there laid down. A party who *negligently* or *culpably stands by,* and allows another to contract, on the faith and understanding *of a fact which he can contradict,* cannot afterwards *dispute that fact,* in the action against the person whom he has himself assisted in deceiving."

To the same effect are the following cases:

2 Devereux's Rep., 179. 9 Cowen, 275. 19 Wendell, 563.—1 Fonblanque's Equity, ch. 3, sec. 9, p. 163.

2d. They were silent when they ought to have spoken, and will not be allowed to speak now.

Robert's on Frauds, p. 130. 2 Vernon's Rep., 151. 1 Story's Equity Jurisprudence, sec. 385, p. 387. 2 Vernon, 370. 16 Maine, 146. 10 Adol. & Ellis, 437. 21 Maine, 137. 7 Watts, 163.—5 Call Rep., 463.

3d. The active agency and participation in the sale by the plaintiffs in this action:

232 6 Adol. & Ellis, 475. 9 Barn. & Cress., 577. 3 Barn. & Adolph., 313. 10 Adolph. & Ellis, 90. 1 Barn. & Adol., p. 142. 9 Cowen, 275. 4 Metcalf, 381. 21 Maine, 130. 2 Murphey's Rep., 6. 3 Hill's Rep., 215.

In same case, Bronson, J., dissenting upon his view of the facts, declares the law of estoppel by admissions.

1st. The admissions must be clearly inconsistent with the evidence proposed, or title to be set up.

1d. That the other party acted on that admission.

2d. Injury, if allowed now to disprove. And the judge lays down as the sum and substance of the whole "The facts and admissions operate against him in the nature of estoppel, when *in good conscience* and *honest dealing,* he ought not to be permitted to gainsay them."

We are content with this exposition of the law.

On the same head:—

7 H. & J., 337. 1 H. & McH., 146. 8 Yerger, 388. 4 Munford, 129. 4 Paige, C. Rep., 94.

Under 3d head, of active agency and participation in my brief advert to record and facts:

It is shown—1st. That the plaintiffs were not only not forbidding the sale, but taking the active *charge, management and control.*

2d. When bidding was chilled by the effect of Archer's announcement, Moseley said "bid—I don't want the negroes sacrificed—I will be glad when they are off my hands." After this, says the witness, the negroes sold better.

3d. The statement by Moseley to the parties, on their objections to title, by assurance "that all was well," was of itself an open declaration of the strongest kind—an admission calculated to remove any impression, if such had before existed, that the sale would be disputed.

4th. Manly's act in encouraging the sale, by having Bloxham act as a bye-bidder, is a gross fraud, if this sale can now be set aside.

5th. The declarations by Moseley that the titles were good encouraging bidders, addressed to the by-standers, was calculated to have effect, and is proved to have had distinct effect, on the general sales; and because every defendant is entitled to the benefit of such declaration, according to the rule laid down by Lord Denman. If, indeed the mere standing by and giving a sort of sanction by that act 233
alone to the proceedings, is declared by Lord Denman to be an act of such a nature, from which the jury can infer that the plaintiffs had ceased to be owners—how much more potent is Moseley's bidding for the property?—does it not utterly repel the idea of then existing title in himself? The bystanders were entitled to put faith in his conduct—and doing so, men were deceived and induced to alter their previous position, to part with their money, and instead become owners of these negroes—and now great mischief and injustice would be caused by permitting the plaintiffs to withdraw from the position they then assumed.

6th. These slaves were knocked off to the purchasers, in the presence of Moseley and Manly, before they had paid their money. Had they spoken out then, and claimed title, these defendants might have refused to complete the purchase. They were silent when they ought to have spoken, they will not be allowed to speak now. But they were cognizant of the transaction, and did nothing to prevent it.

II. Are the plaintiffs in this action *strangers,* or were they parties or privies *to the former judgment of the Bank?*.

The plaintiffs, however, would fain anticipate such an inquiry, and insist that that judgment was and is *absolutely void.* Now, was that judgment void and a mere nullity?

First, It was the judgment of a court of *competent jurisdiction*—the parties sued were yet before the court—the subject-matter was also within the jurisdiction—the parties plead in bar of the action.

5 Cranch, 185. 6 Peters, 16-17. 3 Cranch, 306. 2 Peters, 163. 10 Wheaton, 192. 10 Peters, 468.

Second, The judgment was reversed *mainly* because two pleas remained open, undecided. The Supreme Court plainly regarded the judgment as *erroneous* merely.

1 Florida Reports, 110, and this was the correct view. Viner's Abridgement, (Judgment G. A.,) contains the following strong case:

If *praecipe quod reddat* is brought against my father, who dies pending the suit, and I enter as heir, and after judgment is given against my Father, and the Defendant enters, I shall not have assize, for the judgment *against a dead person* is not void, but error, *quod nota.*

Thus, then, if the old administrators had been "actually," instead of "civiliter" *mortua,* their death would only have rendered the 234
judgment erroneous, or voidable, and not void.

If not a void judgment, but conclusive until reversed, on *parties and privies,* then the question recurs, are these plaintiffs STRANGERS TO THAT JUDGMENT?

Manly *ex ux.* were parties to the suit—duly served with process as *administrators.* They plead *in bar* amongst other pleas, *their discharge*—it is replied to, and on demurrer to rejoinder, judgment was given for plaintiff.

When plea pleaded, *Manly and wife were administrators de bonis non.* This was shown in the pleadings, and is as well as if in proof. Judgment against them, therefore, was good, until reversed. 1 Levintz, 261. 2 Levintz, 190. 1 Lord Ray., 63. Comberback, 220. Lord Raymond, 265.

Two of these plaintiffs then were parties—the third privy in estate. 1 Flor. Rep., 110. Cro. Car., 167. 8 Cowen Rep., 343

The property seized and sold was the property of the estate.

III. But be the judgment in favor of the Bank void, an utter nullity, to which these plaintiffs were neither parties nor privies, how do they stand in relation to the judgments and executions against Manly and wife, administrators of Parkhill, deceased.

These judgments are unreversed and are irreversable—and being so cannot be declared a nullity by any authority of law. 10 Peters, 473.

The sales were made under these executions and judgments as well as that of the Union Bank.

We have thus established, we believe, that the purchasers at these sales show enough to bar a recovery; they show valid judgments of a court of competent jurisdiction, and that sales were made by virtue of executions of the kind the statute prescribes.

If, on the other hand, these plaintiffs are regarded as strangers, whose property was sold on that occasion, they are estopped from impeaching the sale on the ground of better title.

IV. As to specific errors assigned.

1. The introduction of revocation of letters.

2. The introduction of mortagages of Union Bank.

3. The introduction of Bill in Chancery *against no party,* praying process against no one.

These were all *"res inter alios acta."*—The Bill in Chancery is relied on by the Judge in his 6th. charge. The instructions of the Judge are erroneous. In argument we will advert to them.

235 The instructions prayed by defendant below should have been given.

The 1st and 2d instructions asked require reference to authorities We are satisfied they can be upheld. The counts here are two.—*One* on special bailment—*the other* on supposed finding. The second count can only be sustained upon proof of possession obtained wrongfully without pretence of bailment. 4 Bos. and Puller, 145.

In the case at bar, the possession was with the consent of the plaintiffs, either express or implied. The proof, then, being of bailment, recovery must be on the *first* count, or not at all. 4 Bos. & Pul., 351. Buller's N. P., p. 139. 1 Chitty's Plead., 141.

In actions of detinue, *the detainer* is the gist of the action, and upon general principles, where there is no certain debt or obligation due, but a mere collateral engagement or duty, the plaintiff must lay a foundation for his action in a special demand. 1 Saunders, 32 n. 6 Comyn's Digest, Tit. Plead., c. 69, 73, pp. 84 & 85. 5 Term Rep.,, 409. Buller's N. P., 151. 1 Chitty's Plead., 362-3. Lowes on Assumpsit, pages 232, 236, 288, 241.

In the case of Bemers *vs.* Howard's Ex'rs, Taylor's Rep., 149, (1 Iredell's Dig., 146,) it is said, "on a promise to deliver goods, a demand before action is indispensably necessary." 5 Hill, 37.

Also p. 143 to same point. Story on Bailment, p. 82, sec. 107. We cite also—24 Wendell. 203. 6 B. & C., 464.

The plaintiff must have a right to the immediate possession of the thing detained—if returnable on demand, he has no such right until demand refused. Archbold N. P., 287, 290, 292, 295. 2 Tucker's Commen., p. 81. 2 Mumford's Rep., 122. 2 Stephens N. P., p. 1313. 2 Selwyn's N. P., 543.

The 3d and 4th instructions have been already presented in argument.

On the 5th we recur to evidence of sole possession of Moseley in the record, the inventories and appraisement, and the bill of complaint of Moseley.

A full right of action was in Moseley alone, (1 Williams on Ex'rs 653, note c. and authorities,) and we insist he cannot defeat any defence by joining co-plaintiffs in this suit.

See this attempted in 5th instruction of judge, and his refusal to grant all those instructions looking to Moseley's sole action.

VI, VII, and VIII require no further illustration.

Under the 9th instruction arises a view of the case we think perfectly fatal to recovery of plaintiffs.

236 Was there not a valid sale of the negroes made by William D. Moseley, administrator *de bonis non?*. He had full power over the estate. 1 Monroe, 96. Ram. on Assets, 608, N. E., and authorities, 4 D. & E., 632. 2 Vesey, 267. 1 Atkyn's, 463. 2 Bingham, 177. 1 Will. on Ex'rs, (670, N. E.) 1 Lomax on Ex'rs 344. 1 McCord's Rep. 492. 1 Wendell's Rep., 583.

Only exception is where there is collusion between the purchaser, or mortgagee, and the personal representative.

2 Williams on Ex'rs 672, (N. E.) co-executors regarded as one person. 2 Williams Executors, 683, (N. E.)

Antiquated distinction between administrators and executors in respect of their full authority, done away. 1 Wendell's Rep., 583.

The 11th and 12th instructions present same points of view with that last considered.

The 10th would seem a self evident proposition, yet the very converse has been assumed by the court below.

The 14th instruction was properly applicable, and ought to have been given. Had it *alone* been given, plaintiffs never could, *as they never ought,* to have recovered.

Archer, for Appellee:

The introduction of the record, containing the order of dismissal of Mrs. Manly as administratrix, was pertinent to the issues, because it contained evidence to show that the judgment *subsequent* to the revocation was void, and that the sale was consequently also void.

The mortgages executed by Parkhill to the Union Bank, when he became a stockholder, to secure his subscription, were also properly received in evidence, as they embraced the slaves in question, and were of record in Leon. So long as these mortgages were outstanding, the property was not subject to sale under execution at law.

The bill praying an injunction on behalf of Moseley and his securities, was properly received in explanation of Moseley's conduct at the sale. It showed that he had exhausted his remedies before the Superior Court, before the supposed acquiescence was given—and that he did not, except as a necessity, yield his claims to the property.

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The 1st and 2d instructions given by the court were correct, as 237 upon the facts exhibited by the record the judgment and execution were void, and as a consequence no title passed to the purchaser. Griffith *vs.* Fraser. 3 Pet. Cond. S. C. Rep. 1.

The other instructions mostly depend upon the doctrine of estoppel *in pais.* The rule governing estoppels of this character, as given by Lord Denman, and adopted by our Supreme Court, in Cotten *vs.* Williams, 1 Fla. Rep., 54, is this:—"Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the later a different state of things as existing at the same time." The following requisites, therefore, are necessary to constitute an estoppel of this character: 1. The subject-matter of the belief induced must be a state of *things—facts,* and not opinions.—Polk's lessee *vs.* Robertson, 1 Tenn., 463. Craig *vs.* Baker, Hardin Rep. 281.

2. The party to be estopped must not only cause the other to believe in a state of *facts,* but he must *wilfully* do it. That is to say, he himself must not be deceived—there must be imposition.—Moore *vs.* Hitchcock, 4 Wend., 292. Ibid., 480. 5 Pick., 452. 2 Conn., 467. 10 Alab., 278, citing 2 Baily, 581.

3. The party claiming the estoppel must have acted upon the statements of the other party, and altered his position. He must not be informed of the facts from any source—he must have been deceived, and must have acted upon the deception differently from the action he would have taken had he not been deceived.

4. The party to be estopped must be seeking to establish a different state of facts as existing at the same time. That is to say he must be seeking to contradict himself as to *facts,* which the law will not permit him to do. He must be seeking to recover upon his own falsity.

It requires a combination of all these requisites to make up an estoppel of this kind—and if the facts of this case show a failure of either, the appellees are not estopped. A reference to the facts without any comment on them, will be sufficient to convince us that not one of these requisites can exist in this case.

The instructions given by the court, when tested by these principles, will be found scarcely to give the appellees the full benefit of the doctrine of estoppel, as applicable to the facts of this case.

As to the first and 2d instructions *refused,* there was a wrongful 238 and tortuous taking of these slaves by the officer—and where this is the case no previous demand is necessary to maintain detinue.

As to the 3d and 4th instructions *refused,* the court did not err, if we are correct in the position that the judgment is void, by reason of being rendered after the dismissal of Mrs. Manly, and while her successors in office represented the intestate. See Griffith *vs.* Fraser, above cited. Taylor *vs.* Savage, 17 Peters, 224. 1 Fla. Rep., 130.

The execution commanded the officer to make the sum recovered of the goods and chattels, &c., of S. Parkhill in the hands of the original administratrix. This writ was executed by a levy on the goods, &c., of S. Parkhill in the hands of the administrators *de bonis non.* If this can be legally done, as a consequence the securities of the last administrators would be liable to the *devastavits* of the first—this "never could be right." 2 Call, 41, 56.

Brockenbrough, for same:

As to sales under void judgment and execution, see case cited by Mr. Hagner. Armstrong vs. Jackson, 1 Blackford, 211.

A judgment must be produced. Den *vs.* Wright, et al., 1 Peters C. C., 67. Campbell et al., *vs.* Browne and wife, 6 Howard (Miss.) 112. Ventris et al. *vs.* Smith, 10 Peters, 173-4-5-6.

Bona fide purchasers for valuable consideration without notice, acquire no title where the party selling has no right to sell. And this may be either by revocation of letters, or non-compliance with statute.

No one but executor or administrator can sell. Hence if he who is not executor or administrator sells, it is non-compliance with statute. So revocation is in fact a non-compliance with statute. See Thomp. Dig., 202, sec. 2, as to sales, &c. Denning *vs.* Corwin, 11 Wend. 652. Hollingsworth *vs.* Barbour, et al., 4 Peters, 470.

Record must shew jurisdiction of the *party* by *notice* or *publication,* where publication is lawful. Also 3 J. J. Marshal, 105. 1 Florida, 127.

But here the execution was invalid on its *face.* Woodcock *vs.* Bennett, 1 Cowen, 739.

The levy was bad because it did not follow the execution. Moseley's appointment and inventories shewed the property not in hands of Manly and wife as administrators.

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Bad because levied upon property *mortgaged,* and mortgages recorded. Bad because the property is mortgaged, and mortgages are a security for ultimate payment of Terriotrial bonds. Bad because the property by the charter, is to remain in possession of mortgagor until forfeiture, and the charter is notice. It is a public act.

As to the question of estoppel in *pais,* Lord Denman's Rule, 6 A & E., 475, in Pickard *vs.* Sears, adopted by this court in Cotten *vs.* Williams, 1 Florida, 54, is in these words: "The rule of law is clear, that, where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter, a different state of things existing at the same time."

In Gregg *vs.* Wells, 10 Adolph. & Ellis, 90, [37 Eng. C. Law,] Lord Denman says that rule may be laid down more broadly, thus: "A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in the action against the person whom he has *himself* assisted in deceiving. The defence here is in substance *collusion* between Denham and the plaintiff."

1st. In examining this rule the first question is this, can 'one' estop a whole 'party' by his words or conduct in which they do not participate—can one estop several?

2d. Can a man, acting in his own right, estop himself acting in *another right,* or *vice versa,* must not both acts or pieces of conduct be in the same right or capacity.

3d. If he can estop several—and if by his individual acts he can estop himself in *auter droit.* Still can he by himself estop by his individual contract, the acts of himself and *others in auter droit.*

Fraud, imposition, deception, are the ground works of all estoppels *in pais.*

If one man can estop several, a fraud may be worked by the doctrine upon innocent parties for the benefit of a stranger or purchaser, a volunteer, which would be wholly inadmissible; *caveat emptor* should apply. The *fraud* is more palpable, and the law aginst the stranger more palpable when *he knows* there are several in interest, and only sets up the words or conduct of one.

Fraud is the essence of estoppel *in pais,* and where it would work fraud it is never permitted. 2 Smith's Leading Cases, Am. ed., 467.

To make the admission of one, even *receivable* against several there must be *not a mere community of interest,* but a joint interest. 1 Greenleaf Ev., 209, sec. 176, and cases cited. And the first case cited, shows executor's interest to be *a community* and not *joint.* For admission (says he) of one executor cannot be received to take a case out of the statute of limitations aginst his co-executor, citing Tullock *vs* Dunn, R. & M., 416, and Hammon *vs.* Huntley, 4 Cowen, 495, in which case an acknowledgment in writing by 2 of 3 executors was held inadmissible, because it might involve the other in a *devastavit.*

So the admission of receipt of money by one trustee will not bind the rest. Davies *vs.* Ridge and others, 3 Espinassee, 101-2. Lord Eldon puts it on the ground that they are *trustees* and says if individually liable, they would be bound.

So in Doe *vs.* Brown, 4 Cowen, 492. The admission of one tenant in common in the same suit, is not admissible aginst his co-tenants and co-plaintiffs. The court says: "But it would seem an unjust rule which would suffer one tenant in common, to admit away the rights of others. As far as I have been able to discover an admission by a party to the record is evidence aginst him who makes it, and where there are partners aginst them also, but not against others who happen to be joined as parties to the suit. The cases which speak of the admission as proper evidence, will be found to have reference to a sole *plaintiff* or *defendant.*" Such an admission was not held in that case ground enough to admit, "secondary evidence of contents of a will."

2. As to parties acting in *auter droit;* the very examples cited under first head to show that *one* cannot estop *several,* are still stronger to show that he cannot do so in *auter droit.* The case in Espinasse of co-trustees is put on that sole ground. And in the executors case in R. and M., and Hammon *vs.* Huntley in Cowen, it is put on the ground of their being executors, and that one might force others to be guilty of a devastavit—that is, might be made by the rule, to be guilty of fraud on the others. But see further, 1 Greenleaf, 211 and 179. "Admission of a *guardian* or *executor* or *administrator* before completely clothed with the trust, or of a porchien amy, before commencement of suit, cannot be received either against ward or infant in the one case, or *against himself* as the representative of heirs, devisees and creditors on the other, though it may *bind the person himself,* when he is afterwards a party *suo jure* in another action." Why? Clearly because the administration cannot be *qua executor, &c.* Cannot be in *auter droit*—and so if made as an individual after investiture with those powers, it could not bind him, and *a fortiori* not bind others in *auter droit,* for the same reason, and *ubi eadem ratio est ibi idem lex.* See also 4 Perry and Davidson Rep. 1 to 9, Fox *vs.* Waters. Admissions by one co-executor not made *qua* executor not binding on his co-executor. 2. Executors interests not *joint.* 3. Opinion of admission of a matter *of law* as the legal effect of a deed, could not bind a co-executor even in a case where it might in a matter of assets. (In our case it was supposed judgment instead of a deed.)

3. If I have sustained either of the two first propositions in the negative, then a negative must follow upon this. But having established both—that one cannot estop several, unless their interest is entirely *joint* (as partners) and that one acting in his own right cannot estop himself in *auter droit* (especially against one knowing the capacities in which he acts.) it follows *a fortiori* that one acting individually cannot estop several in *auter droit.* If anybody was deceived, it was by him as an individual, for which he must have an action for *deceit* if he can show *fraud* and *damages* sustained by it.

A party acting *bona fide* may bind estates, &c. But can an executor impress his *fraud* upon the *property of the estate?* He may bind *himself* by fraudulent representations, but can he thereby create a *devastavit* and affect *his sureties,* his co-executors, the widow, distributees and creditors? His sureties cannot be affected by his *mis-pleading* though matter of record. Thomp. Dig. 211, S., 4 and S. 5. He is charged as of his own estate, with a *devastavit,* if he cannot prove that he has duly administered *according* to law, if assets have come to his hands.

And see Thomp. Dig. 358, S. 6. When a sale is made of lands or slaves by execution, a deed or bill of sale shall be made, and if more money is made than the exception demands, it shall be paid to the *defendant* without delay.

The defendants in exception not being the administrators in this case, the property would be given away.

Supose that Mosely had designed and perpetrated a *fraud* on Ponder, that fraud would be his own act. He cannot commit fraud *qua* administrator. He cannot give opinions on titles *qua* administrator. His powers are only to administer according to law. These do not extend to letting property go to purchase at a void sale, on a judgment *vs.* nobody, by giving an opinion that the title was good, or "that there would, he thought, be no difficulty." The most rational supposition is that he was himself deceived, as well he might be, by the perseverance of the court—the zeal of the Marshal—the energy of the executioners—the eminent authority and positiveness of all counsel except his own, and the greedy avidity of purchasers —and the universal *opinion* of the crowd, (as Ponder testifies.)

If I have laid down the law correctly—parties could not be *deceived,* because they were bound to know that law, and they had no right to act upon any such declarations. They would be estopped by the law from saying they acted upon such declarations, for they would be bound to know that they could have no effect. Coles, &c., Executors, *vs.* Bank of England, 37 Eng. C. L., 134. An *executor* who had committed forgery not estopped by that, but by gross negligence of testator. And in Davis *vs.* Bank of England, misprison of Felony in *concealing* forgery by which his own stock was sold, did not estop him from recovering the stock. 9 Eng. C. L., 452. See 1 Stra., 20.

But to return to Lord Denman's rules, the 2d question under them. "By his words or conduct *wilfully* causes another to believe in a certain state of things, and induces him to act on that belief." Or in Gregg *vs.* Wells. "Who negligently or culpably stands by and allows another to contract on the faith and understanding *of a fact* which he can contradict."

The gist of this is plaintly, *deceit, fraud.* It must be wilfully or negligently or culpably, and it must be *in a fact,* and the party must not act on his own independent knowledge. He must be induced to believe the fact. He must not believe it before or be induced by others to believe it. It must be a case where *his contradiction* of the fact, would at once induce the party not to act.

A promise, an agreement, a covenant, (though that might in some cases to avoid circuity estop the party by deed,) will not estop the party *in pais.*

1. The party must believe *the fact* and *act upon it;* upon this ground rests: The Pres. Con. of Salem *vs.* Will., 9 Wend., 148.

The party must act on the belief, Wallace *vs.* Truesdale, 6 Pick., 457. A party averred property to be that of a 3d person, to prevent a sale, but the sale went on. He was not estopped from suing for it. Welland Canal Co. *vs.* Hathaway, 8 Wendall, 486.

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243 2. When the party stating *the fact* is himself mistaken, then there is no fraud—the "wilful"—"culpable" and "negligent" are wanting, he is not estopped. Thus in Nichols *vs.* Arnold, 8 Pick., 174, a party was not estopped by declaring he was not a *creditor* of an insolvent firm, and declining to become a party to their deed of assignment under the supposition that a sale made to them in his behalf by auctioneers had been *guaranteed* when in fact it had not. On the same ground that the *parties have participated* in a common *mistake*. A party was not estopped from claiming from his co-surety his half of money recovered from the principal, though he had *testified* as a witness in behalf of his co-surety *vs.* the principal, and thus enabled him to recover the whole debt as his own. Doolittle *vs.* Dwight and another, Administrators. 2 Metcalf, 556.

3. It must be the enunciation of *fact* and not of *opinion of law*. Thus in Kimberly *vs.* Ely, 6 Pick., 451. Even accepting a dividend under a void insolvent law of Mass. did not preclude the party from recovering all the remainder of his debt in New York, though the insolvent law purported to give absolute discharge.—See opinion of Lord Denman himself in Fox *vs.* Waters, 4 Perry, 2 Davidson, 7, cited.

Polk's lessee, *vs.* Robertson, 1 Term. 463. So opinion as to the legal effect of a contract (here it is a judgment.) Bost. Hat Man. Co. vs. Massenger, 2 Pick., 223. "But the testimony was immaterial; since the confession of a party as to the legal effect of his contract cannot bind him, it surely ought not to bind others, who may be joined with him."

So Craig *vs.* Baker, Harden's Reps., 281-3-4-9. A party was consulted as to a title, and pronounced it "as good as any on the north side of Licking," yet was not estopped from setting up his own which was better, after the party consulting him had bought under that opinion.

So admission under a mis-apprehension of his legal rights do not estop. More *vs.* Hitchock, 4 Wendell, 292, 293.

The party must contract on the faith and understanding *of the fact*,—he must be induced to act on that belief. Ponder does not pretend to this. He does not say it, when he might have said it, and it was his interest to say so, *if true*. He does not say he acted on Moseley's advice or in consequence of his declarations. But says "it was supposed that the *judgment* was *legal* and had a right to sell the property."

244 The *general opinion* was that all difficulty about the property had been done away.

It is clear from this and *the bill of sale* he took, whose title he thought he was buying (Camps) not Moseley's nor Mrs. Manly's.—There was no question of fact, it was all of law, whose title was the best, or in his own words had the judgment a right to sell the property? Moseley's opinion could not affect the question, and it seems did not affect the *conduct of the party*. Unless that could be clearly shown, as Ponder might have done by his own testimony, it would be most absurd to say a party should be estopped by conduct or words which had *no effect*. The burden of proof is on Ponder to show that it affected him. Admissions have no effect unless they would produce some injury to the other party if permitted to be denied. See cases cited, 11 Hill & Cowen, notes, and Philips, 210. Estoppel of *receipter* is limited by this *test of injury*. It does not extend without the period or beyond the limits in which it would do injury to refuse the estoppel. Thus after delivery, receipter is not estopped, Johnson *vs.* Church, 12 Pick., 307. So it does not extend beyond the extent of the injury which might be effected by withholding it.—Thus though he cannot set up properly in himself to defeat the receipt, he can do it in mitigation of damages, because by delivery he would have a right to bring trespass. Burley *vs.* Hamilton, 15 Pick., 42.

5. It is not necessary to give a party notice or information of that of which he is already advised. Woodcock *vs.* Bennet, 1 Cowen, 734.

"Process bad on its face," does not always mean that the irregularity appears in the writ—it may exist in a fact *aliunde*, as the party being dead, or "tested out of term." 1 Cowen, 739.

A party who purchases under a void judgment, knowing it to be such, is not a *bona fide purchaser* in the legal sense, and he need have no notice. Jackson *vs.* Caldwell, 1 Cowen, 644. Woodcock *vs.* Bennet, 1 Cowen, 734. Wood *vs.* Calvin, 2 Hill, 567-8.

"The general rule is, that a purchaser, under a power, buys at his peril, and, however innocent, cannot acquire a title without showing a valid subsisting power."

"Lawrence was not a *bona fide* purchaser. He had full notice that the judgment had been paid, and the debtor was not in fault in omitting to tell him, what he very well knew already."

"Knowledge that another party had a claim, is enough to put the party on enquiry." He might have learned all about it by ordi- 24
nary diligence. 1 Coven, 642, Jackson *vs.* Caldwell. That interference at a sale does not amount to a consent to it. See Hearn *vs.* Rogers, 9 Barn. & Cres., 577. 17 C. Law, 452. Willoughby *vs.* Backhouse, 9 Com. Law, 821. 8 B. & C., 821. 9 Eng. C. L., 252.

Lord Coke also lays down certain "rules to make the reader more capable of the learning of estoppels." 3 Thomas' Coke, 467.

1st. Every estoppel ought to be reciprocal, that is to bind both parties.

If Moseley and Manly and wife, administrators *de bonis non*, were sued by Ponder in that capacity, for a debt *vs.* Parkhill's estate would he be estopped by this loose talk from saying *he did not buy of the administrators de bonis non*, but of Camp, and showing his bill of sale? See Welland Canal Com. *vs.* Hathaway, 8 Wend., 486.

A party dealing with a foreign Corporation by its name, is not estopped from denying its existence, and requiring strict proof and the best proof, because there is no reciprocity in such an estoppel.

2d. Every estoppel, because it concludeth a party to allege the truth, must be *certain* to every intent, and not to be taken by *argument* or *interference*.

Apply this test, there is no certainty. It is all argument, and only interference. And what is to be inferred? Even that is doubtful. It may be that Moseley thought Camp's title good, or that he would not sue. It is difficult to find what is to be inferred. There is no *allegation*.

Thirdly. Every estoppel ought to be a *precise affirmation of that* which maketh the estoppel, and not be spoken impersonally, as if it be said, *'ut dicitur, quia, etc., impersonalitas non concludit, nec legat; impersonalitas dicitur, quia sine, persona.'* Here the words are, "There would be no difficulty. He thought there would be no difficulty." Entirely impersonal, *sine persona*. It binds nobody—there is no affirmation.

Sixthly. 'Estoppel aginst estoppel doth put the matter at large.' Ponder having taken Camp's *title*, paid him the money—taken slaves from him, and taken his title, as by law directed, in valid executions, is estopped from claiming the title of administrator *de bonis non*. If Moseley's loose conduct could estop him and Manly, how much more should these grave acts estop Ponder? 2 Murphy 6, Cross *vs.* Terlington. 2 Camp., 441, Holmes *vs.* Lipscombe.

Ellenborough was about to non suit a surgeon, who sued for fees 24
because he had been called "Doctor," and signed prescriptions "M. D.," because a physician cannot sue for fees in England; but when he found defendant had paid £3 13*s.* 6*d.* into court, he thought that remitted the objection, and admited his right to sue as *surgeon*.

Eightly. Where the verity is apparent in the same record, there the adverse party shall not be estopped to take advantage of the truth; for he cannot be estopped to allege the truth, when the truth appearth of record.

Thompson, for Appellant:

We contend—

I. That the judgment of the Union Bank of Florida against Martha Ann Manly and Hiram Manly, administrators of S. Parkhill, deceased, and through which the plaintiff in error claims title, was not void, but erroneous merely.

It must be admitted that the late Superior Court of the District of Middle Florida had jurisdiction over the subject-matter of the suit, which was brought to recover a sum of money due on a single bill made and executed by the said Parkhill in his life time. See Act of Congress of May 15, 1826, Sec. 1. Thompson's Digest. 597—Appendix.

The power to hear and determine a cause is jurisdiction: it is *coram judice*, whenever a cause is presented which brings this power into action. If the plaintiff states such a case, that, on a demurrer, the court would render judgment in his favor, it is an undoubted case of jurisdiction. United States *vs.* Arredondo, 6 Peter's Rep., 709.

Tested by this rule, it cannot be doubted, that of the *subject-matter* of the suit, the Superior Court rightfully entertained jurisdiction.

But it is contended that every court must have jurisdiction over the person of the defendant, and that, without notice, actual or constructive, one can no more be deprived of his property than he can of life, limb, or liberty; and that the Superior Court had no jurisdiction over the person of the defendant, and, therefore, could acquire none over the subject-matter of the suit.

We admit that a judgment is inoperative and null, as against the

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247 person who has not had notice, either actual or constructive; but we shall contend and maintain that the defendants had notice of the institution of the suit, and submitted their persons to the jurisdiction of the court.

The suit in the Superior Court was instituted by summons *ad respondendum,* which was duly served, and the defendants apepared.

The order of pleading which the law has prescribed and settled, and which the defendant is to pursue, is laid down, as follows:

1st. To the jurisdiction of the court.
2d. To the disability of the person.
1st. Of the plaintiff.
2d. Of the defendant.
3d. To the Court or Declaration.
4th. To the writ.
1st. To the form of the writ.
1st. Matter apparent on the face of it.
2d. Matter *dehors.*
2d. To the action of the writ.
5th. To the action itself is bar thereof.

This, it is said, is the natural order of pleading, because each subsequent plea admits that there is no foundation for the former, and precludes the defendant from afterwards aviling himself of the matter, as when the defendant pleads to the person of the plaintiff, he admits the jurisdiction of the court—for it would be nugatory to plead that defence in a court which has no jurisdiction; and when the defendant pleads to the count, he admits that the plaintiff is able to sue him, and the defendant to be sued; and when the defendant pleads to the form of the writ, he admits the form of the court; and after a *plea in bar* to the action, the defendant cannot plead in *abatement,* unless for new matter arising after the commencement of the suit. 1 Chitty's Pleading, 474.

The want of jurisdiction did not appear on the face of the procedings, nor was any pleaded; but the defendants, after general imparlance, pleaded in bar of the action two pleas, viz: *non est factum* and *plene administravit,* on which issue was joined. Wherefore, we say it was not a void judgment. See Thompson *vs.* Tolmie, 2 Peter's Rep., 163.

All the cases cited by the defendants in error of void judgments, for want of jurisdiction of the person, are of the following character.

248 I. Where there has been no service of process, or any constructive notice upon the person sought to be charged by such judgment —as in Campbell *et al. vs.* Brown, 6 Howard Miss. Rep., 111—which was a case where the defendants had never been summoned, either actually or constructively.

Denning *vs.* Corwin, 11 Wend. R., 651—a partition suit, in which there was no service of process, personally or by publication.

Hollingsworth *vs.* Barbour, 4 Peters R., 472, was a proceeding against "unknown heirs," and an attempt to give notive by publication—the court decided the record was no evidence that any such heirs existed, and the decree and deed made in pursuance of it could not avail to pass any title, without evidence that there were some heirs.

3. J. J. Marshal, 105—no service of process, nor any evidence of publication, in a chancery suit; or

2. Where courts of a special and limited jurisdiction have exceeded their powers in assuming control over persons not subject to their jurisdiction.

As in Smith & Shaw, 12 Johnson's R., 257—the case of a court martial assuming jurisdiction over one not in the military service of the United States, held to be a nulity.

Thurston *vs.* Martin, 5 Mason R., 498—where the assessors taxed one without their territorial jurisdiction, held to be an excess of jurisdiction and trespass maintainable against the collector, who imprisoned the plaintiff.

Perkin *vs.* Proctor, 2 Wilson R., 382—where commissioners of bankruptcy assumed jurisdiction over one who was not a trader.

Griffith *vs.* Frazier, 3 Peter's Cond. S. C. Rep., 1—where a Court of Ordinary in South Carolina assumed jurisdiction to appoint an administrator, because of the absence of the executor who had proved the will—which was held to be a void grant.

There is, we believe and contend, no room for doubt, but that the Superior Court of the Middle District of Florida had jurisdiction, as well of the persons of the defendants, as of the subject-matter of the suit, or action, at the time of the institution of the suit, and the filing he pleas in bar, &c. &c.

Now, when was the jurisdiction *ousted;* or, rather, can a court which has rightfully and properly obtained jurisdiction of a suit, both of the person and subject-mater be *ousted* by any matter, supervenient? Can a mater of jurisdiction be pleaded as having occurred "since the comencement of the suit," or "since the last continuance?" 248 It must be answered in the negative.

However, no mater of *jurisdiction* was pleaded, *"puis darrein continuance;"* but it is urged that the fact of the revocation of the letter of administration of Mrs. Manly, set up in the plea *puis darrein,* showed that she was *civiliter mortua.*

Mrs. Manly and her husband, however, still appear in Court by attorney, pleading the fact of revocation *in bar* of the action—the plaintiff continued prosecuting—both parties were fairly before the Court, and the question was upon the effect, or conclusions of law, upon the matter pleaded. The Court decided the question:—this Court has declared erroneously, and the error has been corrected by the reversal of the judgment.

No usurpation of power, no unwarrantable assumption of jurisdiction, appears in the proceedings of the Superior Court.

In Elliot *vs.* Pierson the Supreme Court decides, that "when a Court has jurisdiction, it has a right to decide every question that arises in the cause; and whether the decision be correct or not, its judgment until reversed is regarded as binding in every other court." 1 Peter's Rep., 340.

But it is said Mrs. Manly was *civiliter mortua,* by the revocation of the grant of administration, and the judgment afterwards was a nullity. No greater effect can be given by the law to a *civil death* than to a *natural death;* and a judgment against a dead man is not void, but erroneous. Viner's Abridgement, Tit. Judgment, G. a.

And so, if after the commencement of a suit, a party plaintiff or defendant dies, before verdict or interlocutory judgment, it is an error of *fact,* which is corrected in the same court by a writ of error, *coram nobis.* 2 Tidd's Practice, 1136.

But it is clear, from an examination of the case of the Union Bank and Parkhill's administrators, 1 Florida Rep., 110, *et seq.;* that the judgment of the Superior Court was reversed for errors of law in the record, and was not declared to be a void judgment.

I may here invite the attention of the court to the case of Voorhees *vs.* Bank U. States, in which the Supreme Court of the United States go very far to support a judgment founded on constructive notice of the suit. 10 Peters, 471, 472.

And to the case of Ranahan *vs.* O'Neal, in which the Court of Appeals of Maryland fully sustain the position of the previous case cited. 6 Gill & Johns., 298.

Fraud, too, which strikes at the root of every contract and agree- 250
ment does not affect judgments. Ch. J. Marshal, in delivering the opinion of the Supreme Court in Sims & Wise *vs.* Slocum, said, 'the judgments of a Court of competent jurisdiction, although obtained by fraud, have never been considered as absolutely void, and therefore all acts performed under them are valid so far as respects third persons.' 'All the legal cosnequences which follow a judgment are, with respect to third persons, precisely the same in one obtained by fraud as if it had been obtained fairly.' 3 Cranch Rep., 300.

Courts will not declare a judgment void, unless there is a total want of jurisdiction. The policy of the law requires that some sanctity should be given to judicial proceedings—some protection afforded to those who purchase at sales by judicial process, and some definite rules established by which property thus acquired may become transmissible with security to the possessors. 10 Peters, 473. 8 Missouri Rep., 257. 6 Gill & Johns. Rep., 298.

II. It is also argued by the counsel for the defendants in error, that the execution issued on the judgment is also void because it is irregular *on its face.*

The matter of irregularity, it is argued, need not be stated in the writ to make it irregular on its face, as if, according to the practice in England and in New York, where the execution is required to be tested of some day in term, if it be tested out of term it is irregular on its face; so if it issue against one who is dead, it is irregular on its face, although the death of the defendant be not stated in it, and cited. Woodcock *vs.* Bennet, 1 Cowen Rep., 734-739.

On examination of the facts of this case, it will be found that it was a case of a judgment against two persons; one died—a year and a day elapsed after judgment before execution was sued out. It was then sued out without *scire facias.* The writ was held not void but voidable—it issued correctly against both defendants to correspond with the judgment, but could be levied only on the goods and chattels of the survivor: it was good against the survivor till set aside on his application.

At p. 738, there is a dictum of the court that an execution against one who is dead is *void,* because the dead cannot appear in court to move to set it aside for the irregularity: but the learned judge here referred to the case where the defendant was *ipso facto* dead, not to the case of a legal or constructive death. In the case at bar, the counsel for the defendants in error do not contend for

251 any other than a constructive death, and the reason does not apply; the parties being alive could have appeared and moved to quash or set aside the execution, as effectually as they subsequently appeared in this court to prosecute their writ of error to reverse the judgment.

The case of the administrators of Parkhill and the Union Bank, in 1 Florida Rep., 110, *et seq.*, was also referred to in connection with this point, but I do not understand this court in that judgment to go farther than to decide that the judgment should be reversed for error. If, however, the counsel for defendants in error be correct in their position that Manly and wife were *siviliter mortui*, as administrators, from the time of the revocation of the letters of administration, and had "no day in court," how could this court recognize them as plaintiffs in error in their suit in error here for the reversal of the judgment of the Supreme Court.

III. Having shewn that the judgment of the Superior Court in favor of the Union Bank of Florida against Parkhill's administrators was not void, though erroneous; then we contend that the other judgments and executions under which, as well as that of the Union Bank, the sale was made are not void; the execution having been isued on the same day, and on judgments rendered at the same term of the court, and on the same pleadings as the case of the Union Bank. See Record p. 19. These judgments are now irreversible from limitation of time. See the case of Voorhees *vs.* Bank United States, 10 Peters, 473, *et seq.*

IV. Again, it is urged by defendant in error, there is an irregularity in the *levy* of the writ of execution: the judgment is against Manly and wife as *administrators*—not administrators *de bonis non.* The command of the writ is to levy on the goods, &c., of S. Parkhill, in the hands of Manly and wife, administrators, and the Marshal has levied on the goods, &c., of S. Parkhill in the hands of Manly and wife, administrators *de bonis non,* and this is a patent irregularity.

We answer to this, that they represented the same right, they were the same persons claiming and having the same rights by another title. If one is sued as *executor* when he is *administrator.* and does not plead in abatement, he cannot set it up in bar of the plaintiff's action, because it is the same right and but by another name.—Granwell *vs.* Sibley, 2 Levintz, 190. Harding *vs.* Salkin, Comberbach, 220. Same case, Skinner, 365. Powers *vs.* Cook, 1 Lord Raymond, 63-4.

252 So if judgment is rendered against one as *administrator* who is *executor* with another, and a second suit is brought against both in their character as exectuors, the former judgment against one of them as administrator may be pleaded in bar of the second suit, because there was a true debt due, and a recovery had upon the right of the debt. Parker *vs.* Amys, et al., 1 Levintz, 261.

The judgment being against a proper person by the wrong name does not vitiate it—the law looks to the right, and it is the same.—Therefore, a judgment and execution against A *executor* of B, when he is *administrator* of B, may be levied on the goods, &c., of B in the hands of A, administrator, to be administered, and thus it is shewn there is no irregularity, patent or otherwise.

The case of Griffith *vs.* Frazier, 3 Peters Cond. S. C. Rep., 1, was cited by the defendants' counsel to support their position: but it will be seen, on examination, to be wholly inapplicable. That was a case where an executor had proved the will of his testator, and had obtained letters testamentary thereon in the proper jurisdiction in South Carolina, having removed from the State, the Ordinary afterwards granted administration *durantee absentia* to another. A *scire facias* on a judgment recovered against the testator in his life time was sued out against the administrator *durante absentia,* and execution obtained, levied on the lands of the testator, and a sale thereunder. It was held by the Supreme Court that letters *durante obsentia* could not legally issue after probate and grant of letters testamentary, and that therefore the administrator was not the representative of the deceased, but that *another person* was the representative who was the executor.

In the case at bar, the persons are the same who hold the right of represenation; they are called by the wrong title, but there is no question of their identity.

V. But the counsel for defendants in error assert there is another iregularity. The judgment and execution was against the goods, &c., of S. Parkhill, in the hands of Manly and wife, administrators, &c., and it was levied of the goods, &c., in the hands of Manly and wife and Mosely, administrators.

If an action at law be brought aginst one of two or more executors or administrators, unless the non-joinder of the others be pleaded in abatement, the plaintiff will be entitled to his judgment against the one sued for debt, and if he proves assets in the hands of the defendant and his co-executors or co-administrators, he will be entitled

to his judgment that the debt be levied and made of those assets.— 2
This cannot be denied.

This, then, is a sufficient answer to this alleged patent irregularity. The law will not give a plaintiff a judgment which cannot be enforced.

Again, if suit be brought against several co-executors or co-administrators, and upon the isue of *plene administravit,* assets be found in the hands of one only, the plaintiff can take judgment only against him whom he proves to have assets; if then, it would be irregular to levy on those assets in the hands of another of the executors, or in the joint possession of two or more it would always be in the power of several co-executors or administrators to defeat the action of judgment creditors by shifting the assets from one to another, as the circumstances of their case might require.

The slaves so levied on by the Marshal were in possesson of Manly and wife as well as Moseley, and were of the goods of Samuel Parkhill, deceased, the debtor of the plaintiff. This possession is asserted in the declaration filed in the present suit by the defendants in error, and cannot be avoided or denied.

I have thus, I think, met and answered satisfactorily all the positions of the counsel for the defendants in error, so fas as the validity of the judgments and subsequent proceedings thereon are concerned, singly and in the order presented and urged upon the court; if I am not mistaken in the conclusion I have arrived at, that not one alone is tenable, it certainly follows that they derive no additional force taken together.

If, then, the judgments of the Superior Court were erroneous, and not void, and the execution, the process prescribed by law, it follows that the authorities referred to by my colleague, Mr. Hagner, that the judgment and execution are good and valid until reversed, and that all proceedings had thereon are good—that is, the officer is protected in executing the writ, and the purchaser is protected in the possession and enjoyment of the property acquired at the sale under said process. Upon reversal of an erroneous judgment, which has been executed, the defendant is entitled to restitution of the money only.

Question of Estoppel.—I come now to this question, in which we say, that even if we are mistaken in our view of the validity of our title under the judgments and executions, yet these parties are *estopped* by their acts, declarations and conduct from setting up a title adversary to us.

For a full view of the law upon this point, I need only refer to the 25
very able argument of my colleague, Mr. Hagner, a brief of which is in the possession of the court. With this general reference to the authorities it will be sufficient for me here to asert, that from the decision of Lord Denman in Pickard *vs.* Sears, 33 Eng. Com. Law R. 115, 117, of the same Judge, in Gregg *vs.* Wells, in 37 Eng. Com. Law R., 54, and the Supreme Court of New York in Dezell *vs.* Odell, 3 Hill's Rep., 217, as well as the other authorities, it seems clear that the law of *estoppel in pais* may be laid down thus:

1. Words or conduct causing another to believe the existence of a certain state of things.
2. In which the person speaking or acting did so wilfully, culpably or negligently.
3. By which such other person may be induced to act so as to change his own previous position.

Under the first head, let us refer to the evidence in the record to ascertain what were the words, and what the conduct of Moseley in reference to the subpect matter of dispute.

1. He sent a slave to Ponder to tell him to purchase her assigning his own inability as a reason for not making the purchase himself.
2. At the sale he encouraged Ponder to buy, saying there would be no difficulty about the property, thus giving confirmation as to the verity of general impressions, and removing all trace of doubt in relation thereto.
3. His active participation in the sale by the Marshal, arranging the slaves into lots and parcels—insisting on the division of families in order to secure a better price, recomending the slaves and speaking of their good qualities.
4. Encouraging others to bid; and,
5. Offering the highest evidence of the sincerity of his acts and declarations, and his belief therein, by bidding for himself and his friend and counsel, W. H. Brockenbrough, Esq.

These are among the most prominent of his acts and conduct, and who is there who can say that these acts and declarations, &c., did not induce the belief in all who saw and heard, that, by the sale, a full, complete, and valid title would pass, free from all objection on the part of Moseley? Could any one suppose that Moseley did not believe in such a state of things?—and was it possible for a person there attending and purchasing to believe, or even to think

that from Moseley he must expect a harrassing and vexatious litigation, for the very property which he (Moseley) was urging them to buy? Clearly not. Moseley, therefore, did, by his acts and conduct, induce a "belief of the existence of a certain state of things," which the law of "good words" will now interfere and estop him to deny.

Under the second head, we ask, was not this conduct wilful, culpable or negligent, for either is sufficient? To answer this, it is sufficient to look at the testimony, and see if he did not then know as much in relation to the property as he did afterwards, and now.

Can it be pretended he did not then know that he was one of the administrators *de bonis non* of S. Parkhill—that the property was taken from the possession of Mr. Manly and wife and himself, by the Marshal, on an execution in favor of the Union Bank of Florida, against Mr. and Mrs. Manly, as administrators of said estate, as well as other executions, in favor of other plaintiff?—and did he not know the proceeds of the sale would be applied to the satisfaction of the executions? Did he not know the state of pleadings under which said judgments were obtained? What does he now allege?—that the judgment execution, levy and sale, are void, and no right or title passed thereby to the purchaser. Are his acts, conduct, or declaration at the sale, consistent with the claims now set up?

Knowing all the facts and circumstances, and his present claims of right and title, he was bound to declare them to those strangers whom he saw about to purchase. *Silence* under such a state of things would be inexcusable—*a multo fortiori*—the active participation in the sale, and his encouragement to the persons present to bid for and purchase the property. His encouragement of, and advice to Ponder, to purchase, was personal and direct—and can it be said his acts, &c., were not wilful and culpable?

Lastly. Can it be denied that Ponder's position is changed?—has he not parted with his money?

Is it possible to asert, upon the evidence in this record, that Ponder parted with his money on any other ground than for the purchase of property, to which his title would be good? We say, without the fear of contradication, that if the title be bought proves defective, he looses his money, the consideration paid for it—has no claim for indemnity upon the officer, none upon the plaintiff in execution
256 —he is utterly remediless, unless he is protected in the possession and enjoyment of the property.

Here, then, is a concurrence of every circumstance necessary to constitute an estoppel. The court will not go beyond the record to ascertain what were the moving causes of Ponder's action, when sufficient reasons appear in the proofs. It is said Ponder came to the sale with his own opinion as to the existing state of things.—No evidence of it. Ponder states there was a general opinion, but he does not say he participated in it. He does not seem to have acted on it, or the opinion of counsel; but he asks Moseley for information, and he confirms the general opinion, and advises him to purchase. There seems to have been a doubt upon Ponder's mind—a doubt sufficient to put him on inquiry, and he applies to Moseley, as a representative of Parkhill's estate, as one in authority, and likely to know what was the truth; and it is evident, from Ponder's action, that Moseley's declaration and advice influenced him, and it is from Moseley now that he finds his title assailed. The conduct of Ponder was that of a careful and cautious man, anxious to avoid litigation. Moseley advised the purchase—did all the acts specified in the evidence; and Manly was present during the whole period of the sale, and by his silence, tacitly acquiesced in all that his co-administrator said and did.

On the part, however, of the defendants in error it is alleged that the purchasers should not only have given Moseley and Manly notice that they purchased on the faith of their acts and declarations, but should have demanded their guaranty and bill of sale.

With due reference to my learned brethren, it is clear that to maintain such a principle is to deny, *in toto,* the doctrine of estoppels *in pais;* for if Moseley and Manly had given their bill of sale, then they would be estopped *by deed,* which is another kind of estoppel.

They contend that the two titles which are set up are inconsistent, to wit: 1. Camp's bill of sale; and 2, the estoppel of plaintiffs.

Now this argument would apply to every conceivable case, and would forever prevent the application of an estoppel *in pais.* If I buy a slave from B, and A who is the real owner, stands by, hears the bargain, sees the consummation, and says nothing, is it not true that I buy B's title, and get A's by his silence? And when I rely on A's title, do I repudiate that which I have from B?

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Lord Denman, in the case of Pickard *vs.* Sears, before cited, says 257
that in such a case the real owner may "part with his interest in the property by verbal gift or sale, without any of those formalities that throw obstacles in the way of legal evidence."

Again, it is urged that to constitute an estoppel it must not only appear that the party sought to be estopped made the admission, but the other party acted on it alone.

If this is true, would not the party engaged in a treaty for the purchase from A when B is present, and assures the purchaser of A's title, in every case afford evidence against himself, that he acted upon the faith that he was buying A's title and not B's from the fact that he took A's title, and did not ask for B's? If the *quo animo* of the purchaser was the thing to determine when a party shall be estopped by his admission; and to be thus tested, then there could be no such thing as an estoppel, because the circumstances would always be against the purchaser, that he relied on the title from whom he purchases:—if he did not, it might be asked why not abandon the treaty with that man, and buy the other's title.

The true question therefore is: Did the party make an admission or statement of the existing state of things upon which the other party might have acted—and it is not submitted to the jury to weigh possibilities as to whether he did act on that admission, or whether he relied wholly on the title of the vendor—or whether he would have completed the purchase without the admission?

It is also urged that to constitute the estoppel, the party sought to be charged by it must not be himself deceived, but must know his own rights.

To support this, Moore & Hitchock, 4 Wendell, 292, is cited, but on examination it will be found that the case cited presented not one of the features of an estoppel; it was a question whether a party could explain an ordinary admission made in an attempt to settle and adjust a controversy. It was made after the transaction had occurred—no action was had or could have been had on it prejudicial to the other party, whose position was not in fact altered. But the case of Coles *vs.* The Bank of England, in 37 Eng. Com. Law Rep., 134, is one where the party estopped the plaintiff's testatrix, was herself deceived, most grossly deceived, yet the plea was not recognized as sufficient.

So, also, in Hamer, et al., *vs.* Johnson, et al., 1 Smedes & Marshal Ch. Rep., 563, the party was estopped by his admission that the 258
notes in that case were good, valid and binding notes—the court holding he was bound to make them so; and the plea which he set up that he was himself deceived, was not allowed to have any force. See also 1 Story's Equity, 202-3.

It is also argued that loose expressions will not amount to any estoppel, and the following cases are cited: Jordan *vs.* Antrey, 10 Ala. Rep., 278. Tuffs & Hays, 5 N. Hamp., 452. Jackson *vs.* Anderson, 5 Wend., 480.

While we freely admit that loose and general expressions not made to the party, and not calculated to induce him to believe in a state of things, so as to produce a change of his previous position, will not amount to an estoppel, yet we contend such is not the case at bar. The authorities cited shew that loose and general expressions upon which the party could not have acted do not amount to estoppels, and are not applicable.

It is also urged by the counsel for the defendant in error that one of several cannot estop those interested with him, unless there is a joint interest; that a community of interest is sufficient—and cities Greenleaf on Ev., 209-211.

We admit the position but deny its application here;—if these parties were tenants in common, then the act of one would not bind the others, because they hold by unity of possession, not of property; but co-executors and co-administrators have a *joint* interest, and the act of one in selling or disposing of the estate in their hands, &c., is the act of all—the property passes, for they have a joint and entire interest. See this subject fully discussed in 1 Williams on Executors, p. 591, of the Phil. edition of 1832. Bacon's Abr. tit. Executors, (D) 1.

It is said that the admission of one co-executor will not take a case out of the statute of limitatons; this is not stated broad enough—the admission of *all* cannot have that effect. Thomp. *vs.* Peter, 12 Wheaton Rep., 565.

The true doctrine is that one of several co-executors or administrators or trustees cannot by his admission charge the others *personally* as for a *devastavit*: and it is this which is intended, when it is said one trustee, executor, &c., cannot bind his colleagues. See Nation *vs.* Tozer, 1 Crompton, Meson & R., 172.

The case of Fox *vs.* Walter, cited from 4 Perry and D. 9, has no application, for it is manifest from the evidence that Moseley did act

259 *qua* administrator: he was not, in the eloquent description of the learned counsel, a discredited representative, impotent to act. His suggestions and directions as to the sale of the property so as to produce the most money were implicitly obeyed, even against the dictates of feeling and common humanity in the separation of families. This shows that he assumed to act as one having a deep interest: no stranger would have so acted, or been permitted to make requisitions upon the officer so repugnant to feeling, they were yielded to, no doubt, because they were supposed to be prompted by a stern sense of duty.

In Cross *vs.* Terlington, 2 Murphy Rep., 8, one was held bound as administrator by his acts before his appointment.

Another objection is urged against the estoppel, because it is said Moseley as administrator had not power to dispose of the estate of his intestate by any other means than a public sale, nor could he sell the slave till all the other estate was disposed of, and only to pay debts; and cited Thompson's Digest, 202.

The answer to this is, that the statute is *directory* merely—it points out how the executor, &c., may perform his duty—it contains no negative words—it does not declare the sale made otherwise to be null and void. It does not conflict with the common law, as to the power of executors or administrators, but points out his duty.—If he departs from the instructions given, his acts are not invalid; but if injury results, he is liable as for a *devastavit*.

The case of Ventris *vs.* Smith, in 10 Peters, R., 173, cited by the counsel for defendants in error, was decided on the local law of Alabama, which differs from our statute, and from the common law.—In Alabama, the slaves may not be sold without an order of court—the statute is negative and peremptory, and if not followed, no title passes.

The excuse set up for Moseley, that he yielded to superior force alone, is not sustained by the record—he did not speak or act like one coerced into measures. It is said he had exhausted all his lawful remedies, and nothing was left him but to oppose by force of arms, which he would not attempt.

An error—his legal remedy was not exhausted, if it is true that he was a stranger to the proceedings, he could have interposed his claim under the statute, by tendering his affidavit and bond. The injunction applied for may have been refused on the ground that if he had any remedy, it was complete at law upon his own showing.

260 The only point remaining to be disposed of is, that the property in question has been mortgaged by the intestate Samuel Parkhill in his life time, and, therefore, was not liable to seizure and sale, under an execution at law.

It will be seen from the record that the slaves were mortgaged to the Union Bank, the plaintiffs in one of the executions under which they were sold, to secure the subscriptions of Samuel Parkhill to the capital stock of said Bank; and that the obligation on which the judgment and execution of the Bank was for a loan made under the 29th section of the charter of the Bank, on a pledge of the stock.

The Court of Appeals of the Florida Territory decided in the case of Kissam *et al., vs.* Chapman *et al.*, that the Band had a lien on the property mortgaged for the loan, on the pledge of stock, under the 29th section of the charter, as well as for the subscriptions to the capital by the stockholder, which gives the right to the Bank to pursue the property for this very debt.

Whether the Bank does or does not perform its duty to the Territory, in the application of the funds to the extinguishment of the Territorial bonds, is not for these parties to inquire. If the Bank does not faithfully perform its trust, it is for the Territory, or the holder of the Territorial bonds, to complain. The Bank, as mortgagee, is the legal owner; and these parties—that is, the representatives of Parkhill's estate—cannot deny the right or title of a purchaser of property, under an execution in which they are defendants.

If the Bank has taken its own property, or the property of a third party, a stranger, to pay a debt of their intestate, it does not lie on the mouths of these mortgagors to complain of it.

LANCASTER, J., delivered the following opinion:

This case comes before this court by appeal from Leon Circuit Court. It is an action of detinue brought by the administrators *de bonis non* on the estate of Samuel Parkhill, deceased, to recover from the defendant, William G. Ponder, certain negro slaves alleged to belong to the plaintiffs as such administrators, and to be detained by the defendant, Ponder. The declaration contains two counts. The first declares upon a delivery of the slaves to the defendants by the plaintiffs, to be re-delivered to them, when he, the defendant,

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should be thereto requested. The second count declares, upon a 261
casual loss of the slaves by the plainitffs, and that said slaves afterwards came to the possession of the defendant, Ponder, by finding; and that he, well knowing the said slaves to be the property of the plaintiffs as administrators, &c., aforesaid, although often requested so to do, hath not delivered them to said plaintiffs, as administrators, &c., as aforesaid, and still detains the same.

To this declaration, the defendant pleaded—1st. *Non detinet.* 2d. That said slaves sued for, or any of them, were not the property of the plaintiffs, as in their declaration alleged. 3d. That the plaintiffs were not lawfully possessed of the negro slaves mentioned in the second count in their declaration. Upon all of which pleas, issues were joined. Upon the trial of this cause, the plaintiffs among other things offered in evidence the revocation of letters of administration to Martha Ann Manly, late Martha Ann Parkhill, on the estate of Samuel Parkhill, deceased; to the introduction whereof the defendant by his counsel objected—which objection was overruled by the court, the testimony admitted, and thereupon the defendant by his counsel excepted. The plaintiffs also offered in evidence sundry mortgages executed by Samuel Parkhill in his life time to the Union Bank of Florida, (nine in number,) to secure his shares of stock in said bank, with a view of proving that the slaves in suit were embraced in said mortgage, &c., &c. To the introduction of which evidence the defendant by his counsel objected, but the court overruled the objection, and allowed the testimony to be given in evidence before the jury—to which ruling the defendant by his counsel excepted; also, a bill in Chancery of W. D. Moseley, one of the plaintiffs in this suit, praying an injunction, &c., to restrain the sale of the negroes belonging to the estate of S. Parkhill, deceased—which injunction was denied by the Judge of the Superior Court, to whom it was presented to be allowed. To the admission of which in evidence the defendant by his counsel objected, but the court overruled the objection, and allowed said bill to be read in evidence to the jury—to which decision of the court, the defendant by his counsel excepted. The proof on both sides having been given in evidence, and the cause fully argued by counsel on behalf of each of the parties, the court gave to the jury eight several instructions. And the counsel for defendant moved the court to give sundry instructions, numbered from one to fourteen, inclusive—all of which were refused by the court to be 26
given, but instead of the tenth instruction asked by the defendant, gave an additional instruction—all of which said instructions given or refused by the court are specifically set forth in the record. To all which said several rulings, decisions, and judgments of the court, on the trial of this cause, and to the instructions given and the instructions refused to be given to the jury, the defendant excepted, and prayed his exceptions might be signed, sealed, and enrolled and made part of the record of this case, which was done.

The plaintiffs proved that their intestate, S. Parkhill, deceased, died seized and possessed of the slaves for which this suit was brought, which continued to be the property of his estate, up to the time of the seizure by the Marshal of the Middle District of Florida, of which mention will be hereafter made. It further appeared in evidence, introduced by the plaintiffs, that, on the 20th of March, 1845, the said Marshal levied on the slaves in this suit depending, as well as other slaves belonging to the estate of S. Parkhill, deceased, by virtue of an execution, or writ of *fieri facias*, issued from the Clerk's Office of the Leon Superior Court, wherein the Union Bank of Florida was plaintiff, and Martha Ann Manly, late Parkhill, and Hiram Manly, in right of his wife said Martha Ann, administrators of Samuel Parkhill, deceased, were defendants; which said execution was issued by virtue of a judgment rendered in the Superior Court for Leon county aforesaid, wherein the said Union Bank of Florida was plaintiff, and the administrators were defendants, and which judgment was in favor of the plaintiff. It further appeared, that by virtue of said levy by the Marshal under the execution aforesaid, and after having duly advertised the same, the said Marshal, on the first Monday in May, 1845, proceeded to sell the said slaves in this suit depending at public sale, to the highest bidder for ready money—at which said sale the said defendant, William G. Ponder, became the highest bidder, and bought and paid for the said negroes. Upon which title, supported by an alleged estoppel *in paris*, the defendant placed his defence.

The plaintiffs contend that the aforesaid judgment of the Superior Court, rendered in favor of the Union Bank of Florida aginst the said Martha Ann Manly late Parkhill, and Hiram Manly in right of his wife said Martha Ann, administrator of Samuel Parkhill deceased, as well also as the execution of writ of *fieri facias* issued thereon, and upon which execution or writ of *fieri facias*, the levy and sale of the negroes was had, which said negroes are the subjects of con-

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263 troversy in this suit, were and are null and void. And further that there are or were no acts or things done by the said plaintiffs which can or ought to amount to an *estoppel in pais,* so as to conclude them from having and maintaining this suit.

Upon these positions of the parties, the first instruction given by the court, is in the following words, to wit:

1. The judgment and execution under which the slaves were sold are wholly void, and gave no authority, and no right of the property passed by the sale.

This instruction was excepted to by the defendant and it now devolves on this court to decide upon its propriety.

Whether a judgment be absolutely or wholly void depends upon the jurisdiction of the court in which it is rendered; this again is divided into jurisdiction of the subject matter of the suit, and of the person of the defendant.

The suit in which the judgment referred to was obtained, was instituted in the Supreme Court of the Middle District of the Territory of Florida, held in and for the county of Leon in said Territory, upon a bond executed by Samuel Parkhill in his life time, to or in favor of the Union Bank of Florida. The Superior Court was organized and jurisdiction conferred upon it by virtue of saundry acts of Congress. The act approved May 15, 1826 entitled "An Act to amend the several acts for the establishment of Terriorial Government in Florida," contains in the first section thereof the following provisions: "That the Superior Courts of the Territory of Florida within their respective districts shall have and exercise original jurisdiction in all civil cases in law or in equity, whether arsing under the laws of the said Territory, or otherwise, where the sum in controversy shall amount to one hundred dollars, and shall have original and exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, whether such seizures be made on land or water, and all suits for penalties or for feiture incurred under the laws of the United States, and original but not exclusive jurisdiction of all suits in which the United States shall be a party, whatever may be the amount in controversy in such causes and suits, and shall have and exercise appellate jurisdiction in all civil causes originating in the inferior courts of said Territory, whatever may be the amount in controversy; and shall have and exercise original and exclusive jurisdiction of all crimes
264 and offences committed against the laws of said Territory, where the punishment shall be death; and original and appellate jurisdiction of all other crimes and offences committed against the laws of the said Territory; and original and exclusive jurisdiction of all crimes and offences which shall be cognizable under the authority of the United States, committed within the respective districts of the said Superior Courts, or upon the high seas."

The second section of the same act gave power to the Superior Courts in term, and the judges thereof in vacation, to issue writs of *habeas corpus,* of error, of *certiorari,* of *mandamus,* of prohibiton, of *scire facias,* and of *quo warranto,* according to the principals and rules of law. See Thompson's Dig., 597.

It may, perhaps, be safely assumed, that no court in the United States, or in any State in the Union, either now or in time past, is or was invested by law with a more general original jurisdiction than was by the act of Congress in the sections before recited and referred to, given to that court. It was emphatically a court of general jurisdiction, and by the first clause of the first section recited above, had jurisdiction of the subject matter of the suit between the Union Bank of Florida and the administrators of Samuel Parkhill, deceased.

But to perfect the jurisdiction of a court of general jurisdiction, it is necessary to have jurisdiction of the person of the defendant in the action. That is to say, he must have actual or constructive notice of the institution of the suit by which an opportunity is or may be afforded him of making defence, if he should desire so to do. In the case of the Union Bank of Florida against Parkhill's administrators, the suit was commenced by summons *ad respondendum,* against said administrators, the mode directed by the laws of Florida for instituting suits in the Courts of the Territory. See Duval's Compilation, p. 90, Sec. 4. The process was regularly returned by the Marshal duly executed, and the defendants, the said administrators of the said Samuel Parkhill, deceased, apepared in court, and pleaded to the action, the pleas of *non est factum* and *plene administravit.* These pleas were pleas in bar. It is laid down in Bacon's Abridgement. Title Pleas and Pleading, letter (A.) "that the order of pleading is 1. To the jurisdiction of the court. 2. To the person of the plaintiff, and next of the defndant. 3. To the count or declaration. 4. To the writ. 5. To the action of the writ. 6. To the action itself in bar thereof." The author then adds "this has 265 been settled as the most natural order of pleading, because by this order each subsequent plea admits the former; as where the defendant pleads to the person of the plaintiff he admits the jurisdiction of the court, for it would be nugatory to plead anything in that court that has no jurisdiction in the case." When therefore he pleads in bar of the action he admits the action of the writ—the writ—the count—the parties—and the jurisdiction of the court.—The pleas in that action were pleas in bar of the action, and therefore according to the order of pleading before mentioned (which order is substantially recognized by all the legal writers who have treated on the subject of pleading at common law) all the antecedent steps were admitted by the defendants to have been lgally or aptly taken. But the defendants having appeared in court and pleaded to the action thereby admitted legal notice of the institution of the suit as well also as the jurisdiction of the court, not only of the parties to the action, but also of the subject matter of the suit. On the two pleas in bar before mentioned issues were joined by the plaintiff. At that time the jurisdiction of the court in that cause, not only existed in contemplation of law, but by the steps taken, had acquired a practical application of the parties to the action. Subsequently the defendants pleaded *puris darrien continuance,* a revocation of their letters of administration on the estate of Samuel Parkhill, deceased, to which plea the plaintiff demurred. Demurrer was sustained. Defendants then amended their plea *puis darrien continuance,* the plaintiff filed a replication. The defendants rejoined, and plaintiff demurred, which demurrer was sustained and judgment as aforesaid given for the plaintiff. Upon which judgment execution as aforesaid issued, went into the hands of the Marshal, was levied and negroes sold in the manner herein before stated. After the sale a writ of error was sued out, by the defendants against the plaintiff returnable to the Supreme Court of the State of Florida, upon the hearing whereof it was decided by the said court that "errors were well assigned" and "the judgment was reversed." See Parkhill's Administrators *vs.* Union Bank of Florida. 1 Flo. R., 110 to 133.

The defendant in this case (the appellant in this Court,) claims title to the negroes in controversy, under and by virtue of a purchase made by him at a public sale of the Marshal of the Middle District of Florida, who levied, advertised regularly, and so sold, under and by virtue of an execution issued from the Clerk's office 266 of the Superior Court in and for Leon County, upon a judgment rendered by said Superior Court, at a time when said judgment was unreversed and in full force. But which judgment was afterwards reversed by the Supreme Court of the State of Florida, not because the Superior Court had not jurisdiction in the case, both of the subject-matter and of the parties, but because of errors apparent in the proceedings in the court below. Many instances were cited in argument, which showed the courts had considered and declared judgments void for want of jurisdiction of the person of the defendant. As where the defendant had never been summoned actually or constructively. Campbell, et al., *vs.* Brown, 6 How. Miss. R., 111. No service of process personally or by publication. Denning *vs.* Corwin, 11 Wend. Rep., 651. An atempt at service by publication against "unknown heirs,"—not evidence of the existence of *heirs,* and decree and deed in pursuance thereof, could not pass title without such evidence. Hollingsworth *vs.* Barbour, 4 Peter's Rep., 472.

So also in cases where courts of special or limited jurisdiction, have exceeded their powers by atempting to assume where they have not jurisdiction over the person. Thus a Court Martial assumes jurisdiction where the party was not liable to Martial law, held void. Smith *vs.* Shaw, 12 John. R., 157.

In a case of assessment of taxes, if the person taxed or the subject-matter of taxation, be not within the authority of the officers who make the assessment, all subsequent proceedings by mere ministerial officers under a warrant to enforce the tax are deemed utterly void, the original assessment being *coram non judice.* Thurston *vs.* Martin, 5 Mason R., 501. See also cases there cited.

Upon a commission of bankruptcy sued out against a person not a *trader,* (a class of persons over whom, under certain circumstances commission may issue) it was held the commission of bankruptcy was void, the jurisdiction being confirmed to particular persons and cases. And the court said, "Where courts of justice assume a jurisdiction which they have not, an action of trespass lies against the officer who executes process, because the whole proceeding was *coram non judice.*" 2 Wilson R., 384. An application was made for letters of administration during the absence of the executor who had duly proved the will of the testator, and qualified as executor thereto, which was granted by the Court of Ordinary in the State of South Carolina. This case going by writ of error to the Su-

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267 preme Court of the U. S., the court say, (Chief Justice Marshal delivering the opinion) "In its very nature the appointment of an administrator, during the absence of an executor under no disability is essentially nothing more than the appointment of an agent for that executor. This the ordinary has no power to do. The executor alone can appoint his agents. If the ordinary had *no jurisdiction* in the case, then the grant of administration is void *ab initio*, and all the acts of the grantee are void." Griffith *vs.* Frazier, 3 Peter's Con. R. S. C., 11-12.

These cases and many others not deemed necessary to be referred to, shew that to authorize the assertion, that a judgment is void, it must have emanated from a court of limited jurisdiction, not acting within its legitimate prerogative, or in a court of general jurisdiction where the parties are not actually, or by legal construction before the court and subject to its jurisdiction.

The case referred to in the instructions under consideration was before a court of general jurisdiction. The parties were before the court. Pleas in bar o fthe action and*puis darrien continuance* were filed. Upon the whole case judgment was given by the court for the plaintiff which was subsequently reversed for error. Was this judgment void or voidable?

It is laid down in Elliot, *et al., vs.* Piersol, *et al.*, 1 Peter's R., 340, and re-asserted in 2 Peters, 169, "when a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether this decision be correct or otherwise, its judgment until reversed is regarded as binding in every other court."

So in the case of Voorhees *vs.* the Bank of the United States, 10 Peter's 474-5, the court say: "the line which separates error in judgment from the usurpation of power, is very definite, and is precisely that which denotes the cases where a judgment or decree is reversable only by an Appellate Court or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated or purporting to have been so. In the one case it is a record importing absolute verity; in the other mere waste paper."

The foregoing authorities as well as many others not supposed necessary to be referred to, clearly show that judgments of courts of general or competent jurisdiction, are not considered under any circumstances as mere nullities, but as records importing absolute verity and of binding efficacy, until reversed by a competent appel-
268 late tribunal. They are voidable: not void. The Supreme Court of Florida decided in the case of Parkhill's Administrators *vs.* the Union Bank of Florida, the judgment of the court below was erroneous. It did not decide it was void.

While then the judgment of the Superior Court which has already been shown to have been a court of general and complete jurisdiction remained of record, and unreversed, importing *per se* absolute verity; and possessing by virtue of the authority of the court in which it was rendered, a binding efficacy, an execution issued thereon, and was placed in the hands of the proper officer of the court, who levied the same on the negroes in controversy in this suit, being the property of the estate of Samuel Parkhill, deceased, against whose representation that judgment was rendered and after having duly advertised the sale thereof proceded on the designated day to offer said negroes for sale at public outcry to the highest bidder. At which sale the defendant in this action below, Wm. G. Ponder, being the highest bidder became the purchaser and paid for and obtained the delivery to him of the said negroes. This then being a case of a purchase under an execution issued in conformity to the statute in such case provided, under a judgment rendered by a court of competent jurisdiction, and when execution issued of binding efficacy, it is sufficient to give the purchaser a good title. Armstrong *vs.* Jackson, 1 Blackford, 210.

The judgment of the court, the execution and the bill of sale of the Marshal, were all in evidence in this case, and this was all the defendant was required to shew. Lessee of Cooper *vs.* Galbraith, 3 Wash. C. C. R., 550, and cases there cited. Also Simms and Wise *vs.* Slacum, 3 Cranch, 300. In which last issue C. J. Marshal says, "the judgments of a court of competent jurisdiction (although obtained by fraud) have never been considered as absolutely void, and therefore all acts performed under them are *valid* so far as respects *third persons.*"

The plaintiff in this action in the court below proved that there were nine other executions issued from the same clerk's office on judgments rendered by the same Superior Court, at the same term, and on the same state of pleadings as in the case of the Union Bank of Florida against Manly and wife Administrators of S. Parkhill, in favor of other plaintiffs which judgments have never been appealed from, or in any wise reversed, and which are now irreversible because by limitation no appeal or writ of error can be now obtained,—and under which other executions a levy and sale of the 269
negroes in this controversy, were also had and made at the same time and place. In the case of Voorhees *vs.* the Bank of the United States, 10 Peter's R., 475, the court state the doctrine and say "there can be no middle character assigned to judicial proceedings, which are irreversible for error. Such is their effect between the parties to the suit, and such are the immunities which the law affords to a plaintiff who has obtained an erroneous judgment or execution. It would be a well merited reproach to our jurisprudence if an innocent purchaser no party to the suit, who had paid his money on the faith of an order of court, should not have the same protection under an erroneous proceeding as the party who derived the benefit accruing from it. A purchaser under judicial process, pays the plaintiff his demand on the property sold; to the extent of the purchase money he discharges the defendant from his abjudged obligation. Time has given an inviolable sanctity to every act of the court preceding the sale, which precludes the defendant from controverting the absolute right of the plaintiff to the full benefit of his judgment, and it shall not be permitted, that the purchaser shall be answerable for defects in the record, from the consequence of which the plaintiff is absolved. Such flagrant injustice is imputible neither to the common or statute law of the land. If a judgment is reversed for error, it is a settled principle of the common law coeval with its existence, that the defendant shall have restitution only of the money. The purchaser shall hold the property sold, and there are a few, if any states in the Union who have not consecrated this principle by statute."

It was urged in argument in this case, that the writs of execution were illegally levied. The judgments being against Manly and wife, administrators, and not against them and Moseley, administrators *de bonis non* of S. Parkhill, deceased.

The executions were commanded to be levied on the goods, &c., of Samuel Parkhill, deceased, in the hands of Manly and wife, administrators, &c. That the goods were the goods of S. Parkhill, deceased, and in their hands, is averred in both counts of the declaration: it is true they allege them to have been the goods, &c., of S. Parkhill, deceased, and to have been possessed by them together with William D. Moseley, the other plaintiff in this suit, as administrators *de bonis non.* Now the judgment was against them as administrators, and the execution went against them as such, to be
270 levied of the goods, &c., of their intestate, by reason of his indebtedness; the execution was levied on his property, and went to pay his debt, and *pro tanto* to relieve his legal representatives. If one is sued as executor, when he is administrator, it must be pleaded in abatement—he cannot set it up in bar, because it is the same right, and but by another name. Granwell *vs.* Sibley, 2 Lev., 190. Harding *vs.* Salkin, Comb., 220. Powers *vs.* Cook, 1 Lord Raymond, 634.

If debt is brought against two as executors, they plead judgment against one of them as administrator. This is good to bar, because there was a true debt due, and a recovery upon the right of the debt. Parker *vs.* Amys, 1 Lev., 261. So the administrators *de bonis non* in this case might plead a former recovery against some of them as administrators, and a payment by one as administrator would be good in bar to prevent a recovery against the whole as administrators *de bonis non.*

The court are aware there is a conflict of authorities on this point. In the recent case of Taylor and others *vs.* Savage, 1 How. S. C. R., 282, the court say, (Chief Justice Taney delivering the opinion,) "The decree in the Circuit Court is against George M. Savage, executor of the last will and testament of Samuel Savage, deceased. There was no other party respondent in the District Court, and the decree was passed against him in his representative character. Before the appeal was prayed on either side he had ceased to be the representative of the estate of Samuel Savage, and had no control over it, nor any right to interfere with it, by prosecuting or appearing to an appeal, or in any other manner. By his removal from the office of executor, he was as completely separated from the business of the estate as if he had been dead, and had no right to appeal in or be a party in this or any other court, to a suit which the law confided to the representative of the deceased. No further proceedings, therefore, could be had in the District Court until Benham, the administrator *de bonis non*, was made a party." It further appeared in this case by affidavit, that after appeal granted, and the record was made out and sent up, (for no notice was taken of it on the record,) execution had issued in favor of the appellant. The court say, "In this view of the subject, it follows that the execution issued on the decree was unauthorized and void, and no right of property will pass by a sale under it, if one should be made by the Marshal."

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In the case of Jewitt vs. Jewitt, 5 Mass. R., 275, Chief Justice Parsons says, "that it is a good plea in bar against an administrator, that since the commencement of the action against him, he has been removed from office by the Judge of Probates." "If the matter of the plea be good, it shows that the plaintiff has no cause of action against the defendant, either on this or other writ. It is, therefore, properly pleadable in bar."

I have not been able to perceive the precise analogy of the last case cited to the present one, although by the revocation of letters of administration to Mrs. Manly and her husband on the estate of S. Parkhill deceased, if letters of administration *de bonis non,* on the estate of the decedent had been granted to any other person, the plea would be good in bar because no action could be maintained against them as administrators on that, or any other writ, yet when the same identical persons are appointed administrators *de bonis non,* to succeed themselves as administrators on the same identical estate, and on which the same plaintiff claims to have a cause of action, it seems to me that although the writ on which the suit was progressing might not be properly allowable, yet another writ might be given against the defendants on which suit could be maintained, to wit: a writ against Martha Ann Manly, late Parkhill, and Hiram Manly in right of his wife, and William D. Moseley, administrators *de bonis non* of Samuel Parkhill, deceased, the two former being the same identical persons, and not different, defending by representation the same identical estate. Whereas, if as administrators they pleaded a good plea in bar, when they came to be sued as administrators *de bonis non,* jointly with Moseley, for as much as the plaintiff's action would be barred as to them, it would be barred against the administrators *de bonis non,* because being joint, they are as one person in law for the purpose of representing the estate, and this would be, to make the revocation of letters of administration to Mrs. Manly and her husband, a good plea in bar to the plaintiff's action. I cannot think the plaintiff should lose his right of action, or his demand (if one be due him) for such a cause.

In the case of Taylor, et al., *vs.* Savage, Chief Justice Taney in delivering the determination of the Supreme Court announced the execution in that case void and very properly as a consequence said no right of property will pass by a sale under it. The recognized doctrine everywhere is, that a sale under a *void* execution will not pass property to the purchaser. The reason on which the Chief
272 Justice founded his determination is that in that case there was no defendant in court, the executor having ceased to be the *representative* of the estate of Samuel Savage, and administration having been committed to a different person. That the executor had no right to interfere with the estate by prosecuting, or appearing to an appeal, or in any other manner. If the administration *de bonis non.* had been committed to the same person the case would have been distinctly different, and the execution would not have been void, but at most voidable. In this case we have seen the defendants Manly and wife not only in court pleading after the revocation of their letters, and subsequent re-appointment to the same trust as administrators *de bonis non,* but they pray a writ of error—it is allowed them. They apepar in the Superior Court, are recognized as competent parties, maintained their writ of error, and the judgment below is reversed upon their motion.

They must therefore have been competent parties whom an execution might issue, upon a judgment unreversed and unappealed from, and which itself was not void but erroneous. The execution in this case was therefore only voidable, and under such an one a the case of Taylor, et al., *vs.* Savage. But in the case under conpurchaser acquires a right of property, and is distinguishable from sideration before the Supreme Court, the question of the character of the execution did not properly arise, no question was made by the record, or was necessary to the determination in the case. The character of the execution was not discussed, no authorities on the point were referred to by counsel, or the court; with very great respect for Chief Justice Taney, I incline to think his decision of that point may be regarded as rather an *obiter dictum.*

But the defendant in this case relies on an estoppel *in pais,* as also protecting him in the purchase of the negroes in controversy. I shall not stop to consider the doctrine, but content myself with a reference to the cases of Cotten *vs.* Williams, Flor. Rep., 54, and Camp *vs.* Parkhill's administrators, decided at this term, for the doctrines of estoppel *in pais,* which I need hardly add have the sanction of my approval.

I will look at the facts of this case. Before the day of sale, one of the slaves purchased by Ponder applied to Moseley, one of the plaintiff's to purchase her. He declined (because he said he was unable,) but recommended her to apply to Ponder who owned her husband. She went to Ponder accordingly, and thereafter he attended the sale; at the sale Moseley was present—advised Ponder to 273
purchase, and upon suggestion about title, said there would be no difficulty—said that he had hired the negro, and that she would suit Ponder. Moseley took an active part in separating and parceling the negroes so as to make them bring the best price. Mr. Archer, attorney for Mrs. Manly, forbade the sale, because he said the negroes were subject to her dower. Moseley expressed disapprobation; said the sale had better go on, that the negroes could not be sold at a better time. Said audibly to the crowd, bid up, bid up gentlemen, the property is not bringing half its price. The title will be good. And thereupon the property sold better. Moseley bid at the sale as high as $800 for one negro woman, and at least bid for two slaves at that sale.

Manly also was there and kept an account of the sales; asked William Bloxham, a witness, to bid against Col. Gamble, who was buying slaves for Meintzhagen without competition. Witness did so and caused the slaves bought by Gamble to bring at least $150C more than they would have done. During all this time we heai nothing of a void judgment—a void execution—or a bad title to property—or an improper levy on property. The only claim interposed is for Mrs. Manly's right of dower. The parties even seem to waive that, and *a fortiori* any other claim—and it is most certain, it is not now the pretext for this attempted recovery.

The administrators *de bonis non* were present assisting at and encouraging and aiding this sale. The property sold according to testimony at its fair value. Can now any reasonable person arrive at any other conclusion than that the condition of the purchaser or purchasers was or were changed by this conduct. Suppose these administrators by themselves or their attorney with their assent, had said: This property has been wrongly levied; it is the property of the administrators *de bonis non* of Parkhill deceased; it has been levied on as the property of the administrators whose letters have been revoked. The judgment is void. The execution is void. The whole mater is illegal, and purchasers will buy at their peril. Would the property under such circumstances have brought fair value. Would Ponder who is represented as a prudent, cautious man, have become a purchaser. Was not in fine, a belief induced by the conduct of these administrators which caused the purchaser Ponder to change his previous position. If so, (and so we think) then by the law of estoppel they are concluded from averring against Ponder a different state of things existing at the 274
same time.

The foregoing remarks and authorities referred to, rightly considered, we think, shew that the Superior Courts of the Territory of Florida, were courts of general jurisdiction. That the Superior Court of Leon county had and rightly took jurisdiction of the subject-matter in the case of the Union Bank of Florida *vs.* Parkhill's administrators. That the defendants in that action were legally summoned to answer to that suit, and appeared and pleaded pleas in bar. That that court having competent jurisdiction, both of the subject-matter, and the parties gave judgment in favor of the plaintiff.—That while that judgment was in full force, and when no appeal or writ of error had been sued out on it, an execution issued on said judgment (as well as on sundry other like judgments) from the Clerk's office of said Superior Court, pursuing the judgments on which they had been respectively issued, and acording to law—which executions were all placed in the hands of the Marshal who was the officer of said Superior Court. That by virtue of said execution the Marshal levied upon the negroes in controversy; and upon others being the property and effects of the estate of S. Parkhill, deceased, according to the very right of the case. That under and by virtue of those executions and levy, after having duly advertised, he sold at public outcry, to the highest bidder, the said slaves for ready money. That William G. Ponder, the (defendant below in this suit, and) appellant in this court, because the purchaser, paid for and took possession of the negroes now in controversy. That said judgments being judgments of a Court of Record of general and competent jurisdiction were not and could not be *void;* but valid, unless appealed from, or reversed for error, and therefore voidable only.

That a purchaser at a public sale, under and by virtue of an execution issued upon a voidable judgment, if sale be made before the judgment is reversed, acquires a good title. That nine of the judgments upon which executions issued are valid even if erroneous, the limitation of time for appeal or writ of error having expired. And that there was no iregularity in the levy material to the very right of the parties the true defendant being Samuel Parkhill in his life time and his representatives in right of his estate after his death, and the property levied on and sold, his property to pay his debts, and that the plaintiffs are estopped to deny his title.

275 The court will forbear to express their sense of the inconvenience which would result in society from the establishment of a rule, which would create uncertainty among buyers at Sheriff's sales under executions issued from the highest courts of record and original jurisdiction. It might perhaps be justly apprehended that such a rule would disarm the courts of the power to redress private wrongs or to enforce private rights.

We are therefore of opinion that the circuit court erred in the instructions under consideration. That the judgments and executions under which the slaves were sold were not *void*. That they gave a sufficient authority for the sale, and that the right of property in these slaves passed by the sale to the defendant or appellant, William G. Ponder.

The foregoing opinion being conclusive of this whole case, the court have not deemed it necessary to look further into the assignment of errors set down in the record.

Per Curiam.—The judgment of the court below is reversed and the clerk of this court will tax costs in favor of the appellant.

Hawkins, J., said, that he agreed to the conclusions, but not altogether to the reasoning of the court as expressed in the opinion of Judge Lancaster. He was in favor of a reversal exclusively on the ground that the plaintiffs in the court below were estopped by their words and conduct to deny the title of Ponder to the slaves in question.

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276 Charles Le Baron and Walter T. Colquitt, Appellants, *vs.*

Thos. W. Fauntleroy, *et al.*, Appellees.

A paper purporting to be the will of F. was admitted to probate by the County Court of Escambia, and L. appointed administrator with the will annexed. Under the provisions of the will, L. paid a legacy of $50,000 to the widow of testator. Afterwards the next of kin of F. applied by citation to the County Court for revocation the the probate of the will and the application was refused, but upon appeal from the judgment of the County Court, the Superior Court revoked the probate and set saide the will. Held, that the payment by L. of the legacy did not constitute a devastavit, but on the contrary was a duty enjoined by the obligation of his official oath, and that the next of kin could not recover the amount of the legacy against the administrator.

In such case where the widow and legatee afterwards married and died, her surviving husband is not liable to the next of kin for the amount of the legacy upon suit instituted after death, and simply upon the allegation that the administrator in paying the legacy committed a devastavit.

An appeal from a final decree opens for consideration all prior or interlocutory orders or decrees connected with the merits of the final decree.

This case comes up by Appeal from Decree rendered *pro forma* in Chancery in Escambia county, upon bill filed by heirs of George L. Fauntleroy against Charles LeBaron his administrator, and Walter T. Colquitt who intermarried with the widow of George L. Fauntleroy. The facts of the case and the pleadings appear in the following agreed state of facts and pleadings, and in the opinion of the court:—

The following facts are admitted and agreed upon in this cause:

1st. On the fifth day of November, 1839, George L. Fauntleroy died in Escambia county.

2d. On the 27th day of December, 1839, application was made to the Judge of the County Court of said county, for probate of a supposed will of the said George L. Fauntleroy, deceased, which application was rejected and refused by the court.

3d. On the 22d day of January, 1840, letters of administration were duly granted by said County Court to Charles LeBaron on the estate of said Fauntleroy.

4th. On the 7th day of April, 1840, application was again made by the widow of the said George L. Fauntleroy, deceased, to the 27
Judge of the County Court of Escambia county, for probate of the said supposed will, and the same was then duly admitted to probate as the will of the said George, on the testimony of George Willis and Judith Fauntleroy, now Caldwell, and there being no executor appointed or named in said supposed will, the same was ordered to be annexed to the letters of administration of the said Le Baron.—The said will was written and executed by the said George L. Fauntleroy about two weeks before his death, and in the words and figures following, to wit:

"Pensacola, 22d Oct., 1839.—In the name of God, amen. I, George L. Fauntleroy, of Pensacola, Florida, do hereby make this my true and only will.

"I give my wife fifty thousand dollars forever, to be paid in bonds, &c. I also give her the Piano, the sets of silver, and the dessert set of China.

"To my slaves Davy, James, Maria Ann, and the children of James and Maria Ann, I give their freedom forever, to be liberated at the expiration of six months from my decease. I give."

5th. On the 25th and 31st of May, 1840, said Le Baron as administration with the will annexed, assented to the foregoing legacy to the widow and paid over to her $50,000 in bonds and notes due the estate, and $302.78, this being the estimated value of the Piano, silver set and dessert of China, as directed in said supposed will.

6th. On the 15th day of October, 1840, the said Aphia having removed to the State of Georgia, intermarried with the defendant Walter T. Colquitt, and on the first day of December, 1840, the said Aphia died.

7th. On the sixth day of October, 1841, the parties complainants herein applied by citation to the County Court of Escambia county for revocation of the probate of the said supposed will of the said George L. Fauntleroy, and a judgment and sentence was pronounced by said court against the application. Whereupon the applicants appealed to the Superior Court of the said county, and the judgment and sentence of the County Court was reversed, and a judgment was rendered in said Superior Court revoking and setting aside said probate of said supposed will. Which judgment was afterwards affirmed by the Court of Appeals.

8th. Said Fauntleroy in his life time was guardian of one Ann
Beatty, a minor, who had some slaves in Florida, and they were 2
hired out by the said George, he receiving the hire and keeping a regular account thereof. On the first of January, 1841, there was due to the said Ann Beatty, $4,341.07, as the balance of said hire, and the same was duly paid over by the said Le Baron to the Guardian of said Ann Beatty, appointed after the death of Fauntleroy.

9th. On the 19th day of August, 1840, said Le Baron, as administrator, purchased at Mobile a draft on New York, drawn by Hart, Anderson & Co., in favor of J. C. Jacobson or order, for $668.57; this sum being then due to said Jacobson, in Virginia, for the boarding and tuition of the said Ann Beatty—no guardian of the said Ann having been yet appointed since the death of the said George L. Fauntleroy. Said draft was duly forwarded to the said Jacobson and by him presented for payment, but the same was not accepted, and was protested. Suit was brought and judgment was obtained against the drawers without delay, and the execution was returned *nulla bona*. Suit was then brought by said Le Baron, as administrator against Ann Beatty and Thomas Heard, (with whom she had since intermarried,) in the Superior Court of Escambia county, to compel them to account to the estate for the amount of said protested draft; and at the June term of the Circuit Court for said county in 1846, the defendants having appeared and answered, the said Circuit Court decreed against the bill and ordered it to be dismissed.

10th. The entire amount of assets which have come to the hands of the said Le Baron, as administrator, (counting the $50,000 paid the widow as so much money, and regarding the amount due Ann Beatty as a part of the estate,) is 80,365.37. The amount paid out by him to widow and distributees, (including the amount of the protested draft of Hart, Anderson & Co.,) and for debts and expenses, is, $80,644.60, besides one thousand dollars paid R. C. Corbin.

11th. The following is a schedule of the persons entitled to claim under the will of the said George L. Fauntleroy, and of the payments made to them respectively by the administrators:

Aphia B. Fauntleroy, widow - - - - - -	$50,302.78
Edmund and Leonard Corbin, through their father and guardian, R. C. Corbin, - - - - - -	4,500.00
Amount carried forward, - - - - - -	$54,802.78

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Amount brought forward, - - - - -	$54,802.78
Fanny Wyatt, intermarried with G. L. Nicholson, -	2,500.00
Maria Curtis, through her guardian, C. G. Curtis, -	2,500.00
Thomas W. Fauntleroy, - - - - -	2,673.35
Judith Fauntleroy, Mrs. Caldwell, - - - -	3,676.59
George Willis, guardian of his children, - - -	3,595.00
	$69,747 72

WALKER ANDERSON,
Solicitor for Complainants.
BENJ'N D. WRIGHT,
Solicitor for Defendants.

1. The bill states certain facts as a ground for relief, which are set forth in the agreement as to facts entered upon the record, and prays for relief.

2. Charles Le Baron, one of the defendants, demurs generally to the bill, and specially in that he is bound to settle his accounts, as administrator, in the County Court of Escambia.

3. Walter T. Colquitt, defendant, pleads, and for plea saith, that the will of Fauntleroy was duly admitted to probate, in which a legacy of $50,000, in bonds, &c., was bequeathed to Aphia Fauntleroy, widow. That, in pursuance of the will and probate, the administrator, Le Baron, delivered to the said Aphia the said sum of money in bonds and notes.

4. Charles Le Baron pleads, and for plea saith, what Colquitt said in his plea, adding, thinks at the time of his payment to the widow, the probate of the will was in full force and unrepealed.

5. Charles Le Baron answers, that he has filed a correct statement and account of the assets of the estate of Fauntleroy, together with an account of payments and distribution of the same, so far as administered, and an account of the assets yet unadministered.

6. Decree of the Superior Court.

And now at this day a decree was made by the court, and is in the following words and figues, to wit:

Fauntleroy and others,
vs.
Charles Le Baron, Administrator, W. T. Colquitt and Henry Ahrens. } In Chancery, Nov. T'm, 1843.

The exceptions taken to the report of the clerk, and Master in this case having been overruled, the cause was then submitted upon
280 bill, answer, plea, and demurrer. It appears that some time in the year 18—, George F. Fauntleroy departed this life, leaving a paper writing purporting to be his last will and testament, which was admitted to probate in the County of Escambia. The letters of administration, with the said *"will"* annexed, were granted to Charles Le Baron; that by said supposed last will and testament, fifty thousand dollars in good notes and bonds, &c., were bequeathed to Aphia Fauntleroy, widow of the said George F. Fauntleroy, dec'd; that by authority of said "letters testamentary," said Le Baron took possession of the estate of said Fauntleroy, and paid over to the said Aphia (widow) the said legacy; that said Aphia subsequently intermarried with the said W. T. Colquitt, and shortly thereafter died; that subsequent to said probate payment of the said legacy, and intermarriage of the said Aphia with the said Colquitt, proceedings were instituted to set aside and annul said probate, and resulted in a final decree, declaring the said paper writing not to be the last will and testament of the said George F. Fauntleroy.—It also appears that the legacy aforesaid was paid, before proceedings were instituted to set aside the *will*, and while the probate aforesaid was unrevoked, and before any notice had been given of an intention to revoke the same.

It is therefore ordered, adjudged and decreed, that the plea filed in this cause by the said Colquitt be sustained, and the bill dismissed as to him; for should the legacy, thus paid to the said Aphia, before her intermarriage with him, be excessive of her distributive share as widow under the laws of Florida, then the right of the other "distributees" (if they had any) to sue for this excess should have been exercised before the death of the said Aphia—for by her death her coverture with him was dissolved, and he was no longer responsible for any liabilites existing against his said wife anterior to her marriage with him, and which might have been enforced jointly against them during the coverture. It is further declared to be the opinion of this court, that the said Le Baron did not commit a *devastavit* in paying over the said legacy to the said Aphia, before a revocation of the probate, or notice thereof, and before suit brought to invalidate and set aside the said *will*. It is further ordered that the demurrer filed in the case by the said Le Baron be overruled, and he is hereby ordered and decreed to distribute amongst the complainants, their respective proportions of the assets remaining in his hands after paying the aforesaid legacy, and deducting the costs, charges and commissions incurred, 281
in administering said estate. It is further ordered, adjudged, and decreed that this suit be dismissed, so far as it seeks to make Henry Ahrens the security of said Le Baron on his administration bond, a party defendant, for in case of a default, or devastavit by said Le Baron, the remedy against said surety, would be in an action at law upon the administration bond.

DILLON JORDAN, Judge.

7. From this decree an appeal was taken by defendants, and the Court of Appeals decreed as follows:

George Fauntleroy and others, and } Appellants
Charles Le Baron, Walter T. Colquitt and Henry Ahrens. } Appellees and Defendants.

Upon an appeal to a decree of the Superior Court for the Western District for the county of Escambia.

This cause coming on to be heard on an appeal from the decree of the Superior Court of the Western District sitting as a Court of Chancery in and for Escambia county, and after hearing the arguments of Mr. Anderson and Mr. Brokenbrough, of counsel for complainants, no counsel appearing on behalf of defendants, and after inspection and examination of the record in said cause, and due deliberation being thereon had, it is ordered, adjudged and decreed, and this court by virtue of the power and authority in it vested, doth hereby order, adjudge and decree that the decision and decree of the said Superior Court of the Western District, made and entered in this cause, at the November term of said court, in the year 1843, be and the same is hereby in all things reversed, annulled and set aside, except as to so much of said decision or decree of November term 1843, as directs or decrees that the bill of complaint shall be dismised as to the said Henry Ahrens, and the said decree, so far as the same declares that the said Ahrens is not properly a party to this suit, and ought not to be included in the bill of complaint, is hereby affirmed. And it is hereby ordered and decreed that the said bill be dismissed as to the said Ahrens, without prejudice however to the future rights of the complainants. And it is further ordered, adjudged and decreed, that so much of the previous or interlocutory decree in this cause, (made before the final decree of November, 1843, aforesaid,) by the said Superior Court as ajudged, ordered or decreed the complainants' bill of complaint to be dismissed as to the said Colquitt, and so much of said interlocutory 282
decree as orders and directs the said bill to be dismissed so far as it charges the said Le Baron with a devastavit be and the same is hereby reversed, annulled and set aside, and that the remainder of said interlocutory decree be affirmed. And it is further ordered, adjudged and decreed that this cause be remanded to the Superior Court of the Western District, with directions to that court to overrule the pleas and demurrers of the defendants, Colquitt and Le Baron, and to cause them to answer fully and distinctly the complainants bill, and to proceed in said cause according to law and equity, and as to right and justice may appertain. And it is further ordered and decreed that the said defendants, Le Baron and Colquitt, pay the costs of said appeal in this court to be taxed.

8. Walter T. Coquitt answers, setting forth facts already stated and also alleging that certain of the bonds and notes paid to Mrs. Fauntleroy by Le Baron had been lost to respondent, who had incurred certain expenses in endeavoring to collect them; the facts relating hereto will appear by affidavits, to be taken by agreement.

9. The amended answer of Charles Le Baron recites facts already upon the record, and repiles to his accounts, which are filed.

10. Decree of the Circuit Court:

Thomas Fauntleroy, *et al.*, Complainant,
vs.
Charles Le Baron & W. T. Colquit. } In Chancery, Circuit Court, Western District, Escambia county.

This day came the complainants by their counsel, and the defendants by their counsel, and thereupon this cause was submitted for hearing upon bill, answer and exhibits, and the court having advised and considered the same and the decree of the Court of Appeals of the late Territory of Florida, doth order and decree as follows:

That defendants, Charles Le Baron and Walter T. Colquitt, are properly chargeable in account with complainants, as heirs and distributees of George L. Fauntleroy, deceased, with the bonds and securities in the proceedings mentioned and referred to at the value thereof, delivered by the said Le Baron under the pretended will of the said George L. Fauntleroy to said Walter T. Colquitt, in payment of a legacy to Aphia, wife of said Colquitt, and formerly widow of said Fauntleroy, mentioned in said pretended will.

That said defendants, Colquitt and Le Baron, in accounting for

Le Baron and Colquitt, Appellants, vs. Thos. W. Fauntleroy, et al., Appellees.

283 said securities or their value, and the interest thereon since the date of their respective receipts, are entitled to be credited with the interest in value of said Aphia as widow, and her representatives, in the estate of the said George L. Fauntleroy, that is to say, one half of the clear actual value of the personal estate, (except slaves,) of the said Fauntleroy, with the value of the use of one-half in value of the slaves after the death of the said George L. Fauntleroy up to the death of the said Aphia, and to the value of the use of one-third in value of the lands of said George L. Fauntleroy, deceased, during the same interval: the value of which said uses for life of said portions of the slaves and lands is to be estimated by taking one-half of hires and profits of the slaves, realized or secured during that period by the said Charles Le Baron as administrator, or said complainants; and one third of the issues and profits realized and secured from the land during the same period by said Le Baron, as administrator, or said complainants. Provided, that all payments, (exclusive of the delivery of said bonds and securities to said Colquitt under the said pretended will,) made to said Aphia or said Colquitt, on account of said claim for dower, be deducted as of the dates they may have been respectively made. And provided further, that in estimating the value of the estate of the said Fauntleroy, the estate of Ann Beatty, held by him as guardian of the said Ann Beatty, be not regarded as assets in the hands of the administrator, but that the same be deducted from the fund out of which dower is to be paid to the said Aphia and her representatives.

And it is further ordered and decreed, that it be referred to Owen M. Avery, one of the Masters of this court, to take account of and ascertain upon such proofs as shall be adduced by the parties, after notice to them or their counsel for that purpose, what amount of bonds and securities delivered as aforesaid, under said pretended will, to said Walter T. Colquitt, remains in specie in the hands of said Colquitt, and the value of the remainder which may have been collected or disposed of: and also what is the value of the dower of said Aphia in said estate, estimated upon the principles above laid down—and that the said Master make report to this court, with all convenient speed, upon the matter herein decreed and referred, with such other matter specially stated, as he may deem pertinent, or either of the parties may require to be stated.

GEORGE W. MACRAE,
Judge of South. Cir. Florida, presiding in West Circuit.

284 11. In obedience to the foregoing decree, the Master presented his report as follows:

And now at this day, to wit: on the 13th day of October, A. D. 1874, O. M. Avery, as Master in Chancery, and in pursuance of the above decree, filed his report herein, which is in the words and figures, to wit:

To the Hon. Thomas Baltzell, Judge and sitting in Chancery for the county of Escambia:

The undersigned to whom was referred by an order of this Honorable Court, to take account of and ascertain the amount and value of certain bonds and securities delivered by Charles Le Baron, administrator of George Fauntleroy, deceased, to Walter T. Colquitt, either remaining in the hands of said Colquitt or collected and disposed of by him; and also to ascertain the value of the dower of Aphia, the widow of said Fauntleroy, and since the wife of said Colquitt, estimated upon the principles set forth in a decree of this court at the fall term thereof held in 1846, and to make report thereon with such other matters as he may deem pertinent to the controversy before the court, respectfully reports:

That his first care has been to ascertain the clear value of the estate of the said George Fauntleroy, coming into the hands of the administrator, which is subject to the dower of said Aphia, late wife of the said Colquitt. 1st. The whole amount of the personal estate reduced to the possession of the administrator, as set forth in his account on file, is 80,285 37. From this amount the undersigned by the direction of the court deducts the amount of the estate of Ann Beatty; which having been found in the hands of the deceased as the guardian of the said Ann, was paid over to her by the administrator, to wit: $4,495. He also deducts as directed the amount received on the sale for the hire of negroes and for house rent. This amount according to the statement of the administrator is $3,276. He finds also amongst the assets reported as received a draft afterwards lost, amounting with charges to $752 13—which he deducts as forming no part of the estate realized. The expenses also of administration allowed by the Court of Probate, including the commissions of the administrator, are also deducted, amounting to $6,169 95. The aggregate of these several items is $14,693 08—which being deducted from the whole amount received by the administrator, to wit: $80,385 37, leaves as the fund subject to the dower of the widow $65,692 29. The half of this amount is $32,846 14—to which is to be added according to the terms of the 285 decree of this court, the value of the use of one-half of the slaves and one-third of the lands from the death of Geo. Fauntleroy to the death of his widow Aphia. The real estate appears to have rented at $50 per month, and the slaves to have hired at $22 50 a month.—So that the sum of $27 90 a month is to be added to the dower during the life-time of Aphia Fauntleroy, and she having survived her husband 13 months, the gross amount would be $362 70, making the whole dower $33,208 84.

The undersigned reports therefore that this amount, to wit: $33,208 84, was properly paid by the administrator to Aphia Fauntleroy on the 25th day of May, 1840. And it appearing that on that day, the sum of 50,302 78 was paid to Aphia Fauntleroy, it follows that the sum of $17,093 94 was over paid, and that the administrator and the said Walker T. Colquitt are responsible to the complainants for that sum, together with 8 per cent. interest on the same—which amounting on the 25th Oct., 1847, to $10,142 37, makes the whole amount $27,236 31.

2d. This amount of 27,236 31, due to the complainants, must be divided amongst them in unequal proportions, inasmuch as it appears from the account of the administrator that unequal payments have been made to them.

By a calculation which it is not necessary to spread at large upon this report, the undersigned finds that in order to equalize the shares of the respective claimants the aforesaid sum should be divided as follows, to-wit:

1. To B. C. Corbin, guardian, &c.,	$3,168 75
2. To G. L. Nicholson, husband, &c.,	4,168 75
3. To C. G. Curtis, guardian, &c.,	4,168 75
4. To J. P. Fauntleroy,	3,995 40
5. To Dr. Byrd, guardian, &c.,	6,668 75
6. To A. C. Caldwell, husband, &c.,	2,992 16
7. To G. Willis, guardian, &c.,	3,073 75
	$27,236 31

The undersigned further reports that no testimony has been presented to him as to any losses sustained by the said W. T. Colquitt, on the amount paid over to the widow of George Fauntleroy, except that it is alleged in the answer of said Colquitt, that the amount of loss was about $8000. He is informed by the respective Solicitors of the parties, that further testimony upon this point will be ta- 286 ken at some future period, and he will therefore only observe that according to the principles upon which this report is based, whatever loss sustained by said Colquitt, may by the court be adjudged to fall on the estate of the said Fauntleroy, should be deducted from amount with which he would otherwise be charged.

In conclusion, the undersigned reports, that a large amount of the estate, to wit: More than $14,000 is yet unadministered. The greater portion of this being represented as bad debts, and a part being in process of recovery by law, he submits to the court, that it be left to future adjustment, upon the same principles set forth in this report.

O. M. AVERY,
Master in Chancery.

12. Defendants file exceptions in the following words:

And now at this day, to wit: on the 14th day of October, A. D., 1847, came the defendants by their solicitor, and filed their exceptions to the Masters report, which are in the words and figures following, to wit:

Thomas Fauntleroy, and others, *vs.* Charles Le Baron and Walter T. Colquitt. } In Chancery.

Exceptions taken to the report of Owen M. Avery, Esq., Master in Chancery, made in pursuance of a decree in this cause, dated the 24th day of October, 1846.

1st exception. For that the said Master has in his report excluded the commissions and expenses of settling the estate of the said George L. Fauntleroy, deceased, from among the charges made by the administrator against the distributees, thereby making the same a charge upon the widow's dower; whereas the widow's dower should be estimated and set off without reference to such commissions and expenses, being in this case the entire half of the personal estate, the use for life of one-half of the slaves, and the use for life of one-third of the real estate.

2d exception. For that the said Master in his said report charged these defendants with interest from the 25th day of May, 1840, to the 25th day of October, 1847, on the amount by him declared to have been paid to the widow, over and above what she was entitled to as her dower, when so much interest can be legally or equitably charged.

287 Whereupon the said defendants except to the said Master's report, and appeal therefrom to the judgment of this honorable court.

BENJ. D. WRIGHT,
Solicitor for Defendants.

13. Final decree of the Circuit Court.

Fauntleroy and others, *vs.* Le Baron and Colquitt. } In Chancery.

This cause coming on to be heard upon the report of the Master, made in obedience to a decree of this court, and upon the exceptions thereto, and the counsel of complainants and respondents being heard, and it being agreed by the parties through their respective solicitors, that a decree *pro forma* shall be pronounced herein, without prejudice to the competency of the Judge by whom the decree is pronounced, to sit in the cause in the Supreme Court, in case there be an appeal: It is, therefore, in furtherance of said agreement, considered by the court, that the said Le Baron committed a *devastavit* in paying over to the said Aphia more than she was entitled to as dower in the estate of her deceased husband; and it is therefore ordered and decreed that the exceptions to the said report be overruled, and that the defendants pay to the said complainant, R. C. Corbin, as guardian of his infant children, the sum of $2,-168 75; to the complainant, G. L. Nicholson, the sum of $4,-168 75; to the complainant, G. P. Curtis, as guardian of his infant children, 4,168 75; to the complainant, Thomas L. Fauntleroy, the sum of $3,995 40; to the complainant, Dr. ——— Byrd, as guardian of the infant children of Lawson Fauntleroy, the sum of $6,668 75; to the complainant, Robert C. Caldwell, in right of his wife, Judith Fauntleroy, the sum of $2,992 16; and to the complainant, George Willis, as guardian of his infant children, the sum of $3,073 75—these several sums being the amount with interest which was wrongfully paid to Aphia Fauntleroy on the 25th May, 1840, over and above her dower, and that the defendants pay the costs of this suit. And it is further ordered that the said defendant, Charles Le Baron, proceed to administer the residue of the estate in his hands reported by him to be unadministered, and that as he reduces the same to possession, (after deducting the charges of administration,) he shall pay to the said Walter T. Colquitt the one-half thereof, and to the complainants the other half, in the proportions respectively due to each; and that the said Le Baron make
288 report thereof, as early as practicable, to the Court of Probate for Escambia county.

It is further ordered and decreed that the parties have leave to take further testimony, to be used in the Supreme Court.

THOMAS BALTZELL, *Judge*

Wright, for Appellant.

Anderson, for Appellees.

1. The decree of the Court of Appeals reversing the decree of the Superior Court is conclusive against Colquitt as to his right to retain the legacy paid him.

2. It is also conclusive against Le Baron, the administrator, as to having committed a *devastavit* in paying over the legacy to Colquitt.

3. Supposing it not to be conclusive, they are both responsible to the distributees for the supposed legacy, because the right to the legacy was derived solely from the supposed will, which being a nullity, the legacy was paid in wrong of the distributees.

4. The probate of a will is only operative as *evidence,* and gives no vitality to the instrument itself. 1 Williams on Executors, 159, Ib., 339. Thompson's Dig., 199.

5. The executor derives his title solely from the will, and not from the probate. Ibid. Toller on Ex., 75. 1 Dane's Abridgement, 558. The authority of an administrator to execute a will rests, of course, on the same foundation.

6. The acts referred to by the appellants' counsel, such as the paying and receiving of debts by an executor or administrator, acting under a grant subsequently revoked, differ from the payment of the legacy in question in this: that the former relate to rights pre-existing before the grant, while the latter, resting upon a void will, derives its sole authority from the probate.

7. The allowance of all the acts referred to by appellants' counsel under the revoked grant, secures the rights of all parties while the allowance of the legacy in question would irreparably destroy the undisputed rights of the complainants. 1 Will. on Ex., 373.

"The rightful representative may either sue the buyer from the wrongful representative in detinue or trover, or he may waive the tort and sue for the money." 1 Williams, 368.

8. The probate of a will is an *ex parte* proceeding, and therefore 289 not binding as a judgment. Thomp. Dig., 193.

9. Le Baron was not *compellable* to pay the pretended legacy at the time he did. Thompson's Dig., 205. See statement of facts.

10. The refunding bond required by our statute, (Thomp. Dig., 206,) strengthens all the previous views on this subject, and provides for the very contingency which has happened, and secures, as it was intended to do, the rights of all the parties.

This bond is unnecessary, if defendants' counsel are correct. 2 Call's Rep., 95.

11. The probate of Fauntleroy's will was *void,* and not voidable as is contended, and consequently the acts under it are *void.* Toller on Ex., 78. 1 Williams on Ex., 367, 368, 369, 370, 371, and note (1.) Exception to the general rule: 3 T. R., 125, Allen *vs.* Dundas.

The apparent contradiction of Toller and Williams is reconciled by noting that the distinction between *void* and *voidable* grants applies to administrations, and rarely (if ever in the country) to probates. The latter when revoked are necessarily void, *ab initio.* 1 Toller, 78, 119, 128, 129, 131. 1 Will., 369, and note (o) 370.

The distinction between repeal upon appeal and citation, applies to grants of administration, and not to probates, the latter being an *ex parte* proceeding.

Voidable administrations what? 1 Williams, 361. Comstock's Dig., 262. 1 Williams, 371, and note (1.)

12. The Ordinary is incapable of divesting the interests of the distributees in this case which vested upon Fauntleroy's death.

13. The act of the administrator being void the complainants should recover from Le Baron and Colquitt, the whole amount paid Mrs. Fauntleroy, because no dower having been assigned to her during her life none can be assigned now, the only mode known to the law being now impossible. Thomp. Dig., 186.

14. If the court should think the widow entitled to retain the difference between the legacy and her distributive share as widow, then the principles upon which the account should be made are correctly set forth in the decree below, and Master's report.

Brockenbrough, for Appellees.

Colquitt, for Appellant. 290

First. The decree of the Court of Appeals of the Territory settles no principle of law in the case.

Second. If the decree of the Court of Appeals had decided upon what principles the cause must be settled; still, if in carrying out that decree by the court below, any cause of grievance should justify an appeal, upon such appeal the Appellate Court will examine the merits of the whole cause. 1 Hill's Ch., 450, and authorities there cited.

Third. If the agreement of facts in the fourth statement be, as counsel for complainant insist, conclusive, that the administrator was not qualified according to law as administrator *cum testamento annexo,* after probate of the will, then we insist that he is not administrator at all, and that he is not charged in complainants' bill for any default for which he can be charged as administrator, as the matters of complaint all transpired after his letters of administration were annulled by probate of the will. Williams on Ex., 367.

Fourth. The Court of Probate for the Territory of Florida had exclusive jurisdiction of probate of wills, subject only to the Chancery supervision, as in England, and therefore the Superior Court of the Territory had no jurisdiction of an *appeal* from the Probate Court and their decree upon such appeal was a nullity. Thomp. Dig., 194-5. Ib., 365. Ib., 57-8.

Fifth. The widow has a distributive share of the personal property in preference to all claims, and consequently before the deduction of funeral expenses, &c. That distributive share must necessarily be on the gross amount, and not on the nett sum after deducting expenses of administering the estate. Dower is of the real estate and slaves. Thomp. Dig., 184-5, and notes.

The amount due Ann Beatty was a debt of the estate. 11 Pick., 173. By the statute of the Territory no interest can be allowed but on cash balances, and then only in certain cases. Thompson's Dig., 207-8. Williams on Ex., 1131. 12 Vesey, 386.

While the draft with charges amounting to 752 13, may be a charge on the estate with which the administrator should be credited, it was certainly a *debt* on the estate, and of consequence had to be postponed to the widow's distribution. The widow should have been allowed the full rent of the houses, offices, &c., 12 months provisions, and the hire of half the servants.

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291 *Sixth.* The complainants' bill makes no allegation by which the defendant Colquitt can be made liable. Story's Eq. Pl., 27. Gresley on Ev., 23.

The bill charges, in its charging part, that the administrator paid Colquit $50,000. This charge is denied by the answer, and is not sustained by proof. The bill further charges, in the charging part of the bill, that a portion of this amount was paid in bonds and notes to the said Colquitt. This charge is denied in the answer, and the complainants offer no proof to sustain it. The answer denies ever having received any of the assets of Fauntleroy's estate, except the same may have been received by his marriage with the widow.—The answer admits that Mrs. Fauntleroy may have received bonds, notes, &c., and if she did so she received them properly, under the will of her deceased husband, and would not have been responsible.

Seventh. If the widow were responsible at all to refund as distributee, she could not have been joined, if alive and a *femme sole,* with the administrator in an action for *devastavit* against him.

Eighth. If the widow could so have been joined, and was legally responsible, as assisting to commit a *devastavit, Colquitt after her death* was not liable. And any suit brought for a *devastavit* committed by the wife against him would be dismissed with costs. Will. on Ex., 1128. 2 Kents Comm.

Ninth. Personal assets cannot be followed when disposed of by an executor or administrator unless for fraud. Will. on Ex., 609. 4 Term, 625. Note to Farr *vs.* Newman, 1 Atkinson, 463.

Tenth. When executor consents to legacy the legatee's title is complete. Williams on Ex., 843, and references.

Eleventh. At what time legacies are to be paid. Time allowed the administrator is for his convenience. Will. on Executors, 853-4.

Twelfth. The complainants' bill in stating its equities against the administrator is a simple bill to account. Story's Eq. Pl., 27.

Thirteenth. What is a *devastavit,* and what the duties of an executor or administrator with will annexed. Williams on Ex., 1104.

Fourteenth. When the administrator paid in bonds and notes to widow, it was in conformity to directions of a valid will accompanying his letters, which he could not refuse to obey. It was not a supposed will—not a pretended will—but an actual will—a valid will, and so declared by a court of competent jurisdiction which
292 was binding on the administrator, and all the world. The refunding bond to the administrator could not make an act of the administrator which was legal and right when he performed it, wrongful and tortious.

Fifteenth. The after setting aside of the probate of that will upon citation does not make void the acts of the administrator. Williams on Ex., 367-8. Ib., 371, and note 1. Ib., 339. 3 Bac. Abr., 51, 61, and notes. 1 Danes' Abr., 581, 564. 1 Bailey Rep., 221.

Sixteenth An executor or administrator stands in the most favored condition of all Trustees. Will. on Ex., 1021. 14 Ed. Comyn's Dig., Assetts D. 2 Vesey, Sr., 240.

Seventeenth. The complainants had been virtually receiving under the will. The widow, of course, yielded her legal rights given by statute in case of intestacy, and those rights were at once distributed among the complainants. It is against the principles of equity, that a party shall derive a benefit from an instrument, and then seek rights adverse to it. Story's Eq., 345, Sec. 1082.

"You cannot come forth to a court of Justice claiming in repugnant rights," are the words of Lord Roselyn. 2 Vesey, Jr., 696. The same opinion expressed by Lord Mansfield, 4 Term Rep., 743, n.

In case of Lord Little *vs.* Baily, Cowper, 597, it is said, "that no court will enforce rights which it recognizes as repugnant, may be admitted as a universal proposition.

Eighteenth. The complainant who swore to this bill, and on whose testimony the will was established, and who is acting for others, consented to the judgment of the legacy under the will, acquiesced in such payment for near 18 months before moving by citation—the other claimants, with full knowledge, acquiescing and receiving distribution, adds to the injustice of seeking to hold the administrator liable, and is contrary to every principle of equity.

BALTZELL, J., delivered the following opinion:

On the seventh day of April, 1840, probate was made by the County Court of Escambia of an instrument of writing purporting to be the last will and testament of George L. Fauntleroy by which he bequeathed to his widow the sum of fifty thousand dollars, a piano, some plate and a set of china, and the will was ordered to be annexed to the letters of administration previously granted to Le Baron there being no executor named in the will.

On the 25th and 31st of May, of the same year, Le Baron acting 293
in obedience to this will and under the probate of the court paid to Mrs. Fauntleroy $50,000 in notes and bonds, and a sum equal to the piano and the other articles.

In October 1841, the next of kin the present complainants applied to the County Court for a revocation of the probate, which was refused. They appealed to the Superior Court who revoked and set it aside declaring the will invalid. An appeal was taken to the Court of Appeals who affirmed the judgment of the Superior Court in 1845.

This suit is instituted against the administrator and against Colquitt who intermarried with Mrs. Fauntleroy, complaining of this payment as a devastavit and insisting not only upon the disallowance of the sum paid to the widow, but of the forfeiture of all interest by her in the estate of her husband.

In support of this position complainants reply upon the difference assumed in the books between acts of an administrator or executor regarded as voidable and those that are void, contending that the action of Le Baron in the payment to Mrs. Fauntleroy was void.

"Whether the acts of an administrator or executor whose probate or letters are revoked, are valid or not, depends it is said upon the character of the grant. The distinction is between grants that are void and such as are voidable. If the grant be of the former description the mesne acts of the executor or administrator done between the grant and its revocation shall be of no validity." 1 Will. on Executors, 400. Toller, 120-8.

"But if the administration be voidable only, all lawful acts of the first administrator shall be valid." 1 Will., 402. Toller, 129.

"It may be laid down as a general rule that where the grant *is in derogation of the right of the executor* it is void, but where the administration is granted by the proper jurisdiction and is only in derogation of the next of kin or residuary legatee it is merely voidable." 3 Bacon Ab., 50. 1 Will., 403-4.

Toller says "in all such instances the administration is a mere nullity. The executors *interest,* the ordinary is incapable of divesting." Toller 120.

It seems according to this that if the grant be in derogation of the interest of the next of kin this does not make the action of the administrator void. Let us enquire as to the interest of the executor which is attended with such important consequences.

1st. He had a right to retain for a debt due to him in preference to 294
all other creditors in an equal degree. Toller, 295.

2d. If indebted to his testator his appointment and acceptance of the office shall operate as a release and extinguishment of the debt. Toller, 347.

3d. After payment of funeral expenses, testamentary charges, debts and legacies, if there be a surplus it shall vest in him beneficially. 2 Will., 898. Toller, 351.

This was the law in former times but by our statute this extinguishment is expressly done away, so is the right of retainer by the same act providing for a pro rata settlement of all demands which may be rendered in according to law, whilst there is no instance of a claim to the surplus with us. Duval, 188. Thus clearly placing an executor on the same footing of an administrator, making him alike with the administrator an agent or officer merely for the settlement of the estate with no further interest than that of commissions and fees.

It will be thus perceived why a grant in derogation of the right of the executor was so highly esteemed in the early decisions, yet when the cases supporting this doctrine, to wit, Parten and Barsdens, case 1 Mod., 213—Dr. Henslow's case, 9 Co., 37, B—Abram *vs.* Cunningham, 2 Lev., 182—Wankford *vs.* Wankford, Salk., 307—Graysbrook *vs.* Fox, Plow., 275, were cited before Lord Redesdale in Doyle *vs.* Blake, he said that "some of these old cases could scarcely be supported on principle, they were decided whilst a great jealousy of the Eccelsiastical Court prevailed. That the meaning of the modern determinations was that an administration granted after an executor having acted *in pais* might be repealed by an application to the Ecclesiastical Court, not that it was a mere nullity unless as a protection to the executor. That it was true an executor having acted could not discharge himself from liability by such an administration being granted to another, but that a debtor to the fund could not in answer to a suit by such administrator set up the act *in pais* of the executor against his renunciation, in order to delay or prevent a recovery by the administrator. That the administration was void only as a protection to the executor, but in no other sense." The case before the court was an illustration of these remarks.—Blake and Atley were appointed executors and after performing some acts which the chancellor considered as amounting to an action by them in that character renounced in favor of a third party,

295 to whom administration of the will was committed, he becoming insolvent, they were held liable for his administration as if he had been their agent. 2 Sch. and Lef., 246.

Williams on Executors adopts these remarks, and adds, "so if the executor has acted, and the ordinary not knowing it, commits administration to another, though the administration may be revoked, and the executor compelled to prove the will, yet the grant of administration, with the will annexed, until so revoked, is valid." 1 Williams on Executors, 162, and notes.

This view is sustained by the case of Allen *vs.* Dundas, which was to recover from a debtor a debt which he had paid to an executor, under probate of a forged will afterwards revoked. The position taken was as in this case, that the probate was only evidence of right; that the executor derives his authority from the will, and not from the probate, and that there was no payment. The court, however said: "Here the defendant acted under the authority of a court of law. Every person is bound to pay deference to a judicial act of a court having competent jurisdiction. Here the spiritual court had jurisdiction over the subject-matter, and every person was bound to give credit to the probate till it was revoked." Buller, Justice, said, "I am most clearly of opinion that it is a judicial act, and that the probate is conclusive till it be repealed, and no court of common law can admit evidence to impeach it." 3 T. R., 129.

See also the case of Digby & Hollis *vs.* Wray, B. R., 25 & 26, Car. 2, the plaintiff as executor had judgment against the defendant, and then there was a suit in the spiritual court to repeal the letters, and the defendant prayed a stay of execution till the matter was tried in the spiritual court—the court denied it, for the reason that if a debtor pay money on a judgment and execution to one who is executor *de facto*, having a probate under seal of a prerogative court, he shall never be forced to pay it again. 3 Bac. Ab., 51.

To the same effect are decisions of the Supreme Court of South Carolina. In Benson, administrator, *vs.* Price & Byers, the court say, when an administration which has been granted is properly revoked, the latter administrator may sue the former for money had and received, or in trover for any goods remaining in his possession, by him converted or not duly administered. Any other doctrine would be fraught with the most monstruous inconvenience. 2 N. & McC., 577.

296 In Foster *vs.* Brown administration had been obtained by a fraudulent suppression of the will, in which the executor as well as the administrator concurred—it was held that all acts done in a due and legal course of administration are valid and binding on all interested although it be afterwards revoked, nor can the manner of obtaining the administration, whether fairly or fraudulently, vary the question. 1 Bailey, 221.

In Price *vs.* Nesbit, allusion was made to these authorities, and their application to the case, which was that of a will set up after grant of previous administration enforced. 1 Hill, 461.

So also in Pennsylvania, an opinion was once entertained that payments made to one who had obtained probate of a will which was afterwards repealed were void, and in support of it, 1 Roll. Abr. & Con. Rep., 152, were cited, but those cases have been overruled. The granting probate is a judicial act, and while it remains in force cannot be contradicted. Appeal of Peebles, 15 Sergenat and Rawle, 39.

But there is another consideration showing the entire inapplicability of the rule in the present case, even conceding it to be in operation, when *derogatory to the rights* of an executor. There was no executor by this will possessed of rights to be affected by the action of Le Baron. He was himself filling the office of executor, having been appointed administrator, with the will annexed, and continued administrator after revocation of the probate.

It is contended that the acts of paying and receiving debts by an executor or administrator, acting under a grant subsequently revoked, differ from the payment of a legacy in this, that the former relate to rights pre-existing before the grant—whilst the latter, resting upon a void will, derives its sole authority from the probate. The propriety of the distinction is not perceived. Indeed, to allow it would be to assert that the probate is a judicial act, available to a legatee or creditor of the estate against the officer, but impotent for his protection. This would be to declare a part of his duty as obligatory, and hold him discharged from the remainder. We cannot, however, draw such a distinction. All the duties of the executor or administrator, resulting from the probate of the will, or from the letters of administration, with the will annexed are alike imperative and obligatory. "An executor is he to whom another man commits, by will, the execution of that, his last will and testament, and the duty of an administrator with the will annexed is very little different from

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that of an executor." 2 Black., 503. "The executor is bound to 297 perform a will." Ib., 507.

"All administrators, with the will annexed, shall make oath or affirmation before the Court or Judge that they will *well and truly perform the last will and testament of the testator*, and pay his just and lawful debts, &c." Duval's Com. 170.

"A probate is conclusive both in courts of law and equity, as to the appointment of the executor, and the validity and contents of a will so far as it extends to personal property." 1 Williams, 368. Teller, 76.

"The probate is conclusive as to every part of the will in respect of which it has been granted." Ibid, 369. 4 Rand., 538. 2 Ibid. 194.

The will being established by competent judicial action, and this administrator having sworn to perform it, what was his course?—Obviously to pay debts first, if there are none, then to pay legacies and distribute the residuum. If the assets were in bonds and notes, they should have been collected as early as possible, and paid over; but, if the legatee preferred taking the burthen of collection, we see no objection, but on the contrary very great propriety in the executor permitting it.

It was clearly a matter of duty on the part of this administrator to pay legacies under the will as much as to receive debts, and if there be a discharge in the one case, we are at a loss why it should not operate in the other. In the case under consideration there was an express mandate of the court to pay this legacy—an adjudication upon the very point; the very object of the probate, its almost entire object was to procure its payment, and the officer was bound as well by his office as by the solemn obligation of his oath to pay it. To refuse payment would have been alike inconsistent with both of these. To enforce a performance of duty by such injunction, and then subject the officer to peril of his fortune, if through a diverse action of the parties interested, or a change of opinion as to the law by the courts whose agent he was, would be in our opinion the height of injustice. In the case of the debtor protected as we have seen by the probate, as a judicial act there was no mandate, but mere obligation to pay. If the comparative loss is to be regarded, distributees may be as much affected by improper and illegal receipts, and payments by an executor or administrator, as by the improper payment of a legacy. The remarks of the court in Allen *vs.* Dundas, are so appropriate as to deserve a more special reference on this 298 branch of the subject. Ashurst, J., said "I am of opinion that the plaintiff has no right to call on the defendant to pay this money a second time, which was paid to a person who *had at that time a legal authority to receive it.* It is admitted that if he had made this payment under the coercion of a suit in a court of law, he would have been protected against any other demand for it, but I think that makes no difference. For as the party to whom the payment was made had such authority as could not be questioned at the time, and such as a court of law would have been bound to enforce, the defendant was not obliged to wait for a suit, when he knew that no defence could be made to it." 3 T. R., 129.

If there were yet doubts, we think there is express authority in support of the view we have taken. In Hele *vs.* Stowel the husband devised his lands to his wife during the minority of his son, with power to make leases, to pay debts, &c., and dies, &c., the wife enters and takes the profits, and then marries a second husband, and he lives some years and takes the profits and dies, and the wife continues to take the profits, &c. The son *attains his age*, and proves a revocation of the will, and prays an account. The account was ordered. She was to answer as to what her husband took as in a *devastavit*—the wife having *no notice of the revocation had paid legacies* charged on the lands by will. Ordered that she be *allowed those* Cases in Chancery, 126, quoted 3 Bac. Ab., 50 n. 3. 1 Lomax on Ex., 190. Inaccurately stated in Williams on Ex., p. 406.

We do not perceive that there is any thing in the position that Le Baron was not compellable to pay at the time he did or that the statute allowed him to take a bond to refund. It would not have altered the legal bearing of the act, if payment had been made after the six months fixed by the statute, for the movement against the will took place upward of a yeard after the grant. This time is for the convenience of the executor to ascertain the debts of the testator and the amount of the assets so as to make a proper distribution. 1 Will. 855. Bonds seem to have been required, by the ancient practice in Chancery, of a legatee to refunnd if debts should appear, but it is now out of use. It was for the protection and benefit of the Administrator which he might waive as he might the payment before six months. 1 Story's Equity, 605.

We have not noticed the obvious distinction between cases commenced by citation before the ordinary to revoke a probate and those

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299 by appeal from his decision depending before a superior judicature for the very obvious reason that the payment was made before either appeal or citation.

We have by no means overlooked the cases in which a legatee as well as an executor have been held liable for payments illegally made to or received by them. Such are abundant in the books but they are cases of fraud in which the wrong doer whoever he may be is converted into a trustee. 4 T. R. 625. 1 Atk. 463. 1 Will. 609—370-1-2.

But there is no pretext for anything of the kind as to this payment either on the part of Mrs. Fauntleroy or Le Baron. Indeed the probate of the will was made on the affidavit of two of those who are now complainants in the bill, and another fact is to be remarked that there was no movement to disturb it until after the death of Mrs. Fauntleroy. But the liability is asserted in the bill on account of a devastavit charged to have been committed by Le Baron. Let us see whether this view of the subject is sustainable. "Devastavit is defined to be a mismanagement of the estate and effects of the deceased in squandering and mis-applying the assets contrary to the duty imposed on them for which executors and administrators shall be responsible out of their own pockets as far as they had or might have had assets of the deceased." Bac. Ab., Ex. L., 1. Will. Ex., 1105. Toller, 424.

It is under this head Williams says "An executor is personally liable in Equity for all breaches of the ordinary trusts which in courts of Equity are considered to arise from his office. And it may here be observed that where personal property is bequeathed to executors as trustees, the circumstance of taking probate of the will is in itself an acceptance of the particular trusts; therefore when the will contains express directions what the executor is to do, an executor who proves the will must do all which he is directed to do as executor, &c. Will., 1104. Meeklow *vs.* Fuller, Jacob. 198.

Now it will hardly be contended that the administrator Le Baron could be held liable for not obeying the will by refusal to pay this money and again liable for paying it. We are then of opinion that in equity and justice as well as by the principles of law Le Baron should not be held liable for the payment of this legacy to these complainants.

The question yet remains as to the responsibility of Colquitt.—In reference to this we have no hesitancy in saying that if the pay-
300 ment made to Mrs. Fauntleroy could not be supported under the will of her husband, that it should and ought to be so far as her distributive share as widow extended. If a mistake was committed by her in common with others interested in the estate, as well as by the tribunal whose office it was to adjudicate as to the legal effect of the paper set up as the testament of her husband, it certainly should not operate to produce a forfeiture of her interest as a distributee.

A salutary rule of a Court of Equity is to regard that as done which ought to have been done, and rather than declare a forfeiture of the widow's right, Equity would regard the payment as made to her originally for her distributive share and not as a legacy. This share does not reach the amount paid her by Le Baron and the enquiry is as to the liability of Colquitt to make the deficiency good. Whether such a liability may be made out against him is not the question before us. We have to decide whether the complainants have by their pleadings and evidence, made a case entitling them to relief in a Court of Equity. The allegation as to his liability is to this effect, "your orators further charge that said Le Baron has committed a devastavit upon the estate of his said intestate and wasted the same by paying a large portion thereof, to wit the sum of fifty thousand dollars to the aforesaid Walter Colquitt under pretense of a legacy having been left to the said Aphia in a pretended will of said deceased, which pretended will has long since been pronounced by a court of competent jurisdiction, to be invalid &c., and that said Le Baron and Colquitt have combined and confederated together most unjustly to detain from your orators the said sum of fifty thousand dollars so illegally paid by said Le Baron to Colquitt, and they further show that a portion of the said estate of said Fauntleroy so illegally paid to said Colquitt consists of bonds due by sundry persons, to wit, (here a blank) to the said estate and that many are now in suit by said Colquitt as assignee of said Le Baron and is thereby reducing the same to his possession." Here there is the simple allegation of devastavit against Le Baron for paying to Colquitt, though both are charged with combining to detain the $50,000. Now this charge of payment to Colquitt is expressly negatived by the agreed case showing that on the 25th and 31st of May, 1840, this sum was paid to Mrs. Fauntleroy before her marriage. So that if a decree was rendered in favor of complainants against Colquitt it would be on grounds directly opposed to and falsifying the statements in their bill. It would be without allegation and against proof. We hold it to be very clear too that a mere charge 301
of confederacy against a party is not the foundation for the jurisdiction of a Court of Equity. Story's Eq. pl., 25-27.

The whole case against Colquitt is clearly predicated on the idea of Le Baron's having committed a devastavit and that failing, the plaintiffs' case would seem to fail also as to him. This case in distinct and separate in its character from the distribution and may be better adjudicated by itself than in connection with it. The complainants had permission too of which they did not avail themselves to amend their bill, and cannot complain now of the dismission for want of it.

We are therefore of opinion that the bill should be dismissed as to Colquitt, without prejudice to the institution of another suit against him, if the parties think they can maintain one for the difference between the amount of the legacy and the distributive share of Mrs. Colquitt. In the mean time the present suit will proceed for distribution against Le Baron as to the residue of the estate crediting to him the sum paid on account of the legacy. This view of the subject disposes of the exceptions to the master's report.

This same case was before the Court of Appeals of the late Territory at their January Term, 1845, and they holding different sentiments and opinions as to the law of the case, reversed the decree of the Superior Court which had dismissed the suit as to Colquitt, and declaring that Le Baron had committed a *devastavit,* required them both to answer. This decision, it is contended, is conclusive in this court as to the rights of the parties having been made by a court having full jurisdiction of the subject-matter. This question was very fully considered by the Supreme Court of South Carolina in the case of Price's Executors *vs.* Nesbit, in which the court after reviewing their own decisions and those of New York, held that the appeal from a final decree would, if pursued, open all prior decrees whether of the Chancellor or Court of Appeals. 'So long as a decree operates,' it was said, 'merely as authority or as the reasoning of the court to prove the party's right in whose favor it is pronounced it may be reviewed and reversed whenever it comes up properly before the Court of Appeals, in any of the subsequent stages of the case." The opinion of Chief Justice Spencer in the Court of Errors of New York, was quoted with approbation, concurred in, as it was, by the whole court. "An appeal from a final decree opens for consideration all prior or interlocutory orders or decrees connected with the merits of the final decree." 17 John, 548.— 305
1 Hill, 547.

There could scarcely be higher authority than this in support of a legal proposition, yet without holding it decisive, and reserving the point for a more careful consideration, there is in our opinion in the record and in the opinion and mandate of the court sufficient to shew that it should not conclude the rights of either Le Baron or Colquitt.

There is no where in the record, or amongst the papers, any evidence of an appeal prayed or taken either in the Court below or before the Clerk, nor does notice appear to have been given to the adverse party of the appeal. The mandate of the court itself states that argument was heard of counsel for complainant, but that "no counsel appeared on behalf of defendants." It is true the name of an attorney for defendants is marked on the docket of this court at that time; but at the most this is an equivocal act. In the Circuit Court by statute the name of an attorney operates to prevent a judgment by default in common law cases; but we are not aware that of any law declaring its effect in a case of Chancery or in the Court of Appeals. Does it amount to notice of an appeal by the other side, and of the pending of the suit in the Appellate Court. But again it is insisted by appellants that, that court had not the facts before it, and therefore its decision could not be conclusive, and we are referred to the opening of the opinion commencing as follows: "It is difficult from the very imperfect record before us, to ascertain either what the real questions in the cause are, or what decree ought to be given upon the record, and were we not aided in some measure by the *admission of complainant's counsel on the argument* and by some references to facts in the opinion of the Judge in the Court below we should find it still more difficult. Disregard, however, the defects of the record as much as possible we shall endeavor to express our opinion on the main points or questions upon which the *parties* desire a decision as we undertsand them, from the argument at bar as well as from the record."

In declaring the plea of Colquitt bad, which the court did, on grounds that neither the will nor probate were set out in the plea, nor any averment that the $50,000 paid to Mrs. Fauntleroy were the same $50,000 charged in the bill to have been paid to Colquitt, and no answer connected with the plea as required by the statute, they say, "it should be observed, however, that in the opinion of

303 the judge below, a state of facts is set forth which do not appear upon the record, and upon which it would seem that the decision of the court below was predicated, and which might form *a good ground for the decision of the court below;* and we are not prepared to say, that if the facts set forth in the opinion of the judge were spread upon the record, and those were the only facts of the case, that the *decision might not be entirely correct."* They then direct him to answer fully, and that in doing so he compromits no rights—and if upon the coming in of his answer it clearly appears that he is not properly a party to the suit, the bill may be dismissed.

Even as to Le Baron, they say, "the court below in its decision considered that the payment or delivery of the $50,000 of securities by the administrators to Mrs. Fauntleroy, who was justified by the then existing probate of the pretended will, and in the opinion of that court this conclusion is arrived at upon a state of facts set forth in the opinion, *which nowhere appear in the record,* and upon which that court came to the conclusion, that although the will was annulled and declared void, and the probate of it revoked, yet that Le Baron is not bound to refund, &c.

Now, turning to the opinion of the court below, we find these facts stated as the ground of its opinion. "It is declared to be the opinion of this court, that Le Baron did not commit a *devastavit* in paying over the said legacy to the said Aphia, before a revocation of the probate, or notice thereof, and before suit to invalidate the said will." Perhaps with the facts now before us, the Court of Appeals might have come to the conclusion we have taken in common with the Judge of the Superior Court.

We are, therefore, of opinion, that, under these circumstances, the decree of the Court of Appeals should not be held to conclude the defendants in this case, as contended for by complainants. The decree of the court below will be reversed and set aside, with directions to dismiss the bill as to Colquitt, and to allow the payment by the administrator of the legacy, and for further proceedings not inconsistent with this opinion.

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H. as principal and W. and C. as sureties, executed notes payable to B., as guardian of the heirs of F., upon the purchase by H. of lands belonging to the wards. B. the guardian died, and H. was appointed his successor, who, upon a settlement as guardian with the executor of B., his predecessor received among other things the note executed by himself, and gave receipts as guardian to the executor of B., as for so much money. He afterwards, at the instance of C., one of his sureties, cut the names of W. and C. from the notes. In his accounts filed in the County Court, H., charged himself with a large sum, comprising nearly all the estate of his wards received from the executor of B., as received in "notes and accounts." H. died, and S., who was appointed his successor as guardian, instituted suit in the name of the executor of B., for his (S.'s) use as guardian, against W., one of the sureties on the notes. Held, by a divided court:

That the notes were not extinguished, and that S. was entitled to recover the amount of the notes.

A note payable in "current Florida money," is payable in good funds.

Appeal from judgment rendered in Leon Circuit Court in favor of appellee, for $4,122 24-100, on 23d May, 1846.

This cause was argued at the last term, and also a second time at this term, when the judgment of the court below was affirmed by a divided court. The facts of the case fully appear in the opinion delivered by the Justices.

D. S. Walker, for Appellant:

The first question presented by this record, is whether the notes sued on were the property of Arthur Burney at the time of his death, as alleged in the first instruction asked for. That they were would seem to be admitted by the institution of this suit in the name of his executor Moseley. But as this proposition is in some sort denied by the court below in refusing to give said instruction and in giving the first it gave in its stead, we present the following authorities to sustain it; Chitty on Bills, 160, and cases cited—Same, 358. Story on Promissory Notes, page 130, sec. 125—page 461, sec. 375—page 132, sec. 126—page 296, sec. 250—page 129, sec. 123. Bailey on Bills, 335, and notes—same, 76. 1 Vermont 500.

The error of the court is, in declaring the notes themselves to be the *trust* property of Arthur Burney, in contradistinction, as we suppose to the legal property, must have been fallen into by confounding the *paper and ink* used in making the notes, with the money intended to be secured by them. That the *money,* had it been collected by Burney, would have been holden by him in *trust* for his wards is true, but the notes themselves were not his trust property. See Story on Promissory Notes, 122, sec. 126. 305

2. It being true, then, that the legal title to these notes was in Burney at the time of his death, it follows that that title passed to Moseley as his executor. Therefore the next question is, whether Moseley was not divested of that title by voluntarily delivering them to Hart, the principal obligor, in consideration of his receipts for so much money. These receipts were valuable to Moseley, because they were vouchers sufficient to discharge the estate of his testator, Burney, from the debt it owed to Farmer's heirs. Story on Promissory Notes, 540, 503, 504.

The receipts Hart gave are "binding" upon the heirs of Farmer, so as to preclude them from ever setting up this claim against Burney's estate. See Thompson's Digest, page 201. If, then, with these notes Moseley has paid off and discharged a debt that was valid and subsisting to their full amount against the estate of Burney, how can it be pretended that he still has title to them? If, then, Moseley has no legal title, this suit cannot be maintained in his name; and if his right of action was even suspended, he cannot resume it now. 2 J. R., 471. 5 Peters S. C. U. S., 267.

3. But it is further contended that these notes were cancelled by being delivered to Hart, and by the names of Williams and Chaires being cut therefrom; and that even if such cancellation has been fraudulent, (which is by no means admitted,) a suit *at law* cannot be maintained upon them. A cancelled note is no note at all; but if the cancellation is procured by *fraud,* a Court of *Equity* may relieve against such fraud, by compelling the obligors to pay the money just as if the note had not been cancelled. This power does not appertain to a court of law; our statute in regard to the mode of suing at law upon lost notes makes no provision for a suit at law upon cancelled notes. It is obvious that this cancellation took place with the approbation of Moseley, who had been the legal owner, and Hart the principal obligor, to whom they had been delivered as aforesaid. If this was a fraud, it cannot be relieved against in a court of law, but relief can only be had in a Court of Equity. See Daniel's Chancery Practice, 504, 505, in new law library, 298, and cases there cited. 306

4. But the main question in this cause still remains to be discussed; for it is obvious that if it shall be dismissed merely because a wrong party is suing, or the suit is instituted in the wrong court, the ultimate liability of Williams will not be thereby determined. That question is, whether Williams is liable to any person, in any court, upon these notes. We contend that when Hart, the principal obligor in these notes, became possessed of them as the guardian of the heirs of Farmer, such possession operated in the law as an *extinguishment* of all liability of Williams upon said notes. This, we think, is made manifest by the following authorities: In 5th Peters Rep. of S. C. U. S., 207, the court say—"The executor cannot sue himself, and for this reason he is authorized to retain his debt out of the assets in his hands. The right of action being once extinguished, cannot be revived, either by the executor or his legal representative. On this point the authorities are decisive; and although some difference of opinion seems to have been entertained as to the extinguishment of the debt, yet it is in effect extinguished, as the legal right to enforce the payment of it is gone."

In the case of Hall *vs.* Hall, 2 McCord Chancery Reports, 304, the court say—that "debts due from the executor to the testator are so much cash in the hands of the executor."

In the case of O'Neal *vs.* Herbert, 1 Dudley's Law and Equity Reports, 31, Chancellor Harper, in delivering the opinion of the court, says—"I suppose that if an administrator have in his hands the balance of an estate, and is afterwards appointed the guardian of infants entitled to it, he will be chargeable as guardian, and will be liable as in the case of Simkins *vs.* Cobb, (2 Bailey Reports, 60.) So, if before his appointment he has received a sum of money belonging to his wards, as in McDowell *vs.* Caldwell, (2 McCord's Chancery Reports, 55.) *Or, if in any other capacity he be indebted to himself as guardian, being unable to sue himself, the debt* shall be presumed to be paid."

In Chief Justice Marshall's Decisions, 267, is the following case: The testator Munford by his will gave a bond on John Bannister to his daughter Francis, and made his brother Robert her testamentary guardian, and his own executor. Robert charged himself as executor with the amount of the bond, and assumed the same to be his undeniable property. Chief Justice Marshall held, that Robert as

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307 executor, with his securities, was not bound; but that Robert was bound as guardian, on the ground that when he chose to consider the bond as money in his hands, (which he had the right to do,) he was instantly chargeable with it as guardian, because it being his duty instantly to pay over to himself as guardian, the law will consider him as having done that which he ought to have done. Now, we urge, that if Hart had the right to consider the bond of "John Bannister" or any one else as cash, and to charge himself with the amount thereof, and assume that it was due to himself individually, surely he had the right to consider the notes of himself and Williams as cash, and to charge himself with the amount thereof.

In the case of Galphin *vs.* McKinney and Breithaupt, (1 McCord, 280,) Brooks as commisisoner in equity was ordered to sell land. He did so and McKinney purchased it and gave his bond with Breithaupt as his security for the purchase money. The money, when collected, was to go to McKinney as the executor of Galphin. McKinney applied to the court to have this bond delivered up to him, and it was done. The Court of Appeals of South Carolina decreed that it was properly delivered up to him, and that Breithaupt, the security, would have had the right to have it delivered up to be cancelled if McKinney had not done so. To change the names of the parties, Arthur Burney was made commissioner to sell lands. He did so, and Hart became the purchaser, and gave his notes with Williams as his security for the purchase money. The money when collected was to go to Hart as guardian of the heirs of Farmer. Therefore Hart had a right to have those notes delivered up to him to be cancelled, and Williams himself would have had that right if Hart had not exercised it.

In the case of Gray *vs.* Brown, 1 Richardson's Law R., 352.—William G. Steel was trustee for Rachael Carroll, who married and died, leaving five children, of all of whom B. R. Carroll was appointed guardian, and defendant Brown signed his guardianship bond as security. Afterwards Carroll, the guardian, was substituted trustee in place of Steel, and on 9th June, 1838, filed a petition for leave to sell the trust property. This leave was granted (see it page 353) on his giving bond with security in double the value of the property, the bond was given (see it on page 353.) The property was then sold, and Carroll received the money for it, being $8200. Carroll did not account for the money, which he thus received as trustee and became insolvent. This suit was brought to recover the amount

308 from defendant Brown as security on Carroll's guardianship bond. The Court of Appeals held that Brown was bound to pay it, because it was Carroll's duty, as trustee, to pay himself as guardian, and the law presumes he did so. The court further declared that "even entire destitution of means would not seem to arrest the presumption of payment, which by law results from the union of debtor and creditor." The court says further, "The cases which have been cited from our court—Simpkins *vs.* Cobb, 2 Bail., 60. McDowel *vs.* Caldwell, 2 McCord, Ch. 55. Hall *vs.* Hall, 2 McCord, Ch. 304. Joyner *vs.* Cooper, 2 Bail., 199. Schnell *vs.* Schroder, Bail. Eq., 334, and O'Neal *vs.* Herbert, McMull. Eq., 334, *all* seem to regard the extinguishment of the debt as a necessary legal result of this union, 304.

Mr. Thompson for Appellee contends:

I. As to the first error assigned, that Tom Peter Chaires was properly excluded. He was one of the makers, a co-surety with Williams, and liable for contribution, in case of recovery against Williams. He was not competent without a release. 1 Greenleaf on Ev., sec. 390, et seq., 402—Leroy *vs.* Johnson, 2 Peters, S. C. Rep., 187, 194—Bagley *vs.* Osborne, 2 Wendell R., 527—Ransom *vs.* Keys, 9 Cowen R., 128—Carleton *vs.* Whitcher, 5 N. Hamp. R., 196—2 Philips on Ev., 1521, and notes, where all the cases are reviewed, and the ruling of the court sustained.

II. As to the second error assigned, the refusal of the court to permit the witness Lang to give evidence of the declaration of defendant himself in his favor.

The court below did not err in this—the defendant sought to give evidence of what he had himself said to the witness, a third party in relation to these notes, and thus make evidence for himself.

The conversation, too, was at a time subsequent to the institution of the suit.

I do not conceive it necessary to say more on this point.

III. The court did not err in its refusal to instruct the jury, as prayed by the defendant.

1. The first instruction asked for seemed to regard Burney as the owner of the notes, having full property in them: this was in direct opposition to the evidence, which showed that he held them in his fiduciary capacity as guardian. The first instruction which the 309 court gave states the law correctly according to the facts of the case.

2. The second instruction asked for was, that the delivery, without fraud, by Moseley to Hart of the notes in suit, in consideration of the receipts, operated as a divestiture of all title out of Moseley, and therefore this suit cannot be maintained in his name.

The delivery was made to Hart, in virtue of his letters of guardianship—Moseley being the representative of Burney, the former guardian. If the party here meant that the delivery, without fraud, to Hart extinguished the notes, that will be considered in the argument on the 3d, 4th and 5th instructions hereafter.

If, however, he meant that the notes being assigned by Moseley by delivery operated as such a divestiture of interest and title as would prevent his name being used by a holder to recover the money, it is clearly erroneous and the court below was right in its refusal.

The notes were payable to Burney, guardian, &c.—they did not contain the words, "or order, or bearer"—the assignee or beneficial owner has a right to use the name of the payee for the purpose of recovery. Eastman *vs.* Wright, 6 Pick., 322. Payne *vs.* Rogers, Doug., 407. Locke *vs.* Taunton, 7 Taunton, 9. Skinner *vs.* Sims, 14 Mass. R., 107. Mosher *vs.* Allen, 16 Mass., 452. Winchester *vs.* Hackley, 2 Cranch, 352. Jarman *vs.* Howard, 3 Marsh, 384. Smock *vs.* Taylor, Coxe, 177.

The death of the assignor does not defeat the assignment, but the assignee may use the name of the executor or administrator of the assignor to recover the money. Dawes *vs.* Bowleston, 9 Mass., 337. Cutts *vs.* Perkins, 12 Mass., 206.

The action, therefore, is well brought in the name of Moseley, administrator, for use, &c.

3. The 3d, 4th, and 5th instructions are the same in substance, and assert the position that Hart, being one of the makers, and acquiring the possession without force or fraud, the notes were extinguished.

It is said that when the right to receive and the duty to pay unite in the same person, the debt is extinguished, but there are exceptions to this rule.

When the right to receive is in *auter droit*. 8 Co. Reps., 136. Needham's case. 1 Salk., 326. Gray *vs.* Acton.

It does not extend to administrators. 4 Bac. Abr., 15, Tit Ex's. 310 6 Iredell Law Rep., 448.

Nor to guardians: in which case right of suit is not even suspended. Wilborn *vs.* Gorrell, 4 Iredell Eq., 117, 121.

Nor to the case where a woman residuary legatee married the sole executor; her share of the residue being held to survive to her. Baker *vs.* Hall, 12 Vesey, 497. Gray *vs.* Acton, 1 Salk., 326.

Administrator bound to inventory notes, though he is the promissor, and though he denies they are due. Porter vs. Titcomb, 1 Fairfield R., 53. See also, 2 Rich. Rep., 80, Bellume *vs.* Wallace.—And Kent *vs.* Somerville, 7 Gill & Johns, 265.

4. The 6th instruction asked and refused was, that if Hart obtained possession of these notes lawfully he had a perfect right to destroy the same, &c.

He received the notes in his capacity of Guardian, and in virtue of his authority under the letters, &c.

He had no authority as holder to destroy the interests of the real owner. Hill *vs.* Calbert, 1 Rich. Eq. R., 56.

A Guardian is an agent, having an authority not coupled with an interest. Granby *vs.* Amherst, 7 Mass. R. 6. Manson vs. Felton, 13 Pick., 109. 4 Scammon 127, 133.

They are not invested with anything like the same authority that belong to Executors. Per Hitchcock C. J., in Swoope *vs.* Trotter, 4 Porter, 36. See also, Exum *vs.* Bowden, 4 Iredell, 281.

The value of the interest which a Guardian has in the ward's estate, is not the value of the estate, but the office of Guardjan so far as compensation for labor and services extend. Ritchie *vs.* Mauro & Forrest, 2 Peters, 243.

He cannot release a debt, though to make the debtor a witness for the ward. Fraser *vs.* Marsh, 3 Cond. Eng. C. L. Rep., 235.

So his admissions are not evidence against the ward. 3 Cond. Eng. C. L. Rep., 385.

He cannot bind the person or estate of the ward. 6 Mass. R., 58. 1 Pick. R., 314.

Nor do any act to prejudice his ward. Jackson *vs.* Sears, 10 John. R., 441.

Considered as *agent* of the wards in the collection of these demands, he could only discharge the debtor of his principal by the receipt of the money due. He cannot receive a discharge of a debt

311 due from himself to the debtor, and thus make himself debtor to the principal. Story on Agency, p. 170, sect. 181. Ibid, 439, sect. 430. Paley on Agency, 262.

A factor has authority to sell for money, not to barter: if he barters no property passes. Guereiro *vs.* Peile, 3 Barn. & Ald., 616.

He may not pawn or pledge the goods, and if he does the property in them is not altered. Patterson, *vs.* Tash, 2 Strange, 1178.—Newsom *vs.* Thornson, 6 East, 17. Shepley *vs.* Kymer, 1 M. & S., 484. Everitt & Saltus, 15 Wend., 275. Ibid, 20 Wend., 268.

So also, a party receiving bills to be applied to a specific purpose cannot by applying them to his own use alter that purpose and make the trust a debt. 2 Smith's Leading Cases, 89, 131. See also Woodson *vs.* Payne, 1 Call, 570.

All the parties to the notes had notice of the trust or real ownership. The notes not being payable to Burney, as "Guardian of the heirs of John Farmer, deceased,"—it was notice. Exum & Bowden, 4 Iredell Eq. R., 281. Powell *vs.* Jones, 1 Iredell, 337. Fox *vs.* Alexander, Ibid, 340. Lockhart *vs.* Phillips, Ibid, 342.

Considered as a *Trustee*, he could not alien the trust fund in payment of his own debt. Graff *vs.* Castleman, 5 Rand., 195.

Nor alter the destination of the fund from the purpose for which it was originally intended. Presbyt. Church *vs.* Dounom, 4 Dessau, 154. Hill *vs.* Simson, 7 Vesey, Jr., 152. Dodson *vs.* Simpson, 2. Rand., 294. Rutledge *vs.* Smith, 1 McCord. Ch'y, 119.

5. The court did not err in refusing the 7th instruction asked for by the defendant below.

A receipt is not conclusive evidence: it may be explained or rebutted by parol. 1 Phillips on Ev., 108. Elwell *vs.* Leslie, 2 Halstead, 349.

But these receipts are by Hart, one of the payers of the notes, and to give the receipts the effect contended for is to permit a party to make the evidence of his discharge.

6. The 8th instruction asked for, was on the supposition that the court would charge that the legal title of the notes did not pass to Burney's representative on his death, but the court did charge that Moseley, the representative of Burney, held the notes as Burney had held them in his life time.

7. The 9th instruction asked for, was an abstract question of law
312 which though right the court may well refuse. Caton *vs.* Lenox, 5 Rand., 31. Hamilton *vs.* Russell, 1 Cranch., 309.

8. The court was right in its refusal to give the tenth instruction. "Current Florida money," means specie, or par money. See Cockrill *vs.* Kilpatrick, 9 Missouri R., 697.

9. The court was right in refusing the 11th instruction asked for. The character in which Moseley sues was not denied by plea, which is necessary if defendant would put it in issue. 1 Chitty Pl., 526. Thyme *vs.* Thyme, 2 M. & S., 553. Worshem *vs.* Goar, 4 Porter, 441. Chaplain *vs.* Tilley, 3 Day, 303. Pollard *vs.* Butler, 3 Blackf. 339. Coxe *vs.* Robertson, 1 Bibb., 604. McKim. *vs.* Riddle, 2 Dallas, 100.

IV. The fourth error assigned is that the court erred in the instructions given.

1. That the first is correct is manifest from the facts which appeared in evidence.

2. The court was right in leaving the fact of payment to the jury. See Garlock *vs.* Geortner, 7 Wend., 198.

3. The third instruction is fully sustained by the argument and authorities in justification of the refusal of the prayer of the defendant.

An action at law may be sustained on the notes, though mutilated by the cutting off the names of T. P. Chaires and R. W. Williams, the same having been done by Hart in fraud of his wards the beneficial owners of the notes. See U. S. States *vs.* Spalding, 2 Mason Rep., 478.

It was a fraud in Hart, and none can gain any interest thereby. 4 Iredell Eq., 219.

V. As to the 5th error assigned, that of the trial on the 23d May, 1846, there is nothing in it.

A court may be continued to a distant day by adjournment. See Mech. Bank vs. Withers, 6 Wheaton, 106.

See also 7 Barn. & Cres., 6—the case of the King *vs.* Leicester, in which it was held that the 51 Geo. III. c. 84 which enacted that the Michaelmas Quarter Sessions shall be holden in the week next after the 11th of October is merely directory, and the sessions may notwithstanding that enactment, be legally holden at another time.

Archer on the same side.

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Brockenbrough for Appellant, in reply:

I. In this action we must consider the rights of *Moseley, executor,* alone, and if he, in that character, cannot recover, no recovery can be had—the *appendage* of the words, "for the use of Patrick Smith, guardian of the heirs of John Farmer," in no respect alters the rights, claims, or character of the plaintiff—with them the defendant has nothing to do. He can traverse nothing and take no issue, with or about Smith; the words only regulate rights between Moseley and Smith, and cannot increase Moseley's rights against defendant.

By suing in this mode, Smith admits he has no right of action *in his own name, in this case,* and if Moseley has none, they cannot recover together, when neither could separately. Even if Smith could separately, it will not avail him *here,* unless Moseley, Admr. can, because *he* sues.

Mr. Thompson's doctrines in his printed brief, "that the assignee or *beneficial* owner, has a right to use the name of the payee, for the purpose of recovery, and that the death of the assignor will not defeat it, and even that the assignor cannot dismiss, &c.," *is not denied.* But *the application* is denied.—

1. Because the doctrine and authorities apply only to releases, discharges and equities, between assignor and defendants, *arising subsequent to assignment,* or notice thereof. And here all our defences *vs.* Moseley existed long *anterior* to any possible interest in P. Smith.

2. P. Smith never had any assignment whatever from any one.

3. Smith is not the *"beneficial owner"* of these notes if existing—but his *several wards*—who have several interests, and several rights —and must proceed *severally* in any action that they bring *at law.* —Burnett *vs.* Commonwealth. 4 J. J. Marshall, 389. 7 Pick. 88.

4. If the notes existed, and the law assigned them to Smith, the law made the same assignment before to Hart; and if so, the *legal* title has never been in Moseley, and he cannot now sue. If the words "guardian" imply a severance of the funds from Burney's own funds, as "administrator" is held to do—and upon the authorities cited—it would then have to be admitted that there can be a *guardian* in the nature of a *guardian de bonis non,* to whom the notes would go, as to an administrator de bonis non, in the case supposed. It then follows that the 2d or 3d guardian, (*de bonis non!*) must have the legal title, and sue in his own name, (for by this doctrine Moseley never could sue, as no estate would come to him.)

Administrators de bonis non do not sue in the name of the executor 314
of the first administrator.

This doctrine is inconsistent with the doctrine of assignment from Moseley, and with this suit. If on Burney's death the paper goes to Hart, and thence to Smith, as the ward's estate, nothing goes to Moseley.

II. The question then is not, what could the heirs of Farmer do? or what could Patrick Smith do? As they are not parties to the record, and the *heirs* certainly no more bound by the acts of Smith than by those of Burney or Hart—and Moseley and Smith combined can do more than Moseley and Hare combined. The question is, can *Moseley recover?*

1. *The legal title passed to Moseley—or it did not.*

1. If Moseley can sue now, some legal right must have passed to him on Burney's death. *There is no intermediate state—a man must have the legal* right entirely, *or not at all.* In Mr. Thompson's cases, the words "Administrator, &c.," passed over the whole estate to Administrator de bonis non, and left none in Executor of first Administrator. So on Mr. Archer's supposition, that title passes to successive guardians by act of law in virtue of their appointment.—The whole *title passes,* if he is correct, or none at all—and unfortunately for Moseley's title to sue, the whole title would pass, not to the guardians, but still further off *to the wards,* for the *land was theirs* —as in the cases he supposes, of bond to the Governor and his successors. He says no title could pass to his Executor or Administrator—conceded. But then Moseley cannot sue. See case cited by Mr. Thompson, 8 Eng. C. L., 45, Catherwood *vs.* Chabaud. The administrator de bonis non took the *title,* and sued in his own name. See also 1 Salkeld, 306. *The title passed directly.*

2. If this action is sustainable, then Moseley must have taken the whole legal right in these notes when Burney died. If a right to sue existed, he then had a right to receive payment on them, and charging his account as Executor with the money, to credit the Testator's guardian's account. This was the only thing he could honestly do with the money when he received it. This he did.—When Hart was appointed guardian, Moseley renders *an account,* crediting Hart as guardian, and debeting himself as Executor.—Hart's receipt paid the debt due from him to the guardian, and also the debt due from him as Executor—and being filed, releases him as Executor —releases Burney as guardian—and on his bond to sell

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315 land. It also charges Hart and his sureties with *cash as guardian.* All these things he had a right to do, and it was his duty to do. The payment of notes over to Hart, and his receipt might have left open for a long term of years, dangerous question of liability of his Testator and himself. He closed all questions. He made his election. The law was with him. Alston, *vs.* Munford, 1 Brockenbrough, 278, and note and cases cited, viz: Taylor *vs.* Deblois, 4 Mason, 131. Pratt, &c. *vs.* Northan, &c., 5 Mason, 108. Myers *vs.* Wade, 6 Rand., 444. To which cases special attention is invited.

These things we contend Moseley had a right to do—if he had not, he is *estopped* from disputing his right *vs.* Hart—a *fortiori vs.* Williams. See Lord Denman's beautiful rule as to estoppels *in pais* in the case of Pickard and Sears, 6 Adolphus and Ellis, 475—cited and approved and adopted by this court in Cotten *vs.* Williams, 1 Branch, 34. 5 Arkansas, 568. Cheever *vs.* Smith, 15 Jo., 276. Bacon *vs.* Chesney, 2 Eng. C. L., 352. Parsons *vs.* Administrators of Gaylord, 3 Johnson, 464. Coxe *vs.* Williams, 4 Cond. La. R., 249. "A positive right conferred by law on the doing of a certain act, cannot be destroyed by *speculations* as to what would have been the situation of parties, if that act had not been done." Nolte et al. *vs.* Their Creditors, 4 Cond. Lou'a. Reps., 136. 1 McCord, 298, Galpin *vs.* McKinney, et al., a great case upon the whole subject, the equity of which has not been and cannot be impeached.

This case, and Gray *vs.* Brown, 1 Richardson, 364, (and the many cases there cited,) and the principle of extinguishment in all fully sustained, are not in the least overruled, or even the doctrine approached in Bellune *vs.* Wallace, 2 Richardson, 81. In that case there was no question of extinguishment whatever. The two guardians bonds were held to be entirely cumulative, and therefore the last bond did not discharge the first, and therefore the mortgage given to secure the surety in the first bond, was not discharged by giving the last. And the real question in the case was whether the mortgagee (his mortgage being thus held good,) could bring an action of trover for a slave against a purchaser under judgment against the mortgagee, before he, the surety, had actually paid money on account of his suretyship, and been therefore damnified. And it was held he might. Because the mortgage passed a present estate, and performance of the condition must be shown to defeat. There was no question of extinguishment. Wardlaw, dissenting, still con-
316 tends that the whole doctrine of extinguishment is in full force.—He dissents only on the main question—whether trover would lie, until the party had actually been damnified by payment.

He admits the continuance of the mortgage, by saying "the proceedings were probably such as saved to the plaintiff in his securityship to the second bond, all the securities he had taken when he signed the first bond." And he goes on to say, "BUT IF" the guardianship had been revoked and a new appointment made to the same man, he would have been held to have paid over the assets to himself under the new appointment, and in discharge of his first sureties, under the authority (which he cites) of Gray *vs.* Brown, and cases there cited as the admitted law. And which position, so far from being overruled or doubted, is not even alluded to by the court in its decision.

The hypothetical citation of a well established principle, (in a case in which it is admitted it does not apply,) in a dissenting opinion, on a wholly different question, is cited to show that the court, which does not allude to the subject, intends to overrule a whole series of well considered and established cases, which had been before cited and approved as the law by the same court, in the same year, (1845)—the first being in January, the latter in December.—And when *Wardlaw, O'Neal, Butler,* and *Frost,* decided the first cause, and only Evans dissented. And *Evans, O'Neal, Butler,* and *Frost,* decided the last case, and Wardlaw and Richardson dissented on another point, citing the former case as established law. Can O'Neal, Butler and Frost, be held to have changed their minds, and overruled so many cases, so lately approved, without a *word upon the subject,* and in a case in which it is admitted the question did not arise? No one could be more surprised than those Judges would be at the citation of the last decision as overruling the whole series preceding. Certainly Bellune *vs.* Wallace might as well be cited as overruling any other series of cases.

To return to Estoppels:

See also Doe-demise of R. V. vs. Oliver & Duchess of Kingston's case, 2 Smith's leading cases, 439, [30 Law Lib. 105.] Estoppels must be mutual. Hart and his sureties on his guardian bond, and Hart's adm'r would be estopped by Hart's receipt. Even his wards themselves would be estopped by it conclusively.—*Thompson's Digest,* 201, 36.

If the Farmers sued Moseley for these notes specifically, he might reply that they were paid to him. And it must be a good reply, if he 317
can sue on them. And if sued for the money, he can reply this receipt. The receipt being *conclusive* between him and any subsequent guardian. And if conclusive *for* him, it must be *against him.*—Certainly *when* suing in the same right. Nor is it evidence made by Hart for himself, as Mr. T. contends. Moseley wrote it—dictated—executed it. Moseley made out the account and rendered it—He accepted it—He filed it—He has relied upon it. It is the sheet-anchor of safety to himself and Burney's Estate.

4. The Record shows that Moseley is no longer held bound in the Probate Office—but Hart. There is a judgment there approving Hart's loose memorandum, so far as it charges himself. The account is "examined, approved, and allowed." This is *res judicata* —The decision of a court of competent jurisdiction unreversed.—It discharges Moseley as Executor, Burney as guardian, and on his land selling bond he charges Hart as guardian and discharges him and sureties as an individual.—See Steele guardian *vs.* Glass—1 Kelly, 488.

The recovery in this action by Moseley could not *undo* all this. If he recovers he holds as his own. He cannot by recovery make the discharged parties again responsible. By not paying over the money he would commit no devastavit. If insolvent, Williams would lose it.

III. The notes were *extinguished* before they came to *Hart's hands.* They never came to his hands *as guardian.* He and Moseley are both estopped from saying they did. When Moseley *calculated the interest then due,* and charged up principal and interest in an account rendered—he admitted them paid, and that he only then held them as a *voucher* for correctness of his entry, and when he consummated his act by taking the receipt, or one new voucher for the whole account, he had no longer a right to hold it in any shape. It then became Hart's voucher for the payment for land, and as such he must have received it. Except as such he had no right to receive it.—Hart could not then attempt to set up the extinguished note in his own hands, without fraud.

1. Upon his own securities in the note, who had been discharged.

2. Upon his wards, for whom he had received so much cash, the principal and interest on which combined sum he and his bondmen were liable for interest annually, until they came of age. Thomp- 318
son's Dig., 207.

If the note had come to his hands and been thereby extinguished, he would have been responsible for the amount as guardian, as by his actual arrangement with Moseley; but if as opposing counsel contend, the right of action would have been suspended pending his guardianship, then by attempting to set up this note, when so passed to him by Moseley, he would have committed a further fraud upon his wards, by releasing his sureties on the guardian's bond, (made responsible by his receipt to Moseley)—*and if he could have validly set it up* against Chaires and Williams, he would be holding for a long term of years at *simple interest* his *own uncollected paper,* with all the hazards of death and insolvency in Chaires and Williams, and the certain *operation of the statute of limitations* in a short time, instead of being responsible for cash received on his bond and security as guardian, and compound interest, annually, and immediate liability at all times to a call for new security, or to *disgorge.*—Thompson's Digest, 225, sec. 2.

For these reasons, Moseley and Hart's conduct was most beneficial to the wards. It was best calculated to secure their interests. It was such a course as any man would wish pursued in his own affairs. It was the most favorable arrangement which could be made.

Fields *vs.* Schieffelin, 7 Jo. Cha. 150, [powers and duties of guardians, and nature of their estate fully examined and decided upon.]

We have yet to hear of any disaster. No *devastavit* is shown. The money is yet in Hart's hands, and no evidence of even a call upon him, or his administrators or sureties. The receipt of the money by a guardian is no *devastavit.* It is the very thing he was appointed to do. It is only non-payment when required that shows impropriety. See Bryant, guardian, &c., *vs.* Owen and wife, 1 Kelly, 374—doctrine at large, and confirmed in a subsequent case same volume. The record does not show that they have not collected it. They may be suing now. They might yet sue, and recovery in *this action* would not be a bar, even when paid. When Hart received the note, it would have been a fraud to attempt to set it up. The only honest course was to cancel actually, that which was already legally discharged.

IV.—1. But Williams is only a surety. His obligations are *stric-*

tissimi juris. He had a right to pay the notes at the moment due, and sue Hart. Could *Moseley*. after the receipt, have accepted payment? And if he had, could Wiliams, on Moseley's receipt, have recovered from Hart, who had already discharged the note by irrevocably rendering himself responsible as guardian to his wards? If so, Moseley could, by his acts, lawfully put Hart, without his consent, in a situation to be forced by law to pay the same debt twice.

2. Moseley then calculated all the interest then due, and charged himself with it, and was discharged by Hart. Can he now, after Hart's death, make Hart's surety pay him, not only that interest, but all that has since run upon the note, if unextinguished?

3. Hart is dead. If Wiliams pays, his remedy is against Hart's administrator. But his administrator is strictly bound by his acts. He is estopped from denying that Hart charged himself as guardian. He cannot set up that Hart acted fraudulently or wrongfully in cancelling the notes. Hart's administrator is irrevocably bound to the wards, if they sue for the money. If now in court, against Hart's administrator or heirs, could any defence be made to them? And if Williams at the same time claimed on account of a payment to Moseley, the court must decide in favor of the liability to the Farmers, and Williams must lose his debt, by Moseley's act, or he is now released.

Williams has, on the same principles, lost his right of contribution against Tom Peter Chaires. As to joint and several liabilities, see Cheetham *vs.* Ward, 1 Bos. and Pul., 633. Nicholson *vs.* Revel, 4 Adol. and Ellis, 675. Cited and approved, 4 Meeson and Welby, 465.

As to sureties rights in general, and duty of obligees—Samuel *vs.* Howarth, 3 Merivale, 272. Nisbet *vs.* Smith, 2 Bro. C. C., 579. Rees *vs.* Benington, 2 Vesey, Jr., 510, and notes. Exall *vs.* Partridge, 8 Term R., 308. Bowmaker *vs.* Moore, 7 Price, 234, (3 Eng. Excheq. 38.) Combe *vs.* Wolfe, 8 Bing., 156.

As to alteration—3 Maddock, 120, 221. 15 Eng. C. Law, 44 and 514. Master *vs.* Miller, in Smith's Leading Cases, vol. 1, 599, American notes.

V.—1. Moseley having acted in *auter droit* in his settlement with Hart, and now suing on *the same right*, is as much estopped by his own acts, as if acting in his individual capacity in both cases. He can no more be allowed to do that which would be a fraud upon parties, than he would if acting in both cases for himself.

2. If A. holds B.'s note, and renders him an account, in which the interest on the note is calculated, and the whole interest and principal is added up with other items, and placed to A.'s credit, and B.'s debit on another account, and A. takes B.'s receipt and discharge on the account rendered, and uses it to discharge himself as so much cash on the last account, and gives B. the note which B. cancels, and after B.'s death the cancelled note comes by any accident into A.'s hands, and he sues and recovers the money from B.'s surety, it is a fraud upon B.'s representatives and on his surety.

3. It is not less a fraud, if he does it as executor.

4. Patrick Smith cannot against his will use his name, and make him do that which it would be a fraud for him to do himself.

VI. Moseley can have no greater rights certainly against Hart's surety, than he could against Hart, if now alive, or when he was alive. When Hart was alive, Moseley had not possession, or right of possession, of the note, and certainly no right of action, when it would have been a fraud to recover. Then what sort of a *legal title* had he in the note? And when and how did he get back his right of action?

If Hart's death could by possibility have carried forward a right to sue on an extinguished note—to Smith, or the Farmer's—it could not carry *it back to Moseley as executor.*

VII. Nothing can better exemplify the true merits of the case than the admission, "that if Hart had actually paid the cash, the whole matter would have been proper, and no action sustained, though Moseley had at once paid it back."

The law never compelled parties to do so vain an act. It would be strange, indeed, if all the rights of all the parties depended upon so idle a ceremony, ending in the same receipts, cancellations, debits, credits, discharges, rights, duties, and obligations, precisely as we contend they now exist. *Common sense* has been appealed to as authority. May we not invoke it here, and *common usage* also?—When two men owe a debt to each other, though in different rights, do they always pay the money, and then pay it back again, or pass receipt and papers? Would not so idle and unusual a ceremony raise a suspicion that some fraud, or cloak for perjury was intended?

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BALTZELL, Justice: 321

This case has been twice argued with a zeal and ability proportionate to its importance and the interest felt by the parties in its decision.

It has received from the court the consideration due to the questions involved and the great principles at stake, and though regretting a difference of opinion amongst the Justices, yet they proceed to give the results to which they have arrived.

A tract of land of 400 acres, belonging to the heirs of John Farmer, was sold at public auction on the 1st of January, 1841, and William W. Hart having become the purchaser executed his five notes with the defendant and Tom Peter Chaires as securities for the purchase money, payable in annual instalments of $960 each on the first days of January '41, '42, '43, '44, and '45. The notes were payable to Arthur Burney guardian of the heirs, and the sale was made under the order of the County Court of Leon County, upon the representation of the guardian that the interest of the heirs would be greatly promoted by the sale, that the lands were renting for only $100, whereas they were worth 10 or 12 dollars per acre, and the legal interest on what they would sell for would be equal to $400.

Burney died and Hart in December, 1842, was appointed guardian. Hart died about March, 1843, and Patrick Smith, who has instituted this suit in the name of Moseley executor of Burney, was appointed guardian in his stead. The counsel of both sides agree that the legal title in the notes was in Burney in his life time, and after his death in Moseley. Defendant's counsel support their position in this respect by reference to Chitty on Bills, 160, 358. "In the case of a bill payable to A. or order for the use of B., payment should be made to A. or his indorsee, and not to B." Other authorities are also cited by them to the same effect. Story on Notes 130, 461, 130. To strengthen his case, plaintiff availing himself of a provision in the rules of the late Court of Appeals "that suits may be brought by a plaintiff for the use of another person named in the process of pleadings," has connected the beneficiary or equitable with the legal interest on the notes. So that there would seem to be no real difficulty as to the form of the action.

The general issue was filed in the case, and various positions are assumed in defence, mostly arising from the fact that the names of defendant and his co-surety were cut off from the notes, whilst in 322 possession of Hart as guardian. Before noticing these, it is proper to advert to grounds not taken in argument either in this court or in the court below, but which have been regarded as worthy of attention by the justices dissenting from the decision of the case. The first of these is, that Patrick Smith is not in fact guardian of all the heirs of John Farmer, but of a part only. Objections of this kind are not in general favored—if made to the person of the plaintiff they should be presented in proper time so as not to surprise—usually by plea in abatement, and the issue thus formed is first tried and disposed of. A plea in bar waives objections that could be presented in abatement, and especially admits the character in which the suit is brought. Archb. Pl. and Ev., 283, 167. 2 Phil. Ev., 447. 3 Ibid, notes, 331. 1 McCord, 468, 470. 15 John., 228.—1 Bibb., 604.

Other objections are also taken, such as that the sale was not made in conformity with the order of the court, and the notes taken differently from its directions. These questions are not presented by the pleadings, and the appropriate time to decide them is when they shall be properly raised or adjudication. If the objections exist there should have been a plea alleging the failure of consideration; but there is none such in the record, nor is it pretended that Hart was disturbed in the possession of the land or that his title under his purchase has ever been questioned; indeed we see defendants have taken a mortgage of it for their indemnity. We therefore decline to notice these points. If requisite it might not be difficult to dispose of them satisfactorily and conclusively.

The main reliance of the defence is on the position that the receipt given by Hart to Moseley paid the notes and satisfied them.—It is admitted that Moseley is discharged by the receipt so far as Farmer's heirs are concerned. The question is as to its effect upon Hart, and it is only necessary to refer to the transaction to ascertain its true character. Moseley held the notes as executor of Burney; but they belonged not to the estate he represented, but to the heirs of Farmer, and Hart being their guardian was entitled to them. Moseley delivered them, and takes the receipt for his own protection. The transaction concluded, Hart obtained the notes, Moseley Hart's receipt. Hart got the notes not because he was maker and through a payment to Moseley; (for it is not pretended that money or consideration of any kind passed) but as guardian. It is difficult to

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323 see how Hart can claim under the receipt, it was Moseley's not his. So far from Hart deriving an interest by the receipt, it is on the contrary evidence of Moseley's having derived an interest from him. So far from relieving him from responsibility it creates a duty, and involves accountability upon him. To make the receipt a payment to Moseley, is to make Moseley debtor to Farmer's heirs, thus destroying the entire legal effect of the receipt, and the design of the parties in executing it. Such an idea was never entertained by the parties at the time of the transaction nor afterwards, and is not in our opinion the fair import of the agreement which is to be taken or considered in reference to all its parts. Hart retained the notes as they were received from Moseley until his death—returned them in his guardian account as the notes of his wards, distinct from cash—retained his own name in the notes, whilst he cut off, or permitted the names of his securities to be cut off, showing that he did not consider them as paid. The Judge of Probate too charged the notes to him separate from cash. But the relation which the two parties Moseley and Hart occupied to the subject we think is conclusive, if anything were wanting. They were co-trustees to the infant heirs of Farmer, Moseley having the naked legal title while on Hart was imposed the duty as guardian of taking charge of the notes, and the money obtained from them until his wards came of age. A receipt by one to the other on parting with their possession would have the effect merely to devolve on the party receiving the peculiar duty and responsibility of collecting them as in the case from Chitty, of a note given by A. to B. for the use of C. C. gets the note from B. and gives a receipt for it, this is no discharge of A. The only effect is to relieve B. of the responsibility, if there be one, of collecting the note. Hart, however, through means of the receipt obtained possession of the papers, and the true question is not whether the receipt constituted a discharge, but whether through this possession, thus uniting the two characters of maker of the notes and guardian, there was in law an extinguishment of the debt.

That in case of an executor indebted to his testator such a result would follow is very fully settled, though we shall find that the grounds upon which it has been permitted to operate are various and conflicting both in this country and in England. The probability is that it is a consequence of the enlarged interest in the estate of the testator allowed by the law at a very early period to the executor already referred to by this court in the case of Colquitt *vs.* Fauntleroy. In the leading case on this subject, that of Wankford reported in Salkeld, we find a difference between two very eminent judges Lord Holt and Justice Powell, the latter remarking "some books say the action is gone, some say the debt is gone, and some say *the debt remains*, they will all be reconciled by this, that the debt will be assets," that it was by way of legacy or gift of the debt, and not by release, &c. The Chief Justice said, "as the person entitled to receive it is also the person that is to pay it, that amounts to an extinguishment." Salk., 303.

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In Masachusetts the court say, "It is not always a legacy nor a release nor extinguishment of the debt. It is more correct to say that although the duty remains, the right of action is discharged because the executor can't sue himself." Shephens *vs.* Gaylord, 11 Mass., 269. In New York it is considered in " the nature of a specific bequest of the debt not to be paid unless there are assets sufficient to pay the debt." Marvin *vs.* Stone, 2 Cow., 781.

Notwithstanding the rule we shall find that an executor could be sued by a creditor of the estate at law always, and charged with his debt as assets. Will. on Executors, 937, 945. Freshly *vs.* Fox, 9 B. & C., 130.

So also will be charged in equity at the suit of a legatee, distributee or next of kin. Toller, 274. 2 Cowen, 781. 3 Brown Cry., 111. 3 Ibid Par. Ca., 607. 11 Vesey, 90. 13 Ibid, 262.

By statute the rule has been abrogated with us both at law and in equity as early as 1834. Duval, 188. It never was applicable to an administrator in reference to whom it is said "the appointment being by the mere act of the law, and a temporary privation of the remedy only the debt is not extinguished—the action merely is suspended during his administration; but revives after it ceases."—Toller Ex., 349. Will. Ex., 937, 946. 2 Black., 512. 1 Salk., 306. Story notes, 543.

1 Siderfin, 79, was the case of an obligor appointed administrator who had died, and his executor was sued for the debt by an administrator de bonis non, of the first intestate and a recovery was had. 8 Co., 136. Keble, 313.

No authority has been cited showing the application of the doctrine to guardians, and we have been unable to find such ourselves. If applicable it must be by some analogy to the office of executor, and we propose to enquire whether any such exists. The civil law is more full and clear as to this relation than ours, and we propose to refer to it in connection with this subject commended as it is by 325 those two eminent jurists the late Judge Story and Chancellor Kent. "It is equally a provision of religion as of law that those who are deprived of their father during their minority should be put under the conduct of some one who will fill the place of a father as far as possible, and be charged with their education, and the care of their property, who is termed a guardian." Domat, 171.

"His power and authority extends to all that can be necessary for the faithful management of the affairs of the ward—he is esteemed acting for his ward *when he rightly manages the estate, not when he wastes and destroys it.*" Ibid, 171.

"He cannot give away the goods of his ward nor surrender any right he has, nor even diminish it, nor impose on the estate new burdens, nor can he impair, nor render worse the condition of his ward—he has no power but to *preserve the property* of his ward not to injure or destroy it." Ibid, 176.

The same principles are maintained and asserted by the common law. "The authority of the guardian extends only to such things as may be for the benefit and advantage of the infant whereof he may give an account." Bac. Ab. Guard, 684. Co. Litt., 89, a. 7 John., 557.

He can do no act to the injury of the ward. 10 John., 441.

"The court will not suffer an infant to be prejudiced by the laches of his guardian." 1 Black., 463, n. 11.

"When it can pronounce a contract to be to the prejudice of the infant, it is void." Maule & Sel., 482. 2 Hen. Black. 511. 2 Mason, 82.

He cannot set aside an award favorable to his ward. 4 Bibb, 437.

In law he is the mere *bailiff or servant* to the infant, and liable to account which an administrator or executor was not subject to except by statute. 2 Bacon's Ab., 687. 1 Black., 643. 1 Com. Dig., a. 2.

Now account lies not for wrong or waste, but only for money paid. 1 Com. Dig., a. c., 192.

As servant or agent he can only discharge on receipt of the money due. Story's Agency, 170, 437. Paley, 262.

He cannot release a debt even to make a debtor witness for his ward. 3 Cond. Eng. Chy., 235.

His powers and duty seem to bear a very near, if not complete resemblance to those of an administrator *de minore aetate* who "may pay debts of the estate—sell and dispose of the goods if perishable, 326 retain for his own debt—receive debts due to the testator, and discharge and acquit them on payment. But he is only in nature of a bailiff, and ought to account to the executors—has no authority to transfer the property by sale except in case of necessity nor to release a debt without actually receiving it." Toller Ex., 405-6. 1 Com. Dig., ad. F., 1.

There is no power here to give receipts without payment nor discharges without satisfaction—the power obviously results from the duty, and extends not beyond it; it is to guard, protect, and save the goods and property of the ward during his infancy, and turn them over when he comes of age. The moment the guardian attempts wrong or injury the law intervenes to prevent it by declaring his impotency, and the nullity of the act. Especially we have seen that there can be no bequest, gift or other circumstance in the case of a guardian as in that of an executor to create an extinguishment of the debt. Nor is it by any means clear that if the note were discharged by extinguishment as to Hart, the other makers, the defendant and Chaires, would be exonerated by it. "A discharge of one joint maker of a note by mere operation of law, and without any act done by the creditor will not discharge the other maker." 13 Mass., 148. Story's Prom. N., 502.

Again "Extinction of the debt as to the principal, in general discharges securities, except when it arises from causes such as bankruptcy, which originate with the law and not in the voluntary acts of the creditor." Theobold, 73. Brown *vs.* Carr, 7 Bing. 508. 2 Russ. 600. Other cases relied upon "as precisely in point," are to the effect that "because a guardian could not sue himself, it, the debt, shall be presumed to be paid, and he and his securities on the guardian bond shall be liable." Dudley's S. Carolina Reports.

Literally construed, this authority asserts that if A., indebted to an infant, be appointed his guardian, the debt is presumed to be paid (that is, discharged and settled,) and this is the construction contended for by defendants' counsel. Now it is obvious that if this be true there is no liability on the part of any one; and the principle asserted by the court is directly at variance with their adjudication. But we do not so understand it, nor the numerous cases to be found in the American courts on this subject. In none of them was the question raised as to the liability of the original debtor, whether sued upon the debt in its original shape, or upon the guardian or adminis-

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327 tration bond. Can it pretended that to a suit instituted for the recovery of this debt the party could invoke the presumption of payment through his appointment as guardian or administrator as a means to defeat the suit against him? We think not. The question in the cases alluded to was, whether such indebtedness of the guardian or administrator of themselves, were sufficient to make the securities liable, and such liability was asserted on the ground that as an officer he must be presumed to have discharged his duty; and their liability was the result of such presumption. But it is difficult to perceive how a rule of law whose obvious effect is to enlarge and extend a liability, indeed to give new names and further security, can be invoked to impair, defeat and destroy one already in existence. To discharge the principal under such circumstances would be to overthrow the cases referred to: for obviously without an obligation on the part of the principal there can exist none against the security; it would be to set up the doctrine of extinguishment as to administrators and guardians which we have seen uniformly denied from the commencement as to the former, and opposed to every principal and analogy as to the latter.

A class of cases invoked by defendant maintains that where an executor or administrator is also guardian, the responsibility is devolved by operation of law from the securities of the one to those of the other. These go upon a like presumption that the officer has discharged his duty, and that neither he nor his securities on his official bond can excuse themselves from responsibility by alleging a failure of duty. But upon another ground it is clear to our minds. An administrator or executor is the agent or trustee for creditors, legatees and distributees; so soon as he becomes guardian for a minor having money in his own hands, his joint agency ceases as to this by operation of law; he then holds the money as the individual agent of one instead of all his former *cestui que trusts*. If he gives bond as guardian, his securities become liable for this separate agency, displacing by necessity his former joint action and the responsibility connected with it.

A further illustration may serve to explain: A. is agent for several individuals connected in business; they dissolve and he is made agent by one of those having a large amount of money in his hands derived from the old association; his employment and possession of the money continue under his new relation. It is very obvious that this separate and individual agency supercedes and displa-
328 ces the former joint agency and responsibility, thereby creating new liabilities. If a new bond were given, the relation of the securities under the new and old arrangement would necessarily be altered; and such we apprehend is the case with the offices of guardian and administrator. But any way considered we do not see that the law of these cases is applicable to the case of this defendant. Hart was never executor or administrator of Farmer's estate so as to transfer a responsibility from the securities on an administration bond to those on his guardian bond.

It is a mistake, too, we think, to suppose that the securities on these notes occupy a more favorable position than the securities on the guardian bond. In establishing the liability of the latter, it by no means follows that the former are discharged. In the case of Fox *vs.* Alexander, decided by the Supreme Court of N. Carolina, the guardian had traded a note of the ward's in payment of his individual debt. The ward coming of age recovered the amount of his debt against the securities on his guardian bond; the latter filed their bill, alleging the insolvency of their principal, and praying that the payers of the notes be compelled to pay them in preference to the person to whom the note had been traded; the court say, they (the securities on the guardian bond) have a right in a Court of Equity to stand in the place of the ward and follow the trust fund and recover satisfaction to that amount now in the hands of the defendant or in the master's office." 1 Iredell, 341.

To the same effect is Powell *vs.* Jones in the same court. Ib. 337.

Reliance is placed on the 40th section of the act of the Legislature, Duval, p. 178. But to bring the case within that provision there must be "a discharge given by an executor, administrator or guardian, of a debt, &c., belonging to a minor." Now we know of no discharge given by Hart to Williams and Chaires except the cutting off their names can be regarded in that light. But the design of the law must be construed to mean not an act of waste or spoilation, but of lawful and rightful discharge. It would be a forced and most violent construction to suppose that the Legislature designed to make an act such as we have been considering, a discharge binding upon a minor and orphan.

Another position is, that "the notes were in fact and in law cancelled and discharged as soon as Williams' and Chaires' names were cut off by Hart, and this, if it were done even through fraud." If a guardian cannot make a contract to the prejudice of his ward, he cannot without payment legally destroy one already made. There 329
is no where within our knowledge a law written or unwritten, a rule or principle of any court professing to administer justice, which permits the improper mutilation or defacing by an officer, of the evidences of title or of debt entrusted to his charge. So far from it, there are prohibitions of every various character, civil as well as criminal, against such profanation. We could not well give our sanction to a doctrine more mischievous in its results or more disastrous to the peace, the morals, and the dearest interests of society. If a guardian may discharge a debt due to his ward by tearing or cutting up the note of his ward, and more particularly discharge a debt of his own by such expedient, why may not all other officers having a trust and charge protect themselves after this fashion, and pay their debts also—and with less criminality on their part, representing as they do the interests of those able to protect themselves; whilst guardians have the weak and the helpless children alone confided to their charge. But if this doctrine is to prevail, what is to prevent its extension to deeds, judgments, bills of sale, and the records of the Courts? Why may not mutilation pay debts evidenced in this manner as well as notes to a guardian, and thus riot and spoil become the order of the day?

But the law is not subject to such reproach. "The principle is well settled," says the late Justice Story, "that the obligor shall never take advantage of his own wrong, and that his own deed fraudulently or innocently destroyed by himself without payments, does not thereby lose its legal obligation; and the principle applies still more strongly where there are sureties." 1 Gallison, 74. 2 Mason, 2. Olcott *vs.* Rathbone, 5 Wendell, 492. Mitchell *vs.* Cotten, decided at this Term. Equally clear is the doctrine in cases of notes and bills of exchange. Chitty on Bills, 143. Bailey, 358.

Turning to the facts of the case we find no ground for indulgence favorable to the case of the defendant, or to the action of the guardian. These notes were evidently designed by the County Court, under whose orders and by whose direction they were taken, as a permanent investment in lieu of the land of the minors; they were payable after the long interval of five years, and from all that appears in the record were well secured; there seems to have been no necessity for their collection or a change into other notes, with a view to different security. They might have remained with the guardian unaltered, and his duty was not to change them. If a
330 change had been indeed made in good faith with a view to better security, or even if the securities had paid such as were due, or the guardian having the money in hand for the purpose of payment had returned it in his account to his debit as cash received, there might be a color in the position that the securities were discharged.

But to hold it so, under the circumstances of the case would be to declare a discharge because Hart got possession of the notes as guardian, or gave a receipt to procure their possession from one having their temporary charge or custody, or because somebody else may be responsible for their payment. Such is not our opinion. We hold them to be contracts preserved from injury and maintained in force by a fundamental law prevailing at the time of their execution, acknowledged as well by the Constitution of the United States as by this State and every State in the American Union, operating against every action of the legislature or any other power to weaken or impair them.

The case of Dickerson *vs.* Lockyer, decided by Lord Loughborough bears a near resemblance to the case under consideration, and we have thought it worthy of particular notice. It was a suit brought by an administrator de bonis non, to recover from one of three obligors on a bond which had been delivered up to him and cancelled. The defence was that Lockyer, the general devisee of the estate of Furze (the original obligee) in trust for the widow and children, (with whom the bonds were left by the executrix) had settled and discharged them. They were due by himself and two others as partners, and on a settlement between him and his partners he delivered them up. The defendant contended that but for this arrangement he would have retained assets from the firm—that Lockyer being the agent of the widow and being in possession of the bonds, he was the only person to whom the money could be paid, and that the delivery of the bonds by the executrix to him amounted to an assignment. The court after saying he was not executor but trustee, and that Bener had notice of the trust say: *"they took the seal off the bond, but this is not payment*—then what is the consideration? *there is none as to the estate of Furz, but it is a personal consideration to the trustee. This would not do as a payment at law.* The question in this court is whether the trustee of a bond can without the *cestui que trust* release the obligor. This is a very particular case for he is debtor with the two others. *They cannot by management amongst themselves destroy that security. There was no real payment of the*

331 *money* into the hands of Lockyer as money belonging to the estate of Furze to be laid out according to the will. Three co-obligors in a bond by a transaction between themselves, agree that one shall be discharged and the whole security rest upon the two without the privity of the executor."

It is not necessary to enquire what would have been the case if actual payment had been made, and the money was in the hands of Lockyer, &c., &c. The defendant was declared liable although the court said it was a very hard case, they all meant well, &c., and excused them from costs. 4 Vesey, 40.

Another objection is that Chaires, a co-security was excluded as a witness. But we are of opinion there is no error in this. 1 Greenleaf, 440. 2 Phil. on Ev. 1521, notes.

It is next contended that, as these notes are payable *"in current Florida money"* the value of Florida money only should be recovered, by which is meant that a depreciation should be allowed. To solve this question presents the enquiry as to the legal signification of the terms "current Florida money." Do the words "current in Florida" qualify the word "money" so as to change its meaning? We think not. The legal signfication is certainly not as contended for. If it be insisted that the popular acceptation is to govern, and not the legal, it would be difficult to establish even then we apprehend that current money means differently or otherwise than that the bank notes or specie shall be current and pass for what they purport to be worth. If depreciated they cease to be *"current"* wherever the depreciation exists. When this takes place, though the note may be the subject of barter as unsound goods or bad merchandize, it ceases to be money. No longer "a standard by which to measure the value of other things," it is itself subject to measurement to ascertain its own value.

The Court of Appeals of Kentucky, where this subject was discussed and considered with great care under circumstances greatly resembling ours, decided that the terms "current money of Kentucky" mean that kind of money made current by the act of Congress which is the only current money of Kentucky. The same Court in Bainbridge *vs.* Owen interpret "current money to mean constitutional coin." 2 J. J. Marshal, 463.

The Supreme Court of Missouri say, "gold and silver coin by the constitution of the United States constitutes the 'current money of Missouri' as well as of all the other States of the confederacy."
332 9 Miss., 703. So also notes payable in Tennessee money, and in Arkansas money were held payable in gold and silver. Searcy *vs.* Vaner, Mar. & Yerg., 25. 1 English, 225. We are then of opinion that there was no error in taking the sum fixed by the note as the true measure of damages.

The judgment in this case was rendered on the 23d of May, and as the term for Leon county is directed by law to commence on the 4th Monday of April, and the term of the court in Gadsden intervened after that period, and before the date of the judgment, it is therefore urged that the Leon court must have been continued by adjournment beyond the term in Gadsden, and that this could not be legally done. It might be safe we apprehend, to rely in answer to this objection on the decision of the Supreme Court of the United States in the case of Hopkins *vs.* Lee, in which the court say, "the power of adjourning to a distant day is common to all courts." 6 Wheaton, 106. 4 Cond. R. 22.

We think independently of this, that the power will clearly be found to be by law with the courts of this State. "By the common law at the earliest period throughout Christendom, the whole year was one continual term for hearing and deciding causes; for the Christian magistrates to distinguish themselves from the heathens who were extremely supersitious, went into a contrary extreme and administered justice on all days alike." 2 Black., 276. 6 Jacob L. D., 210.

At a later period the Courts of Westminister Hall were prohibited from transacting business on certain holy seasons as Advent, Christmas, &c., on Sundays and some particular festivals, yet this prohibition did not extend to the Court of Parliament, the Chancery nor the Inferior Courts." 6 Jacob L. D., 210.

At the earliest period of our Territorial existence the common law of England of a general nature, and all statutes of a general nature, and not local to that Kingdom, are declared in force and are continued to this day. Duval, 357.

By a law of Congress it was provided "that the Judges of the Superior Courts shall have power to order extra terms of said courts or to adjourn them to any other time or place when the public interest may require it, and when from sickness or other cause the judges cannot hold the regular terms, giving due notice of the same." Laws of Congress 1828.

Such was the state of our law to the year 1839, the time of the formation of the State Constitution, and the framers of that instru- 33
ment so far from altering or repealing the statute and common law of the Territory in this respect, re-enacted them by that remarkable provision of Magna Charta, "all courts shall be open, and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Thus by the paramount power has the ancient rule of the common law been declared the paramount and fixed law of the land. It is insisted that because the courts are directed by law to be held on certain days, this is in the nature of a prohibiton to hold at other times. Not admitting the power of the Legislature to abridge the action of the courts, thereby closing them in effect, and denying, and delaying justice, in opposition to the express language of the constitution, we by no means admit that such direction is at all inconsistent with the power contended for. The fact that the power to hold extra terms existed in the Territorial Government all the time in conjunction with this direction to hold Courts on particular days, without conflict and without any supposition of contrariety is a conclusive answer. Indeed the use of the term extra precludes the idea of conflict, it is not a provision for the regular term fixed by law; but for a term beyond it required by the public interest, or when the regular term has not been held. If we are to be restricted to the very words of the law, and because the Legislature has said the courts shall be held on the first or other Monday of a month, as is, and has been the case in all our public acts, be required to say that they are confined to the very day, then the entire business must be despatched on that day and no other, there being no authority by law to continue beyond. But where is the reason and propriety of such restriction, why is it that such a rule is to apply to the courts to whom alone of all the public agents the emphatic language of the constitution has been so specially addressed.

The other departments of Government, the Governor, Treasurer, Secretary of State, Judge of Probate, all transact their business whenever required. We venture to say that there is not a doctrine or rule, or principle, of any law sustaining such a distinction, and that it is wholly opposed to propriety and reason. Can it be pretended that a direction to an agent to transact business on a particular day, or a particular hour of a day, is a prohibition to do it at another hour or another day? We imagine not. If authority were needed, we have it expressly in point. "A question sometimes arises whether, when a 33
statute points out a particular mode for the performance of some act therein commanded, its enactments shall be taken to be imperative or only directory; in the former only of which cases, an act done in a different mode from that pointed out by the statute would be void. A clause is directory when the provisions contain mere matter of direction and no more, but not so when they are followed by words of positive prohibiton; thus the statute which *directs the quarter sessions to be held at certain times* of the year are construed to be directory, and the sessions held at other times are not void." 1 Smith's lead. cas., 170. Rex *vs.* Jus. Leicester, 7 B. & C., 6. 2 Ad. & El., 96.

So in Frazier *vs.* Willey, decided at the present term of this court, "Statutes directing the *mode of proceeding* by public officers are advisory and not essential to the validity of the proceedings, unless it be so expressed. 8 Vermont, 280. 6 Wend, 480.

We have spoken of the act of Congress of 1828 as operative on this subject. That it is in force it is only necessary to refer to the schedule and ordinance of the Constitution, declaring "that all laws and parts of laws now in force, or which may be hereafter passed by the Governor and Legislative Council of the Territory not repugnant to the provisons of this Constitution, shall continue in force until by operation of their provisions or limitations the same shall cease to be in force, or until the General Assembly of this State shall alter or repeal the same." If any doubt existed as to the construction of that act, a transposition of its terms would remove them; thus, the judges shall have power to order extra terms when the public interests may require it, and when from sickness or other cause the judges cannot hold the regular terms, they shall have power to order extra terms.

By law of the State, "the jurisdiction of the Superior Courts of the Territory was conferred on the Circuit Court of the State." Acts, 1845, p. 9.

We hold then, that the action of the court below, in giving judgment in this case at the time was not illegal nor prohibited, but has the sanction of the constitution and laws of the State.

The Judgment is therefore affirmed, with costs.

R. W. Williams, Appellant, vs. W. D. Moseley for the use of P. Smith, Appellee.

335 LANCASTER, Justice.

This cause comes by appeal from Leon Circuit Court. It is an action of assumpsit brought by William D. Moseley administrator of &c., of Arthur Burney, deceased, who sues for the use of Patrick Smith guardian of the heirs of John Farmer, deceased, against Robert W. Williams on three promissory notes, of which one is of the following tenor:

"By the first day of January next, we, or either of us promise to pay Arthur Burney, guardian of the heirs of John Farmer, deceased, nine hundred and sixty dollars in current Florida money for value received, bearing interest at 8 per cent. from date, this the 2d day of January, 1841.

[SIGNED] "WILLIAM W. HART."

The other two notes are of the same tenor, date and amount, and signed in like manner by Hart, but they vary as to time of payment, one being payable by the first day of January, 1843. The other by the first day of January, 1844.

To the Plaintiff's declaration, the defendant pleaded the general issue of non-assumpsit. On the trial the plaintiff gave in evidence the notes aforesaid, also the deposition of Susan C. Murray who proved that she knew the notes sued on. That she had seen them in Wm. W. Hart's possession, and that they were in his possession at the time of his death, and that when she first saw the notes, besides the name of William W. Hart, they had on them also the names of Robert W. Williams and Tom Peter Chaires. That sometime in March, 1843, Chaires came to see Hart, who was sick. After some conversation between them (of which she heard but little) Hart asked for his pocket-book and a pair of scissors, which she gave him. After Chaires had left she saw several small bits of paper on the hearth, with Mr. Chaires' and Col. Williams' names written on them—afterwards saw the notes and Col. Williams' and Mr. Chaires' names were cut off—heard Mr. Chaires say when at Hart's that he wanted his brother, Green Chaires, to do some business for him which he refused to do unless his (Tom Peter Chaires') name was taken from the notes. Witness says that the consideration for the notes sued on, was a tract of land purchased by Hart from Ar-
336 thur Burney, guardian of the heirs of John Farmer, deceased, of whom she was *one*. She was Hart's wife—and Chaires and Williams were securities on Hart's notes. Says also that Hart settled with Burney as her guardian, her share of the estate in his hands. Plaintiff also gave in evidence a copy of a mortgage from William W. Hart to Robert W. Williams and Tom Peter Chaires, to secure them for becoming his securities on said notes for his benefit and accommodation. Also three receipts in the hand writing of Wm. D. Moseley the plaintiff, with the endorsements on them, but signed by Wm. W. Hart. One is as follows:

"Received of W. D. Moseley, executor of Arthur Burney, deceased, thirteen hundred and sixty-five dollars and six cents, in part payment of the amount due Rufus Farmer from said Burney as his guardian, as per account current, rendered this day, January 1st, 1843.

[SIGNED] WILLIAM W. HART.
Guardian of Rufus Farmer.

[ENDORSED.]

Book acc.		6 26
Your note due 1st January, 1843,	960 00	
2 years interest 8 pr. ct.	153 60	
		1113 60
Your note,		6 00
1 yr. interest,		0 48
Your note,		66 00
1 yr. interest,		5 28
J. J. Hart 169 less,		155 48
Hire of Comfort for yr. 1843, less interest,		11 96
		1365 66

Other two receipts in same form, also for money dated same day, each for the sum of 1757 79-100, signed 'Wm. W. Hart, guardian of Argyle Farmer' and 'Wm. W. Hart, guardian of James Farmer," with the other two notes sued on, and other notes, and interest computed on all amounting to the sum of $3515 59, which was equally divided to make the last mentioned receipts—endorsed thereon as account rendered.

Plaintiff also gave in evidence a statement marked F. as follows, to wit:

1841. Amounts of sale and hire of the land and negroes belonging to the estate of John Farmer, dec.: 337

Jan. 1.	Sale of land to W. W. Hart,	$4,800 00
	Hire of Ellick,	235 00
	" of Ben,	161 00
	" of Comfort,	6 00
	" Eliza,	57 00
	" of Amanda,	50 00
	" of Lina,	60 00
	" of Jane,	60 00

"This is a true statement of the sale and hire of the land and negroes of the estate of John Farmer, dec., this March 9th, 1841.

ARCHER BURNEY, Guardian."

Sworn to, March 17th, 1841, before D. McRaney, Clerk, and filed in his office.

Also statement of Wm. W. Hart, guardian, from which statement the following is extracted, as referring to this cause:

"Wm. W. Hart, guardian in account with James, Argyle and Rufus Farmer:

Received of W. D. Moseley, executor of A. Burney, dec., in Cash,	$ 40 00
In notes and accounts,	3,463 00"

"The above is as near correct as I can at this time make it, being very sick. W. W. HART, Guardian."

Some debits then follow for negro hire, not needful to be stated here, also signed by Hart, guardian. To which is appended the following:

"I charge the guardian, as per account stated

above, Cash,	40 00
Notes and accounts,	3,463 00
Hire of negroes for 1843,	250 00
	$3,753 00"

"The credits asked are not sustained by vouchers, and are suspended. June 5, 1842. J. E. BROOME, Judge Leon C. C."

The plaintiff then gave in evidence certified copies of three guardian bonds of Patrick Smith, dated 23d day of December, 1843.—One as guardian of Argyle Farmer, another as guardian of James Farmer, and a third as guardian of Rufus Farmer, all minors. Also a guardian bond of Arthur Burney, dated 24th November, 1843, as guardian for Susannah Farmer, Edward Farmer, James Farmer, 338
Argyle Farmer and Rufus Farmer, minors, and five in number. Also another bond of said Burney for the sum of ten thousand dollars, dated 14th February, 1840, conditioned to make a faithful and legal application of the proceeds of the sale of the real estate of the infant children of John Farmer, dec. Also the petition of Arthur Burney for leave to sell said real estate—representing it to be for the interest of his wards. And the order of the Judge of the County Court thereon, in these words, to wit:

"A bond having been filed by Arthur Burney, Sen., and his securities, satisfactory to the court, it is therefore ordered by the court, that on the first day of May, in the year 1840, Arthur Burney, Sen., guardian of the children of John Farmer, sell to the highest bidder the lands described in this petition aforesaid on the following terms: 1st. Notice to be given for two months previous, of the time and place and terms of sale. 2d. The terms shall be one-fifth of the purchase money payable on the 1st of January, 1841. One-fifth January, 1842,—and the balance in three equal annual instalments; the purchaser to give a joint and several bond, with three securities. The bond shall bear interest from this date; the interest shall be paid yearly. It is further ordered, that if it appear to the said Arthur Burney, Sen., that William W. Hart, in right of his wife, is entitled to one-fifth of said land, that then if the said William W. Hart and wife will execute an assignment of their rights, titles and interest to the same to the purchaser, the said Arthur Burney shall deliver over to W. W. Hart the bond which shall become due on January, 1841.

[SIGNED.] W. M. GIBSON, Judge."

Also an order dated December 13th, 1842, appointing Wm. W. Hart guardian of the estate of James Farmer, aged 12 or 13 years and his younger brothers, Argyle Farmer and Rufus Farmer, all children of John Farmer, dec., on his entering into bond, &c. All three guardian bonds of the said Wm. W. Hart, in the sum and with the securities named by the court dated 16th September, 1842. One as guardian of James Farmer, another as guardian of Rufus Farmer, and a third as guardian of Argyle Farmer. And here the Plaintiff rested his case.

The defendant offered Tom Peter Chaires as a witness. But plaintiff's counsel objected to his competency on the ground of

339 interest and relied on the deposition of Susan Murray and after proofs to prove that interest; which objection, after arguments, the court sustained, and excluded the witness. To which ruling of the court defendant by his counsel excepted.

Thomas Lang called by defendant, proved that part of the land mortgaged by Hart to Williams and Chaires, had been allotted as dower to Hart's widow, now Mrs. Murray the witness in this case. That he is administrator on Hart's estate having succeeded the Sheriff who acted sometimes *ex virtute officii*. That the estate of Hart is insolvent. Witness said that the notes sued on had never been in the possession of the Sheriff nor in possession of witness. That he had other notes in his possession on which the name of Hart remained, and from which the names of sureties had been clipped, which had been satisfied. That these notes were not the only papers in Hart's possession at the time of his death, which witness was entitled to possess, and which had been taken by some person without authority. That he knew of his own knowledge a great many other papers had been so taken.

David S. Walker called by defendant, proved that in the conversation he had with Governor Moseley, plaintiff in this case, said Moseley told witness that he, as executor of Arthur Burney, became possessed of the three notes upon which this suit is brought—that after William W. Hart was appointed guardian, he Moseley, as executor of A. Burney, delivered to said Hart, guardian as aforesaid, he having first exhibited his letters of guardianship, and his bond as guardian, which Moseley regarded as sufficient, the said notes, and took therefor the receipts of said Hart, as for so much cash—that he considered himself as then parting with all claim and interest which he, as executor aforesaid, had in or to said notes—that he had always regarded the transaction in that light, and that consequently, this suit to recover the amount of said notes in his name, for the use of Patrick Smith, guardian, &c., was instituted without his knowledge or consent—that if witness would let him know when the trial should come on, he would attend and state to the court and Jury what he had then stated to witness. Witness further stated, that a day or two before the trial took place, Gov. Moseley was called, unexpectedly, on official business, to Pensacola, and that was the reason why the witness was called upon by the defendant to testify to the above facts, instead of the Governor himself

This was the evidence offered

340 After counsel had been heard on both sides, the counsel for defendant moved the court to instruct the jury as follows:

1st. That the notes sued on were the property of Arthur Burney at the time of his death, and the legal title to the same passed to Moseley, his representative, who alone had the right to sue on the same.

2d. That if they believed from the evidence that Moseley, as representative of Burney, voluntarily and without fraud, delivered up the notes in question to William W. Hart, the principal obligor in the same, in consideration of the receipts offered in evidence, it operated as a divestiture of all title out of Moseley; and therefore, that this suit cannot be maintained in his name.

3d. That if the Jury believe from the evidence, that William D Moseley, executor of Burney, the payee of these notes, delivered them to William W. Hart, the principal obligor, the defendant Williams was released thereby.

4th. That if the Jury believe from the evidence, that William D. Moseley, executor of Arthur Burney, deceased, agreed, in consideration of a recepit to him, as executor, of so much money as they called for, to deliver up, and did so deliver up said notes to Wm. W. Hart, the principal obligor, the same amounted to a release of the obligors thereto, and annulled and extinguished the notes.

5th. That if Wm. W. Hart, the principal obligor, came lawfully into possession of these notes, all liability on them, as securities, was extinguished, and Hart became liable, as guardian, for the money, as though the same had been paid to him in cash

6th. That if Hart obtained the possession of these notes lawfully, he had a perfect right to destroy the same, and to cut off the names of his securities.

7th. That Hart's receipts to Moseley, offered in evidence by plaintiff, constitute perfect evidence of the payment of these notes by the principal obligor to the legal holder.

8th. That if the court shall charge the Jury, that the legal title to these notes did not pass to Moseley, Burney's representative, then and in that case, the court is requested to charge the Jury, that this suit cannot be maintained in his name, as instructed, in lieu of 1st instruction.

9th. That a suit cannot be maintained at law, in the name of any person, except the legal owner.

10th. That in the event of a verdict for plaintiff, he is only entitled to recover so much as "current Florida money" is proved to 341
be worth in specie at the time the notes fall due, and that this proof lies upon the plaintiff.

11th. If the jury believe, from the evidence produced by the plaintiff, that Moseley is the executor, and not the administrator, of A. Burney, deceased, then he cannot maintain this action as administrator.

All of which the court refused to give, but gave instead thereof, the following instruction, to wit:

1st. Instead of 1st instruction asked by defendant's counsel, the court instructs the jury, that the notes sued on in this action, were the trust property of Arthur Burney, as guardian of the infant heirs of John Farmer, deceased, at the time of said Burney's death; and that the legal title to the same passed to his administrator or executor, Moseley, in like character and effect in law, as it existed in his intestate, the said Moseley alone having the right to sue on the same.

2d. In lieu of the 4th instruction, the court instructs the jury, that if they believe from the evidence, that Moseley, executor of Burney, received from Wm. W. Hart the amount of the notes receipted for, in money, then the said notes, to the amount paid in money, were and are discharged.

3d. The court further instructed the jury, that the mere act of Wm. W. Hart, cutting the names of R. W. Williams, defendant, from the promissory note in question, cannot in any wise affect his liability, as one of the makers of said note; that if said note were void, said act was unnecessary in order to cancel it. And that if it were valid and binding in the hands of said Hart, he could not invalidate it, or release said Williams, by cutting off his name, or that of T. P. Chaires, as aforesaid; and that the jury should apply the evidence, under this and the other instructions of the court.

To which said several rulings and opinions of the court, the defendant, by his counsel, excepted.

It is also admitted by the plaintiff, that the court instructed the jury, that if they shall find for the plaintiff, that they must, in assessing the damages, find the same amount as if the notes were payable in money, instead of *"current Florida"* money. And it is admitted by the defendant, that Lang testified that he became administrator of Hart, on the day of A. D. These admissions to be part and parcel of the Bill of Exceptions, to the 342
same extent as if the same were signed by the presiding judge.

JAMES T. ARCHER,
for plaintiff,
LONG & WALKER,
Attorneys for defendant.

The errors assigned are as follows:

1. The Circuit Court erred, in refusing to allow the defendant below to examine Tom Peter Chaires as a witness in this cause, or even to swear said Chaires as a witness.

2. The Court erred, in refusing to allow Thomas Lang to answer the question propounded to him, to which exception was taken, as appears from the bill of exceptions in this cause.

3. The Court erred, in refusing to give each of the instructions to the Jury, asked by the counsel of defendant below, numbered in the bill of exceptions from one to eleven, inclusive.

4. The Court erred, in each of its instructions to the Jury, set forth in the bill of exceptions, from one to three, inclusive.

5. The Court erred, in trying this cause, and pronouncing judgment in the same, on the twenty-third day of May, A. D. one thousand, eight hundred and forty-six, as set forth in said record,—the said 23d day of May, A. D. 1846, not being embraced within either of the terms of the Leon Circuit Court, as established by law.

LONG & WALKER,
Atty's for Appellant

We will for the present pass over the first and second assignment of errors in this record, and consider the third and fourth. This brings before us the instructions asked by defendant below and refused, and also those which were given by the court. And the first enquiry necessary to be made is, who are John Farmer's heirs? By reference to the bond executed by Arthur Burney, it will be seen they are Susannah Farmer, Edward Farmer, James Farmer, Argyle Farmer, and Rufus Farmer. *Five* minors and infant children of John Farmer, deceased

2d. What interest had Arthur Burney, guardian, in the notes sued on at the time of his death?

It is admitted on all sides, and indeed is too plain to be denied, he was the legal holder and had the right to sue on them when past due. But they were made payable to "Arthur Burney, guardian of the heirs of John Farmer, deceased," and were not negotiable

343 It is true the words guardian, &c., may be considered as mere *descriptio personam,* and do not necessarily include the idea that Burney took and held the notes as guardian. But the consideration on which the notes was given is explained by the testimony of Mrs. Murray. It was for the sale of the lands belonging to the five children and heirs of John Farmer, deceased, and if Burney strictly pursued his authority to sell, would vest the equity in the proceeds of the notes in his wards unless he has clearly shewn an election otherwise.

Did Burney pursue his authority for selling the lands of his wards? By reference to the order of the County Court it will be seen,

1st. He was to give notice for two months previous of the time, place and terms of sale. It does not appear by the record whether he did or did not; it is not shewn and cannot be inferred.

2. The sale was ordered to be on the first day of May, 1840.—It occurred on the first day of January, 1841.

3d. The terms were five annual and equal instalments of the purchase money, the first on the first of January, 1841, and yearly thereafter. The purchaser to give joint and several bonds with three securities. He gave joint and several promissory notes with two securities.

4th. The bonds were to bear interest from the day of sale (1st of May, 1840.) The notes bear interest from the 2d of January, 1841

5th. The interest to be paid yearly. By the notes it is payable when they respectively become due.

6th. The bonds were to be payable in money. The notes made payable in current Florida money.

It will be apparent to every one that Burney repeatedly, and in some respects materially, departed from his authority to sell. The difference in the value of the fund arising from the sale of the land was on the 1st of January, 1845, $542 62—is was so much less valuable than if the sale had taken place when directed, and interest had been payable as directed, by reason of the non-observance of the terms. But Burney never reported the notes to the court as he took them, nor the securities he had taken to secure their payment. On the contrary he merely reported to the court the sale of the lands, which is offered in evidence by the plaintiff, and hereinbefore set ou' As much as it as here material may be correctly stated thus:

344 "1841, January 1st. Amount of sale of land belonging to the estate of John Farmer, deceased.

"Sale of land to W. W. Hart, 4,800 00

"This is a true statement."

[SIGNED] "ARTHUR BURNEY,
Guardian."

Which was sworn to March 17th, 1841, before the Clerk of Leon County Court, and filed in his office.

An enquiry naturally presents itself, what is the legal effect and import this statement, and return made by Arthur Burney, guardian, to the County Court? No exhibit of bonds as required by the order of court, nor of the notes taken, no mention of the securities or their number—nothing to show any departure from the order requiring the payment of interest annually—nor any effort to obtain from the court an approval of his actings and doing in the premises. It must be considered an admission that he as guardian had in his possession $4,800 00 for the sale of the land, to bear interest according to law, and to be distributed among his five wards as they should respectively arrive at lawful age. He by his return bound himself as guardian, as fully for the purchase money arising from sale of the lands as he did for the hire of the negroes. Not having been ordered by the County Court (so far as appears) to put out this money at interest upon mortgage security as directed by the statute, see Thomp. Dig. p. 207, sec. 2, it results he retained it by leave of the court, and bound himself to pay interest for it according to law.—He upon his own petition obtained the order of court to sell those lands. He stood before the court in the double position of *quasi* commissioner to sell the lands, and of guardian to the five heirs.—He does not as commissioner report what he has done, but as guardian what he has in possession. His authority to sell was not pursued, but departed from, and therefore cannot bind his wards. But his statemnt of having sold the land to W. W. Hart for $4,800 binds him, binds his securities, and binds Moseley his legal representative. Having elected merely to report the amount of the sale and being bound thereby as guardian—the notes taken to secure the purchase money, became his, not only legally but equitably.—The day he charged himself on the record as guardian with the amount of the sale, all equity in the notes taken to secure payment vested in him absolutely.

Moreover, Burney paid the share of one of the heirs to W. W.

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Hart, her husband, and thereby extinguished the interest, which she 345
(Susan Farmer) had in the notes, so that *eo nomine* "heirs of John Farmer, deceased, could not be the claimants in equity of the notes or of their proceeds, his guardianship of her interests was surrendered to Hart her husband. But Burney was as appears by the testimony adduced and made a part of the record of this case, at the time of his death guardian of the four other heirs of John Farmer, deceased, to wit: of Edward Farmer, and of the three for whom after his death Wm. W. Hart was appointed guardian, and for whom after his death Patrick Smith gave bonds as guardian.—Burney having in his life time paid and settled the interest and claim of one of the heirs of John Farmer, deceased, it is not even plausible, that he was the mere legal holder of notes payable to "Arthur Burney, guardian of the heirs of John Farmer, deceased," for the use of the remaining four heirs, and less plausible when a less number claim—suppose Burney in his life time had paid four of them and but one remained to be paid, might not that one with equal propriety claim the equity of these notes, as the three for whom Patrick Smith has given bond as guardian. If the plaintiff succeeds in this case, it is for his own benefit or for the use of Patrick Smith, or for the use of the heirs of John Farmer, deceased. If for the use of the heirs of John Farmer, deceased, it will be unjust because one of them has received her share. If for the use of Patrick Smith he has neither legal or equitable claim to it. If for the benefit of the plaintiff Moseley, he must shew a strict legal right.

The truth is, this suit is brought wrong to enure to the benefit of the heirs of John Farmer or any of them—if intended for the benefit of the wards of Patrick Smith, and if they have a joint interest, it should have been, James and Argyle, and Rufus Farmer, by their next friend Patrick Smith, 4 J. J. Marshal, 389. Thomp. Dig., 320, sec. 5. If their interests are several their suits should have been.

The designation of Patrick Smith, guardian of the heirs of John Farmer, deceased, is not supported by the proofs on the record. There are five of them, he has given bonds as guardian for but three—and unless his claim is for his own use (and of that there is no pretence) he has neither legal or equitable standing in the case.

Waiving for the present the legal liability which Burney in his life time had incurred by binding himself and his securities for the amount of the purchase money and interest accruing on the sale of the lands belonging to Farmer's heirs—let us proceed to the 346
time of his death and consider what follows that event. Moseley the plaintiff in this suit, took letters testamentary under his will and consequently became his legal representative. He examined the condition of affairs, made himself acquainted with Burney's liability as guardian of the heirs of John Farmer, saw that he was bound on two bonds, one in the penalty of $5000, and another in the penalty of $10,000, conditioned for a faithful application of the proceeds of the sale of the lands, and for paying the heirs as they respectively attained lawful age. Saw that his testator had paid Hart, the husband of Susan, her share—and that there remained four to settle with. Saw that Hart had been appointed guardian of three of them. Examined his appointment and his bonds, and considered them good. Saw the return his testator had made to the County Court, and considered his estate bound for the amount. And being so bound that the notes sued on belonged to his estate. He knew moreover that the receipts of the newly appointed guardian for any debts, rents, or sums of money belonging to each of his wards would be a good discharge for his testator Burney, and effectual in law signed severally as guardian for his several wards, if he could obto full age, see Thomp. Dig., 201, sec. 6. Knowing, or believing all this, it is not difficult to suppose he would come to a settlement with Hart, strongly disposed to procure from him receipts for money, signed severally as guardian fr his several wards, if he could obtain them. That a receipt for the notes to be held for the use of John Farmer's heirs, would not suit his purpose. But if it would, Hart could not give such receipt being guardian for but three of them.

Coming to this settlement under these impressions, he, Moseley, the plaintiff in this action, wrote the receipts himself—he stated the account current on the back of them himself. He took them severally for each of Hart's wards, for money expressed to be in part payment of the amount due from Burney as guardian—and Hart signed them as guardian of the wards in each case

It is not possible to perceive what consideration was given Hart, to induce him to sign and deliver money receipts, to Moseley, executor of Burney, unless he and Moseley agreed to consider his notes due to Moseley, executor, as cash. And the account current (in the hand writing of Moseley,) on the back of the receipts, charging up these notes and the interest due on them, as part consideration-

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347 for the receipts, well sustains this idea. This was at the suggestion of Moseley, he was prominent actor in shaping these receipts.—They are as he fixed them. They were filed in the Clerk's office of the county, to protect Burney's estate *pro tanto* against Farmer's heirs; to operate as a credit in favor of Moseley, executor, in the settlement of his accounts with the estate of Burney, his testator.—It may be added, they served the purpose of shewing the amount of Hart's liability as guardian to his three wards severally. No allegation is made of any surprise, mistake, or fraud, in obtaining these receipts—to the contrary, it was admitted all was fair and correct. But it is objected to allow these receipts to operate is to allow Hart to make testimony for himself. This is not perceived. The plaintiff offered them in testimony. He wrote them—he obtained them—he uses them against Hart to discharge Burney's estate for so much—and for the additional purpose of crediting himself with their amount as executor, in his settlement with the estate. They shew that Hart received their amount in money, which binds him and his securities to his wards. Moreover Hart is not a party to this suit, but Williams; and his, Hart's interest is equal both ways, if Williams is bound his, Hart's securities on his guardian bonds are not, if Williams is not bound they are. But in either event Hart's estate is bound. The evidence of Hart's liability to his wards as their guardian is found in his receipts to Moseley.—The evidence that Moseley parted with the notes and all interest in them to Hart is found in the account current on the back of them in Moseley's hand-writing. He did not assign them in writing, but by delivery—he did not assign for the use of John Farmer's heirs; but if for their use then severally to three of them. If he intended to deliver the notes to Hart to be kept as notes for the use of the three young Farmers why did he not take receipts to that effect? he could as easily have written such as those he did write. Or why did he enquire into the solvency of Hart's securities on his guardian bonds, but with a view to convert Hart's notes given to Burney into cash.

There is every evidence it was the intention of Hart, and the understanding of Moseley at the time of making those receipts, that he, Hart, elected thereby to bind himself as guardian for the amounts specified in the receipts? Indeed it is preposterous to suppose him bound as guardian for the amount of the receipts, and also bound for the proceeds of the notes. But if Burney's estate can have
348 credit for the amount of the receipts, and this is not controverted, Hart, and his sureties on his guardian bond are bound for the amount.

Moseley then delivered the notes sued on to Hart, the principal obligor in them, as and for payment for the receipts which Hart gave him. He considered them in that transaction, as Walker testified as so much cash, and that he parted with all claim and interest in them—and it must be they were considered as cash by both parties, or Moseley obtained receipts for money without paying it, and such a transaction would not be free from surprise, or mistake, or fraud.

Who is it that is at liberty to explain by extraneous proof a written receipt. This rule was manifestly intended to protect the maker against surprise, mistake, &c., in executing a receipt. But I apprehend no case will be found where the party protected by it or for whose use it was given has claimed the benefit of the rule especially when he wrote it himself. The receipts of Hart, made evidence by plaintiff, shew that Hart paid the notes sued on—and they were delivered to him. Other testimony of plaintiff shews that Hart while possessor, cut off the names of Chaires and Williams (the defendant,) who were his securities on these notes, as he did in other cases of his notes with sureties when he paid them—that this was done at the instance of Chaires in the case of these notes—and that the notes remained, and were in possession of Hart, at the time of his death.

How or on what consideration Moseley again became possessed of them is not shown. Counsel seemed coy in approaching this inquiry. It is not pretended that Hart's administrator ever delivered them away. He thinks himself still the legal custodiary of them—and says in his testimony "they were taken from among Hart's papers by some person having no authority." These circumstances raise a violent presumption in this case, that Moseley is not now the rightful holder of the notes, and has no legal interest in them or right to sue on them.

It was incumbent on him to repel this presumption. The record furnishes no such proof.

It is said this suit was brought for the use of Farmer's heirs, that the equitable interest attaches in them in the notes, and they have the right to elect their remedy on the notes. It has been shewn that the equity as well as the legal right was in Burney in his life time, by his election to charge himself as guardian with the 34
amount of the sale of land. It has been shown that this suit is not and cannot be for the use of Farmer's heirs.—The record shews that the three for whom Hart was guardian are yet minors. Their right of election is personal to themselves when they arrive at mature age and cannot be delegated during their minority. It has been shewn that Moseley paid these notes to Hart the principal obligor for the receipts which he obtained, and extinguished all demand which he as executor had on them, unless he may be allowed to take the receipts as for money, use them for purposes valuable to himself and his testator as money; and deny in this action having given money for them. It does seem equity, as well as law, would estop him from alleging anything to the prejudice of these receipts. An estoppel, says Lord Coke, "is where a man is concluded by his own act or acceptance to say the truth." Cited 2 Smith's L. C., 430. In this case Moseley, the executor, wrote the receipts, and induced Hart to consider his notes as money, and as payment for them. Hart signed them severally as guardian and Moseley accepted and used them as money receipts. Ought he now to be allowed to allege them to be anything else.

Mr. Justice Cowen in the case of Dezell *vs.* Odell, 3 Hill's Rep., 219, lays down an estoppel in pais to be "an admisison intended to influence the conduct of the man with whom the party is dealing, and actually leading him into a line of conduct, which must be prejudicial to his interest, unless the party estopped be cut off from the power of retraction."

Applying this rule which appears both lucid and just: Moseley to obtain money receipts from Hart the guardian considers his Hart's notes to Burney as cash, admission tending and intended to influence Hart to give receipts to him for money; by this admission of Moseley to Hart, he, Hart, is actually led into a line of conduct prejudicial to his interest unless Moseley be estopped the power to retract. He and his sureties on his guardian bonds are bound to his wards severally for the sums which by his receipts he acknowledges to have received. This retraction, if allowed, would bind him also to Burney's estate or to Farmer's heirs for the amount of the notes—which were the consideration in part for the receipts.

These receipts being then valid when given, and not alleged to have been executed by surprise, or mistake or fraud, but to have been fairly given and fairly received; and having been offered in evidence in this case by the plaintiff Moseley, may be considered 35
good evidence of such facts as they establish. The prominent facts established by them are, That Hart acknowledged by them the receipt as guardian of the sums of money specified in them respectively, and thereby elected to charge himself in his liability as guardian with the amount; and second, in consideration of so charging himself as guardian the notes sued on were delivered to him by Moseley as paid and discharged.

This view is supported by the return of W. W. Hart as guardian of James, Argyle and Rufus Farmer. He reports himself as having received of Wm. D. Moseley, Executor of A. Burney, dec.:

In Cash,	40 00
In notes and accounts,	3,463 00

And adds, "The above account as near correct as I can at this time make it, being very sick." He then accounts for the hire of certain negroes amounting to $250 00. And the Judge of the County Court enters thereon "I charge the guardian as per account stated above;" and after setting forth the items, again sums up and says $3,753 00. Thus it will be seen the judge on the return made by Hart, as guardian, charges him as such with the whole amount which he admits he had received. The return was in amount obviously incorrect; but Hart says it was as near correct as he could make it, being very sick. The proof shews he was sick in March, and died during the year; there is no date to his return. It may therefore be as true as he could make it at the time when made.—But right or wrong the Judge of the County Court considered it sufficient and proper evidence on which to charge him as guardian with the whole amount.

From the foregoing it is plain, that at the time of settlement between Hart and Moseley, Hart was debtor to Burney's estate, therefore to Moseley the representative of that estate, on sundry notes given by him to Burney, guardian of the heirs of John Farmer, dec.; and also that he was guardian of three of these heirs. That in consideration of the delivery of these notes to him, and their supposed payment, (by both parties) he gave Moseley the money receipts in evidence in this suit, and bound himself and sureties on his guardian bonds for so much money; does this amount to an extinguishment of the notes due from him as a principal debtor, and by operation of the law of retainer, render him liable as guardian?

It will be remembered these receipts shew the several sums which

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351 he acknowledges to have received, as guardian, severally of his wards, and in addition to this evidence of election to hold as guardian. The County Court charges him as guardian, with the whole amount he acknowledges to have received. The evidence in both ways is sufficient to fix his indebtedness in that character. He was the person to pay and the person to receive; by operation of law when this conjunction occurs, the money is regarded as *ipso facto* paid. Gray *vs.* Brown, 1 Richardson L. R., 337. Simpkins *vs.* Cable, 2 Bailey R., 60. Joyner *vs.* Cooper, same, 199, 202-3.

The case of Gray *vs.* Brown above cited, was an action against the surety on a guardian bond.

The court held that when the right of receiving a fund as guardian, and the duty of paying it as trustee unite in the same person, the law presumes performance of the duty, and without further proof a surety of the guardian is liable. But the court say when the right to receive and the duty to pay *absolutely concur* there can be no election. Whenever, by this *concurrence* or by *election,* the retainer is established, it is no answer for the surety of the character that has received by retainer to say, that the default occurred in the other character. In that case Carroll the principal held funds as *trustee* which he had been directed to re-invest but had failed to do so.—He was also *guardian* of his *cestui que* trust—and the question was whether the liability fell on his sureties, on his bond as *trustee,* or as guardian. The court say, "If in the case before us it should be supposed, that under the bond taken by the commissioner of B. R. Carroll as trustee there was a right of action in the commissioner for the trustee's default to re-invest, or that said right of action was in the minors, suing by their next friend, it will be perceived that whatever sum may have been received in either form, would have belonged to the minors, and might have been made payable *to the guardian* whenever the order of the court of equity should have been made for said payment. The case would have been just as it is now if judgment or decree for the amount of his default as trustee had been obtained against B. R. Carroll, and that the chancellor had directed his retainer as guardian." The court further said, "Proof of the trustees inability to pay his debts could not prevent the presumption of retainer, for this debt may have been met, although others could not have been. Even entire destitution of means would not seem to arrest the presumption of payment, which by law results from the union of *debtor and creditor* in the same per-
352 son." The cases of Simkins *vs.* Gable, 2 Bailey, 60. McDowell vs. Caldwell, 2 McCord, 304. Joyner vs. Cooper, 2 Bailey, 199. Schneill *vs.* Schroeder, et al., Bail Eq. Rep., 334. O'Neal *vs.* Hurbert, McMull.'s Equity Report 496, all seem (the court say) to regard the extinguishment of the prior debt as a necessary legal result of this union. Gray *vs.* Brown, 1 Rich. R., 364.

In Schneill *vs.* Schroeder et al., 1 Bail. Eq. Rep., 364, the court held "a debt due by an administrator to his intestates estate is assets *in his hands;* and if the administrator of an intestate becomes also the administrator of one of the distributees, his liability for the distributive share of the latter, in the estate of the former, attaches upon his *second administration.* And if he also becomes *guardian* of the sole distributee of his second intestate, his liability attaches upon him in the *latter* character, and for a default in paying over of funds in his hands, to which his ward is entitled as distributee of the *first* intestate, the sureties on his guardianship bond are alone responsible.

Jacob H. Boyer died intestate in 1817, leaving three children, Mrs. Schroeder, wife of John Schroeder, the defendant, Jacob F. Boyer, and Mrs. Wirtemburgh, who were the distributees of his estate. The defendant Schroeder took out letters of administration on the estate—and Schneill, the complainant, and one Herman Moore became sureties on his administration bond. Mrs. Wirtemburgh died subsequently leaving an only child, a daughter, who since intermarried with the defendant Marshburn. Schroeder also administered on the estate of Mrs. Wirtemburgh, and thereafter was appointed guardian of her child.

The bill in this case was filed by Schneill, one of the sureties on Schroeder's original administration bond, to enjoin proceedings at law, in an action brought against him on said bond, for the recovery of a sum alleged to be in the hands of his principal, Schroeder as administrator. And the court held, upon the death of Mrs. Wirtembrugh, Schroeder, as her administrator, was himself *alone* entitled to receive her dividend of the estate of her father, Jacob H. Boyer. It was in his hands, and (the court say) the condition of the bond was not only *legally* but *literally* fulfilled. The whole object of the bond is to secure the payment of the proceeds of the estate to those who may be legally entitled to receive them. But the claim of Marshburn and wife upon the complainant are still one degree further removed. Schroeder was appointed guardian of Mrs. Marshburne when she was an infant (supposed regularly and 353
upon sufficient security) and the *necessary* consequence of this was that the amount in his hands, to which she was entitled as distributee of her mother became so much *held* by him in trust for her *as guardian;* and according to McDowell *vs.* Caldwell, 2 McCord Ch. R., 55, the sureties to the guardianship bond are responsible for it. And the circumstances referred to constitute a complete bar to the right of Marshburne and wife to recover at law. 1 Bail. Eq. R., 340.

In the case of Hall *vs.* Hall, 2 McCord Ch. R. where it was shewn that the executors themselves owed considerable sums to the estate, the court held the following language:—"The decided cases say, that these debts are so much *cash* in the hands of the executor; and the court will often order executors to pay the debts they owe, into the hands of the proper officer of the court for the security of the parties interested, 2 Cox's Ca., 377; Eggleston and Coventry *vs.* Kingston, 8 Vesey, Jr., 466; Berry *vs.* Usher, 11 Ves., Jr., 87; Toller on Ex., 480; 6 Mass. R., 149; 11 do., 256.

A debt due by the executor of the estate of a testator, is assets upon the same plain reason upon which an executor, who is a creditor, may retain; that he cannot *sue himself.* 13 Ves., Jr., 263; Hankey *vs.* Garrett, 3 Bro. C. C., 458; and it has been held a sufficient cause for the appointment of a receiver, Winthrop *vs.* Bass, 12 Mass. R., 199; Middleton *vs.* Dodwell, 13 Ves., Jr., 268-9. Thus the principle seems well settled, that where an executor or administrator having assets in his hands is also *guardian,* he can elect to hold the share of the legatee or distributee (his ward) in his character of guardian, and thus exonerate the sureties on the administration bond, and thus charge those on the guardian bond.

In the case of Joyner *vs.* Cooper, 2 Bailey's Equity Reports, one indebted by specialty to the estate of a lunatic, is appointed committee of his estate, and the specialty is transferred to and accepted by him as committee. The court held the debt extinguished, and the sureties to his bond as commissioner are liable for so much received by him. So far as that case is applicable, it is as follows:

John McNish was by a decree of the Court of Equity directed to account with the commissioner for his actings and doings as commissioner of John Dupont, the lunatic. He was reported by the commissioner to be indebted to the estate of the lunatic in the sum of $8,802 47-100, and the report was confirmed and made a decree of the court. In the amount reported was included the sum, prin- 354
cipal, and interest, of a bond for 1,200, which McNish owed, and which was due to the estate of the lunatic before his appointment to be committee; after his appointment this bond was transferred to him by Thomas Dupont his predecessor in the office of committee and accepted by him. And it remained in the hands of his attorney uncancelled at the trial of the case. McNish being removed his successor instituted suit on his bond as committee and recovered judgment on it for the whole amount of the decree in equity. On this judgment among the questions raised one was: whether John McNish was properly charged as committee with the amount of *his own debt,* as so much money *received by virtue of his trust.*

Upon this point the presiding Judge delivering the opinion of the court, says: "I regard the point as settled, that where one owes a debt to a trust, and afterwards assumes the management of the trust, the amount of *his debt* shall be considered as so much cash *in his* hands". Upon appeal the court said, "This court concurs in the opinion of the presiding Judge below, on all the questions he has discussed. The second ground, however, presents a question which although in effect decided by the judgment below, it may be necessary to decide expressly here. It cannot be denied that the committee of a lunatic is not subject to any further liability, if on the revocation of his powers he has accounted for and paid over the funds in his hands, to whomsoever may be legally entitled to receive them. Who in this case was entitled to receive from the former committee, Thomas Dupont, the funds in his hands? Unquestionably the committee, John McNish, who was appointed in his place. The commisisoner of the court had no right to receive them, unless specially authorized by the court. McNish's appointment clothed him with all the power to receive and manage the estate of the lunatic. If he thought proper to settle with the former committee without even an account before the commissioner, he could do so, and his receipt for the funds was an act, to which he was fully competent. If he thought proper to receive *his own bond* there was nothing in the undertaking or duties of his trust to prevent his doing so; and the money due on the bond became thereby *a part of the trust fund,* and his sureties are answerable for it." See Joyner *vs.* Cooper, 2 Bail. Eq. R., 205.

The foregoing case seems analogous in principle and in every

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355 essential feature, parallel with the case under consideration.

In the case of Galphin *vs.* McKinney, 1 McCord Ch. R., 298.—Nott, Justice, in delivering the opinion of the court said, quoting from the Chancellor's opinion appealed from, "The order of the court it is said, directing the delivery of the bond to McKinney as the executor of the estate of Galphin, was not intended to operate as a discharge of the debt, for there was no proof of payment made; nor was it put to the court, that in making that order it was intended to cancel the bond, and release the surety." The Justice in reply to these views of the Chancellor says: "With the most respectful deference for the opinion of the learned Chancellor who delivered that decree, I cannot bring my mind to concur in that construction of the order delivering the bond to the obligor must of itself imply an intention to place it entirely at his disposal. What other intention can possibly be conceived? It is said it was delivered to him as executor *"eo nomine,"* for the benefit of the estate, and if he destroyed it he was guilty of a breach of trust. If it was delivered to him for the benefit of the estate, it was for the purpose of enabling him to appropriate the money due on it, to the payment of the debts and legacies of the estate. It was then giving the entire credit to the *principal;* and the court would violate its own rules, not to construe it into a release of the *surety.* The destruction of the bond was no breach of trust, because being in the hands of the obligor it became a dead letter. The misapplication of the fund might have been a breach of the trust; but the surety on the bond was not answerable for that. He was not security for the faithful administration of McKinney."

If the foregoing views have any force or propriety, and they are authoritative in South Carolina, where they have been acquiesced in and approved by the courts, they seem to apply themselves to the case we are now discussing with peculiar fitness.

In the case of O'Neall *vs.* Herbert, Dud. Law and Equity Rep. Dec. Term, 1837, page 31-2, Chancellor Harper, delivering the opinion of the court, said, "I suppose that if an administrator have in his hands the balance of an estate, and is afterwards appointed as guardian of an infant entitled to it, he will be chargeable as guardian, and the sureties on his guardianship bond will be liable, as in the case of Simkins *vs.* Cobb, (2 Bailey R. 60) referred to by the Chancellor. So, if before his appointment he has received a sum of money as in McDowell *vs.* Caldwell (2 McCord's Ch. R., 55) or if in any

356 *other capacity* he be indebted to himself as guardian, being unable to sue himself, the debt shall be presumed to be paid, and he and his sureties will be liable.

In the case of Pratt et al. *vs.* Northom et al., 5 Mason R., 108, Mr. Justice Story says: If any act had been done by Ambrose by which *he elected* to pass the property to his guardianship account, or if he had charged himself with it, in the Probate Court *as guardian,* there would be little difficulty in adopting the construction, that by operation of law it was instantaneously transferred to his accounts as guardian.

The real question in this part of the case, is, whether without any admission of assets, or any admission of responsibility as guardian, a Court of Equity is bound to make that application for the party, which he has not made for himself; in this respect it differs materially from Taylor *vs.* Deblois. See 5 Mason R. 108.

In the case of Taylor *vs.* Deblois, 4 Mason R., 133, the court said: "The principle of retainer is, where the party unites in himself by representation, or *otherwise* the character of debtor and creditor, inasmuch as he cannot sue himself, he is entitled to retain, and the law will presume a retainer in satisfaction of the debt, if there are assets in his hands." The learned judge further said, "I see no reason upon a review of the authorities, to doubt the accuracy of the statement; and it is supported by Burdett *vs.* Fix, 1 Roll. Abr. Title Executors L. 3, C. 45. 2 Browlows, R. 50. Woodward *vs.* Lord Darcy, Plowden R. 184. Toller, C. 3, Chap. 3. Same 109. 8 Serg't & R. 24, 30. 1 Pothier on Ob. 425.

In the case at bar, Hart did not owe money by representation, but admitting that Burney in his life time, and Moseley his representative, after his death, held these notes in trust for the use of Hart's wards, after that transfer, then he owed them *otherwise,* to wit, as principal; and according to the doctrine in the last case cited, inasmuch as he could not sue himself, was entitled to retain, and the law will presume a retainer in satisfaction of his debts to them.—This case is very unlike the case of Pratt et al. *vs.* Northom et al. There the guardian admitted no assets either in that or any other character; but it is plain from the case, had he admitted assets as guardian, Judge Story, who tried that cause would have charged him as such, and held all responsibility under his administration bond as *extinguished.* Here Hart receipts for the notes as cash, and signs the receipts *as guardian.* He accounts with the County Court for what he had received *as guardian,* and is charged by the court 357 in *that character* with the amount. In this case then the duty to pay and receive both devolved on him, and the law presumes a retainer as guardian, and an extinguishment of the notes sued on. In this case, Hart elected to receive as guardian and account with the court as guardian. And by his election a retainer of the funds as guardian, and an extinguishment of his notes as principal was worked, according to the authorities cited, "as a necessary legal result."—And he not only became chargeable as guardian for the amount so received, but to the extent of his return to the County Court, in fact was so charged.

Is Moseley bound to Hart's wards, the young Farmers, for the amount of these notes?—most obviously not, because the receipts he took of Hart the guardian, releases the estate he represents for that much; and are also good vouchers for him in his settlement of that estate.

That the mere loss or destruction of a note will discharge the liability of principal or surety, is a proposition which we apprehend will not be seriously urged by any one; we do not understand, however, that Williams the appellant, rests his defence on that ground.

But because the notes were delivered to Hart the principal as paid and released—or if not so, because by delivery to him as guardian the amount became chargeable against him and his sureties on his guardianship bonds—or because by delivery to him as guardian the right of action became suspended by operation of which his sureties, on the original notes (the subject of this suit,) were discharged. It was suggested in argument on the part of the appellee Moseley, that these receipts of Hart, guardian, to Moseley, executor of Burney's estate, are receipts made by the debtor, and to allow them as evidence of extinguishment of the original notes, or of retainer as guardian, is to permit the party to make evidence for himself. It must be recollected these receipts were taken by, and delivered to Moseley the plaintiff in this suit below; it also appears by the testimony they are in his hand writing, and by the bill of exceptions, that they were put in evidence by him in the Circuit Court. It is too late to make the objection after he, Moseley, has used them and offered them in evidence below, to refuse to the appellant any benefit he may derive from them here. A party offering evidence is understood to waive all objection to its competency. Greenleaf *vs.* Birth, 5 Pet. R., 132-7-8. These receipts were received by Moseley, executor of Burney, from Hart, guardian of three of Farmer's heirs; 358 Moseley, the appellee wrote them; Hart, as guardian, signed them; Moseley offered them in evidence. Williams, the appellant, had nothing to do, as far as appears, with the making of them, or their custody, or any connexion with them whatever—why may he not avail himself of evidence thus thrown in his way? Their chief effect is to shew that Hart elected to charge himself with their amount as guardian of his wards; and this is evidence of the same kind usually referred to for that purpose; most of the cases before cited turn on such testimony—to which may be added the case of Alston *vs.* Munford, where the guardian Munford was charged as such, (though he was testamentary guardian without security, and his securities as executor were discharged,) because he so charged himself on his own books, and to a bond debtor, whose debt had been bequeathed as a specific legacy to his ward, he wrote, apprizing him of the fact. 1 Brock. R., 278. In the case of Taylor et al. *vs.* Deblois, et al., 4 Mason R., 135, the only evidence of transfer was a certificate given by Mrs. Deblois to the Probate Court that she (who was administratrix,) held the funds as guardian, this Judge Story held to be conclusive, and she became bound as guardian, and her securities as administratrix were discharged.

The weight of the objection that Hart received these notes, *eo nomine* for the use of Farmer's heirs, is not perceived. He did not receipt for them as notes; but for their amount, both principal and interest, as money. He did not receipt for them as guardian of Farmer's heirs; but separately as guardian of three of them, there being five. Moseley, the appellee, was an actor in making and receiving these receipts, they were moulded, as he thought best, to serve his interest. He surrendered the notes to Hart the principal obligor in them, as the consideration for the receipts and according to his own statements in evidence in the record, thought he was parting with all interest in them. By that act he suspended his right of action against Hart and his sureties on these notes for an indefinite period, that is during Hart's life time afterwards. This (if the doctrine of retainer did not apply) would be giving time to the principal in consideration of the receipts, without the privity or consent of the surety, and would in law discharge him. U. S. *vs.* Hillegan, 3 Wash. C. C., 70; Bank of Steubenville *vs.* Hogue, 6 Hamm., 17; Kennebec Bank *vs.* Tuckerman, 5 Greenl., 130; Bank *vs.* Woodward, 5 New H., 99. The delivery of a note, bill or execution, with

intend to *transfer the debt* upon a *fair* bargain, and for a *valuable* consideration, is a sufficient assignment. Fitcomb *vs.* Thomas, 5 Greenl., 282; Clark *vs.* Rogers, 2 do., 157; Jones *vs.* Witter, 13 Mass., 304; Dunn *vs.* Schnell, 15 do., 485. And so held of other choses in action. Briggs vs. Dorr, 19 John., 95; Prescott vs. Hall, 17 do., 284; Vose *vs.* Handy, 2 Greenl., 322; Robbins *vs.* Bacon, 3 do., 349; Onion *vs.* Paul, 1 Har. & John., 114. These and numerous other authorities sustain and make valid the transfer by Moseley to Hart of the notes sued on.

It is said in argument, these notes were not extinguished, but the right of action was suspended during the lifetime of Hart, the guardian, and again revived at his death. It will be remembered the only legal holders of these notes were Burney in his life time; Moseley, his executor, after his death, and Hart, the guardian, by transfer, by delivery, from Moseley for a valuable consideration.—So that any time after the notes were five years past due, the statute of limitations would have been a valid as well as meritorious plea, for the appellant, Williams, who is only a surety. The accident of the death of Hart is the fact on which the law of the case is therefore made to depend. Had Hart lived until these notes, or any of them, were five years past due—after that, a plea of the statute of limitations, would have been a bar to a suit brought against Williams the surety, on all of them so conditioned. For during Hart's life, Moseley, the appellee, had no right of action against the surety Wiliams, he having parted with all interest in the notes. It seems therefore the right of Moseley to maintain this action does not depend upon any legal title, which he has in, or to the notes sued on; but upon the death of Hart, to whom he had transferred them, and all interest in them for a full and valuable consideration.

The court being equally divided in opinion the judgment of the Circuit Court will stand. But I for the reasons herein stated, think that W. D. Moseley, the appellee, in this Court, and plaintiff in the Court below, has not shown a legal ground of action against Robert W. Williams, the appellant here, and defendant in the Circuit Court, and that the judgment of that Court ought to be reversed.

Upon the question of holding adjourned terms of the Circuit Court raised by the exceptions in the record of this cause, the 3d section of the act of 1828 to regulate judicial proceedings, Duval L., 90, provides "when any Judge shall not attend on the first day of the term, the Court shall stand adjourned until twelve o'clock on the second day, and if said Judge shall not then attend, it shall be the duty of the Clerk at that time to continue all causes and adjourn the Court to such time as the Judge may appoint, or until the next regular term by law established." Justice Lancaster, and Chief Justice Douglas, are of opinion that the Judges have power under this section to adjourn the term of the Circuit Court at the time, and under the circumstances provided in the section above mentioned (to hold adjourned terms of the Court) at any time not to interfere with the regular term of any other Court in the Circuit, but that their powers to adjourn terms under other circumstances, seem not to be created by statute; therefore, no opinion is given on that point.

HAWKINS, J., for Affirmance.

DOUGLAS, C. J., for Reversal.

JOSEPH C. OSBORNE AND WIFE, *vs.* THADDEUS D. VANHORN, ET AL.

It may be regarded, as established by the English and American decisions, that a mother is entitled to an allowance for the maintenance of her children out of their fortunes, especially where her own fortune is inadequate.

In gneral this allowance is to be confined to the annual income, and should not extend beyond it; but where the property is small and more than the annual income is necessary for the maintenance of the infants, the Court will sometimes allow the capital to be broken in upon.

If there is a necessity for breaking in upon the caiptal of an infant for his maintenance, the proper course is *first* to apply to the Courts for its sanction. If, however, this course is not adopted disbrusements beyond the income are at the peril of the guardian, and he is bound, before he obtains an allowance for such disbursements, to show a state of facts demanding and justifying them and should produce the vouchers, &c., of his expenditures.

The statute of limitations is no bar to items of such expenditure, disbursed more than five years anterior to the filing of a bill by the distributees for an account and distribution.

Where real estate is, by order of the County Court, converted into money, the heirs and distributees cannot claim that the one-third belonging to the widow of intestate for her natural life, be paid over to a master, to be by him laid out at interest. Her life interest in money in her hands is not subject to be disturbed, except on a shewing of fear of loss or making away with it, and even then she should have the privilege of giving security for it.

Appeal from a decree in Chancery rendered in Leon Circuit Court, DOUGLAS, Chief Justice, presiding.

Thadeus D. VanHorn, in right of his wife, Mary Ann, daughter of Daniel Faust, deceased, with others, also children of said Daniel, filed their bill in Chancery against Mary Ann Osborne, (formerly Mary Ann Faust, widow of said Daniel,) administratrix of Daniel Faust, and Joseph C. Osborne her present husband, for an account of the administration, and distribution of the surplus. The defendants answered and submitted their accounts, and claimed an allowance for many items of expenditure for the children of Daniel Faust disbursed since his death. The defendants also claimed the use, during the life of Mrs. Osborne, of one-third of certain moneys, realized by a sale of real estate of the intestate made by order of Leon County Court. It was referred to a master to make and state an account of the administration, and of the surplus for distribution. The report of the master allowed the administratrix the disbursements for the maintenance of the children of Daniel Faust, and the use for life of one-third of the moneys realized from the sale of real estate. The allowance for maintenance of the children was not confined to the annual income of the children. Exceptions were filed to the master's report, and are considered in the opinion of the court delivered by Justice Baltzell to which reference is made for the further material facts in this case.

In the court below a decree was rendered in favor of complainants directing the widow's third of the money arising from the sale of the real estate to be preserved in the hands of the master to be laid out at interest for her benefit during her life, and excluding all disbursments by the administratrix for the maintenance of her children (heirs of Daniel Faust) made more than five years previous to the filing of the bill.

From this decree the defendants (appellants in this court) appealed, and the complainants took a cross appeal.

This cause was argued by,

Mr. Archer, for Appellants, and

Mr. Gwynn and *Messrs. Long & Walker* for Appellees.

BALTZELL, J., delivered the opinion of the court:

This suit is instituted by the Complainants to recover from the administratrix of Daniel Faust, dec., the distributive share due to them as heirs of the decedent. The accounts of the administratrix where referred to a master, the exceptions to whose report constitute the ground of appeal to this court. The mother, now Mrs. Osborne, was administratrix, and complainants object to allowing her "any sum whatever for board and clothing her own children; this they say was her duty by law and nature." And, secondly, admitting the claim, she was entitled to use no more in their support than the annual interest or profit of their estate. By the common law it was the duty of parents to support their minor children. 1 Bl. Com., 446.

It has been, and continues to be, an established rule in equity to allow maintenance where the parents are not of ability. Harley *vs.* Bannister, 4 Mod., 275. "It is not necessary that the father should be absolutely insolvent, but that he should not be in sufficient circumstances to maintain his child suitably to his reputation." Buckworth vs. Buckworth, 1 Cox, 80. "So in previous cases it was held that a parent must maintain his child unless totally incapable, or by having a numerous family of children he borders on necessity.' 1 Mad. Chy., 344.

Where the circumstances of the father are sufficient for the maintenance of the infant, the court will compel him to do it, and refuse an allowance. 1 Ark., 514. 6 Vesey, 349.

A mother seems to occupy a position somewhat different from the father. Thus Lord Hardwick, in said, "As to compelling the mother to maintain her daughter out of her own estate, it will be going too far." 2 Atk., 446.

Lord Eldon has repeatedly declared, "a master cannot do a wiser thing for the benefit of a family than to make a liberal allowance out of the children's fortune for their maintenance and education to a mother who is inadequately provided for." Note to 1 Brown Ch. R., 164, Bradshaw *vs.* Bradshaw, 1 Jac. Pr. 647.

The maintenance will be allowed when the father is not of ability although the mother has a separate estate. 1 Cox, 275.

A mother married to the second husband is not obliged to maintain the children by the first, but shall have an allowance from the interest of their fortunes. 1 Brown, Ch. R., 268.

The English authorities are to the effect stated. Let us see how far the American Courts agree. In Hoffman's Master in Chancery we find "it is the course of the English Courts to appropriate a cer-

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363 tain sum out of the fortune of the infant for his support, and to direct a reference to fix the amount. This is not usual here; the disbursements are judged on the settlement of the guardian's account. The English course is in some respects preferable, least troublesome to the guardian, and least expensive—as the guardian would be allowed the whole sum fixed for his maintenance without providing his disbursements. But it has this disadvantage, that the guardian having a fixed sum, may be tempted to profit by it by diminishing the proper allowance to the infant. 2 Atk., 618. Hoffman's M. C., 135.

The case of Susannah Bostwick, decided by Chancellor Kent was that of a mother of six children having a share of her husband's estate amounting to $3,682.99, a legacy of $250, 1-5 of a house and lot in New York, subject to life estate of her mother, 56 years of age. The Chancellor directed an enquiry as to what yearly sum would be a proper allowance for the mother and children, and to examine and report on the justness and truth of the charges for past maintenance. In the case of Hayward *vs.* Hayward's executor, the Court of Chancery of S. Carolina say, "The children are entitled to a considerable estate, and she has not more than a competent provision for herself. It is reasonable, therefore, that she should be relieved from the burthen of maintaining and educating them. The allowances ought to be liberal but not beneficial. The mother ought to be indemnified for all expenses on account of her children, but not for her care and attention." In this case the sum of $2000 annually was allowed for the maintenance and education of her daughter, and the maintenance of her sons. 4 Dess., 445. It may then be regarded as established both by the English and American decisions, that a mother is entitled to an allowance for maintenance out of the property of her children, especially in cases where her own provision is inadequate.

The second exception is, that this allowance is to be confined to the annual income, and should not extend beyond it.

This no doubt the general rule, the exception is where the property is small, and more means are necessary for the due maintenance of the infant. In this event the court will sometimes allow the capital to be broken in upon. 2 Story's Eq., 584.

This rule is founded in prudence and a just regard to the rights of infants, to prevent extravagance and incautious action on the part of guardians. The rule, however, is not inflexible. In the case of
364 Bostwick above referred to, the subject of breaking in upon the capital of the infant, and of allowance out of the infant's estate for past maintenance were both considered, and the Chancellor says of the former: "We must impair the principal sum or give no relief.—The capital is small when divided among the six children, and we may well adopt the remarks of Lord Keeper North in Barlow *vs.* Grant, "that it was fit and reasonable that part of the principal of a child's legacy of £100 should be allowed for his education.—The money laid out in the child's education was most advantageous and beneficial for the infant, and therefore he should make no scruple of breaking into the principal where so small a sum was devised that the interest thereof would not suffice to give the legatee a competent maintenance and education. But in the case of a legacy of £1000 or the like, it might be reasonable to restrain the maintenance to the interest of the money.

The petitioner also asks for reimbursement for the past maintenance of her children, or for the discharge of debts which she has of necessity incurred for that purpose. Such an allowance is also within the rules and practice of the court. Lord Thurlow held that no such allowance could be made; but afterwards, 6 Vesey, 454, Lord Eldon approved of this old practice by Lord Rosslyn, and allowed a father to be reimbursed for the past maintenance of the child.

Lord Thurlow was said to have changed his first opinion on this point, and Ld. Alvanly frequently made a retrospective allowance for maintenance, and the practice afterwards grew familiar. 9 Ves., 285. 11 Ves., 1. 14 Ves., 449. The old rule says Chancellor Kent would lead to great inconvenience, for though the wants of the infant might be ever so pressing he could not receive any maintenance (charity excepted) without the expense of a suit and reference to a master." 4 John. Chy., 104.

In addition to the quotation already made from Hoffman's Master in Chy. we find the opinion of Lord Hardwick as to exparte applications for maintenance. "I had a doubt whether the court could upon exparte applications allow maintenance for an infant where no cause is pending, *for it is at the peril of a guardian in socage what he applies for maintenance,* and he will be allowed according to the discretion he has used, &c. 2 Atkins, 315. Hoffman's M. C. 136. The same authority says, "if the petition prays maintenance as well as a guardian, which is usually the case in England, the order includes a direction to the master to consider what is proper to 365
be allowed for the maintenance and education of the infant. If the guardian proposed has expended anything before, the words *for the time past* and to come should be added."

In such a case the state of facts laid before the master should contain in addition to what is requisite to the appointment of a guardian, a statement of the items of previous disbursements, which may be by way of schedule and a proposal of their amount to be allowed for previous disbursements, as well as an annual sum for future maintenance. The statement of expenditures must be proved by vouchers as usual. The state of facts should contain everything except what is peculiar to the proposal for guardianship. It should be sworn to, and the voucher produced of past expense if any."—Hoffman's M. C., 136. 3 Br. Ch. R., 88. 1 Br. Ch. R., 179.

In the case of McDowell *vs.* Caldwell, the subject was considered by the S. C. of South Carolina, on exceptions to the report of the master, and the court said, "no account has been furnished of the actual expenditures, or of the length of time they were boarded abroad; and the basis of the charge against them is by probale conjecture as to what would be the expenses of board, tuition, clothing, &c., for the whole length of time. It is a well settled rule that the guardian is not entitled to break in upon the capital of his ward for his subsistence, except under peculiar circumstances which do not enter into this case, and generally it is limited within the income. 2 McCord's Chy., 58.

We are of opinion then, that as a general rule, the guardian should be confined to the income; and if there is necessity for invading it, his proper course is to apply to a court for its sanction in the first instance. If, however, he does not adopt this course, disbursements beyond the income are at his peril, and he is bound to shew a state of facts and circumstances demanding and justifying them, and should produce the vouchers, &c., of his expenditures. The exceptions in this case assert the general principle that the mother is not entitled to anything, and secondly, to no more than the income. Had specific objections been presented as to the mode of allowance by the master, the want of vouchers, &c., there might have been greater difficulty in sustaining the report.

The second exception presents the enquiry whether there are in the facts of this case as presented by the master, a sufficient excuse and justification for the guardian to break in upon the capital of these infants. This can be determined only by reference to the 366
condition of the estate in the hands of the widow, shewing her income as well as that of the infants. There were seven children of the intestate, all of them daughters but one, at the time of his death, Oct., 1833. One died four months after him, another eleven months, and the boy two years afterwards.

The administratrix had four negroes,			
Valued at		1,125 00	
Provisions,		240 00	
Other property,		401 25	
		94 00	
Debts due the estate,		247 50	
		2,107 75	
Paid debts,		701 58	
			1,406.17
In January, 1835, a sale of lands and lots was had,		2,136 48	
Debts paid,	569		
	608		
		1,187 00	
			948 48
In March, 1838, was a further sale of real estate,		3,992 04	
Debts paid		371 02	
			3,620 92
			$5,975 58

The legal interest on the amount of the portions belonging to the widow and the distributees will be, according to an authority quoted, a fair test of the annual income of each, and we have endeavored so to regard it, without aiming at entire accuracy in the calculations.

Deducting the thirds of the widow from the $1,406 in her hands to Jan., 1835, and there will be as a portion to the children $937 34; the interest on which for a year would be $74 98, to be divided amongst seven children for their support, making an allowance of near eleven dollars to each, for board, clothing and education to the 1st Jan. 1835. Proceeding to 1838, and adding this principal of 937 34 to the sales made in that year, after deducting the widow's dower, ($632) we have the sum of $1,596, the income of which, $125, is to be divided amongst four children, making $31 for each,

for maintenance and education to March, 1838. Progressing to this period, and adding the sum of $1,569 to the $3,620.92 deducting the dower, ($1,206.97) leaves $2,413.95, which added to $1,568 makes $3,982.95 as the property of the infants, the interest of which is $318.36, making $79.68 each, to be divided amongst the four children.

We will now enquire as to her means of support for herself. Her share to Jan., 1835 was $468.66, yielding an interest of $37.39. In 1835 her share was enlarged 632, making with the 408, $1,100.66, and giving an interest of $88. In 1838 her share was enlarged 1,206, making with the 1,100, $2,306, giving an interest of $184.48.

If correct in this view we think it very clear that at least until 1838 there was a deficiency of means, both of the widow and children, and that a Court of Equity, if applied to, would have allowed the capital to be broken in upon; and there being no complaint of the exhorbitance of the charges, or mistake of the master in this respect, we see no reason for disturbing his report. These two exceptions were then, in the opinion of this court, properly overruled by the court below.

We do not concur, however, with that court in sustaining the eighth exception of complainants. The statute of limitations does not, in our opinion, bar the items charged for support of the children. The complainants ask equity, and must be required to do equity. They cannot expect to exact payment from the administratrix of this fund without allowing her all fair payments and deductions arising from and connected with her administration. This should be overruled.

We think, too, the court erred in ordering the amount in the hands of Mrs. Osborne, as her share for life, in place of dower in the lands, to be paid over to the master, and by him laid out at interest. Mrs. Osborne has a life interest in this, not subject to be disturbed except on a showing of fear of loss or making away with it by her; and even then, she should have the privilege of giving security for it. But there is neither proof nor allegation of any peril attending its being with her. On the contrary, looking to the care and prudence in the past management of the property, there is every fair presumption of her taking proper care of it in future. It would, in our opinion, be dealing very harshly with one who has acted so well and so faithfully to her children to exhibit a distrust of her honesty in this respect. It is so seldom that courts are called to pass upon a case exhibiting so much merit, such rare fidelity and worth, that we would by no means discourage it by undue harshness or severity.

Indeed in looking at the state of accounts as exhibited by the master, we have been struck with the extraordinary prudence and success attending the management of the affairs of this estate by this lady; and that during the disastrous periods of embarrassment and losses from 1838 to 1847. "No losses," says the master, "are claimed to be allowed for bad debts or depreciated money. No charge is made for supporting negro children, or taking care of sick negroes, and not a single medical bill charged."

Some reliance has been placed upon the agreement between Osborne and his wife, as preventing any allowance for board after the marriage. We do not regard it in that light. Osborne binds himself to his intended wife not to make a charge for board, but does this exclude and prevent her from doing it. This same agreement provides a separate interest to the wife in her property, and the design was probably to leave it to the management of the wife as a part of her separate affairs. The deed or contract is by no means clearly expressed. Still it is between Osborne and his wife, and not between them and the children. The latter were not parties—did not contribute to its consideration—are not bound by it in any way, how then can they claim under it?

A majority of the court are of opinion that a sufficient allowance has been made in this case independent of the ten per cent. on the interest and hire, and direct this to be disallowed. They are by no means prepared to reject it as a good general rule, but think under the circumstances of this case, a deduction should be made in this respect.

We are then of opinion that the exceptions of complainant be overruled, and that the decree allowing the exceptions as to the statute of limitations, and the order for distributing the life estate of Mrs. Osborne, and allowing the ten per cent. aforesaid, be reversed. In other respects the Master's Report is confirmed. The case will be remanded with instructions to enter a decree in conformity with this opinion.

Joseph B. Watts, Administrator of Thos. T. Clardy, vs. James Clardy. 369

A deed using the terms "have loaned to A. during her natural life, and after her death hath given unto the heirs of her body which shall survive her, to be equally divided amongst them:"

And a devise "I lend unto my daughter A., during her natural life and after her decease to the heirs of her body, share and share about," were held as well by the laws of South Carolina as the common law of England to create an estate-tail in personal property so as to vest it obsolutely in A., and on her marriage in her husband. On her death the property belonging to his administrator, and not to her heirs.

Writ of Error to Hamilton Circuit Court.

Joseph B. Watts, administrator of Thomas T. Clardy, brought suit in Hamilton county in *detinue* against James M. Clardy for the recovery of certain slaves named in the declaration, and alleged to be detained by defendant.

The jury at the trial, on the 6th of April, 1846, found a special verdict as follows:

We, the jury, find that Thomas T. Clardy, the plaintiff's intestate, died possessed of the negroes sued for, that the plaintiff demanded the same from the defendant, who after the death of the said Clardy detained and still detains the said negroes, that said demand was duly made before suit was brought; and the jury assess the value of the negroes as follows:

Charles at	$600	Sanco at	$200
Daniel at	$600	Moses at	$300
Samuel at	$300	Bellat at	$300
Charlotte at	$400	Patience at	$200
Silvey at	$500	Lavinia at	$300
Tenor at	$500	Violet at	$100
Maria at	$500	Maria at	$500
Cass at	$600	Mary at	$150
Boston at	$600	Jenny at	$150

That the following named negroes, to-wit: Charles, Silvey and Tenor are the same negroes named in a certain instrument of writing, under which defendant claims for himself, and as guardian for his brothers and sisters, the property therein mentioned, dated April 370
21st, 1827, made by Wm. Gore, which is hereunto annexed, marked exhibit A., whereby the said negroes, with future increase, which increase since born are Maria, Boston, Cass, Sancho, Lavinia, Moses, Bella, Patience and Jenny, were deeded to Anner Clardy, to have, hold and enjoy during her natural life, as therein mentioned; that the following named negroes, to-wit: Sam, Violet and Maria, Daniel, and Charles, (together with Mary, child of Maria, since born,) are the same negroes which were devised, under and by virtue of the provisions of the last will and testament of William Gore, senior, in favor of Anner Clardy, as therein set forth, dated the 30th of May, 1825, and hereunto annexed, marked exhibit B., under the provisions of which will, and the eighth and ninth clauses thereof, the defendant, James M. Clardy, for himself and as guardian for the rest of the children of said Thomas T. and Anner Clardy, claim property. That the said William Gore died 30th October, 1828; that the said Anner Clardy was his daughter, and is the same person named in said will. And the said Anner Clardy and Thomas T. Clardy were married and resident in the State of South Carolina at the several times and before the dates of said instruments. Exhibits A. and B. That said exhibits are fully proved and authenaticated; that Anner Clardy departed this life in the year 1839, and that the said Thomas T. Clardy survived her and has since died, and that the plaintiff is his administrator; that the defendant, James M., and his sisters and brothers, to-wit: Amanda, John, Alva, Vienna and Mary Ann, the children of said Anner, survived her and her infants at the time of her death. And forasmuch as the jury are ignorant in point of law upon the facts of the case, on which side they ought to find the issue, they do agree that if the court should be of opinion, that Mrs. Anner Clardy took an absolute interest, as first taker in the negroes devised under William Gore's will, by virtue of the provisions in her favor, which negroes are herein before set forth; and, also, took a like interest in the negroes above mentioned, which were deeded, with their increase, by the deed of 1827, by said William Gore, which negroes in such event, by reason of such inter-marriage, vested in her husband, Thomas T. Clardy, as absolute owner, then they find for the plaintiff, that he recover the said goods and chattels in the declaration mentioned, and so above assessed, wrongfully detained by the said defendant, or the value there-

Joseph B. Watts, Administrator of Thomas T. Clardy, vs. James Clardy.

371 of, as above assessed, and his damages about his suit, to wit: ten dollars and costs.

But if the court are of an opposite opinion, and consider that the children of Anner Clardy took by purchase or remainder-men, or otherwise, at her death, under said will and under the limitations of said deed, then they find for defendant, and that he doth detain the the negroes above named; but in either event, he doth detain the negroes, Grace, of the value of one hundred dollars, and Chloe, of the value of three hundred dollars, and assess their value as above, with ten dollars damages, and costs of suit. We further find that defendant doth not detain negro Isaac, in said declaration mentioned.

THOMAS H. HAGNER,
Attorney for the Plaintiff.
B. C. POPE,
Attorney for Defendant.
ARTHUR ROSSITER,
Foreman.

(EXHIBIT A.)

Horry District.
STATE OF SOUTH CAROLINA,

To all people to whom these presents shall come, I, William Gore, of the State and District aforesaid, send *Greeting*:

Know ye, that I, the said William Gore, for and in consideration of the natural love and affection which I have and bear unto Anner Clardy, during her natural life, and to the heirs of her body, and for divers good causes me hereunto moving, have loaned unto her the said Anner Clardy, during her natural life and after her death, hath given to the heirs of her body which shall survive her, to be equally divided amongst them, the following negroes, with their future increase, viz: Charlotte, Silvey and Tenor; the said Anner Clardy to have and to hold and enjoy during her natural life, the said negroes Charlotte, Silvey and Tenor, and their future increase. and after her decease, to be then equally divided between her surviving heirs, as their exclusive property. I, the said William Gore, do by these presents bind myself, my heirs, executors and administrators, and family, to the intent the said Anner Clardy shall have a life time estate in the aforesaid negroes, and at her decease to be equally divided between her surviving heirs as aforesaid mentioned

372 One thousand eight hundred and twenty-seven, witness whereof I have hereunto set my hand and seal, this April 21st day, Anno Domini 1827.

(Signed,) WM. GORE.

Recorded, Nov. 1827.
Test: JOHN GORE,
REBKAH FRINK,
WILLIAM BESSERT.

(EXHIBIT B.)

In the name of God: Amen.

I, William Gore, Senior, of Horry District and State of South Carolina, being of sound and perfect mind and memory, blessed be God for it, do this 30 day of May, in the year of our Lord one thousand eight hundred and twenty-five, make and publish this my last will and testament, in manner as follows: I resign my body to the dust from whence it came, my soul to God who gave it me. First. I lend unto my beloved wife Mary, during her natural life, as much of the plantation where I now live, as much as Exectuors, hereafter to be named, shall think necessary for her support. Also as many of the negroes as they shall deem proper for her comfortable support. Also as much of my stock of cattle, sheep and hogs, household furniture, plantation tools and so forth, together with a good riding horse; all which shall be during my said wife Mary's natural life and no longer; then to be equally divided between my lawful heirs, share and share about.

Secondly. I give unto my son John Gore, one hundred acres of land that he has now in possession. Also two hundred and fifty acres lying on the Beaverdam swamp. Also three hundred and forty-two acres of the lower part of the Daniel Gore lands.

Third. I give and bequeath unto my son William Gore, the land that he has now in possession; also from Poplar Branch to Cyprus Branch, and up the said Cyprus Branch to the main road leading from Mourney's to George Reaves' ferry; also one hundred acres lying above said road, being all that tract.

Fourth. I lend unto my son Jonathan Isaac Gore, the balance of my plantation whereupon I now live, after my Executors has laid off my wife her part, and after her death, the said land which my said Executors has laid off for my said wife Mary. Said land shall begin on the lower line on Capt. Randall's corner, thence running up little river, such a distance and out to the back line as shall make 373
three hundred and eighty acres out of a tract of seven hundred acres which said tract of three hundred and eighty acres shall include my buildings and at least four acres around them; should the dividing line not allow it, said dividing line shall be as nearly paralled with the East line of the said tract as possible, and the balance of the said tract of seven hundred acres shall be to my daughter Mary Meike, as hereafter will be mentioned.

Fifth. I lend to my daughter Rebecca Frink, two hundred and fifty acres of land lying in the Seven Creeks, known by the name of the Rich Island; also three hundred acres taken off the upper part of the Daniel Gore tract of land lying on Gum Swamp in Columbus county, during her natural life, then after decease, I give and bequeath the said unto the heirs of her body to be equally divided betwixt them.

Sixth. I lend unto my daughter Mary Miek during her natural life three hundred and twenty acres of land whereon she now lives, being the balance of the trust that I gave to my son Jonathan Isaac Gore, and provided that his part does not include the buildings, he shall extend to take them, and she shall be allowed as many acres out of his part immediately below it; also two hundred more out of a tract lying on Cedar Creek, the balance of the tract which is fifty two acres, to Jonathan Isaac Gore, and shall be taken off adjoining the hundred acres that he now lives upon, one hundred acres more to Jonathan I. Gore, lying on Cedar creek whereon he now lives, and if there are any of my Bigelow land left unsold at my decease to be equally divided between Mary Miek and J. I. Gore.

Seventh. I lend unto my daughter Kitey Thomas during her natural life, five hundred acres of land whereon she now lives, including Mullet creek land bought from Maj. Day. Also two hundred acres of my Bigelow land where she formerly lived, and after her death the land shall be equally divided between her heirs, share and share about.

Eighth. I lend unto my daughter Anner Clardy, during her natural life, a tract of land in her possession, containing one hundred and fifty acres, more or less; also one other tract of five hundred acres lying in Waccammay, where she now lives, and after her decease to return to the heirs of her body, share and share about.

Ninth. It is hereby declared to be my will, that at my decease my Executors hereafter to be named, shall divide all the remainder and residue of my negroes, stock of all kinds, household furniture, 374
plantation tools, ready money, debts that are due me, and all other any personal property not already divided, betwixt my said sons and daughters having an equal share, only my son Jonathan I. Gore, and my daughters Rebekah Frink, Mary Meik and Kitey Thomas and Anner Clardy are only lent during their natural lives, and then to return in manner above mentioned. Also what negroes, stock and property my wife Mary may have at her decease, shall also be equally divided between my sons and daughters in manner and form before directed.

Tenth. Also, if my lands lying in Columbia should be unsold at my decease, for to be equally divided between my sons John Gore and William Gore.

Eleventh. If there should be any debts due at my decease, each one of my heirs shall pay an equal share.

Twelfth. I also ordain my sons, John Gore and William Gore, executors to my last will and testament. I also appoint them as trustees for the heirs of Jonathan Isaac Gore and Rebekah Frink and Mary Meik and Kitey Thomas and Anner Clardy, to procure the property by me given, that they are not defrauded out of their right.

In witness whereof I have hereunto set my hand and seal, the day and date above mentioned.

(Signed,) WM. GORE, [SEAL.]

Signed, sealed in the presence of us,
WILLIAM VAUGHT,
THOMAS BRANTLEY, JR.,
JOSEPH VAUGHT.

On the first June, 1846, the court below (Judge Macrae presiding,) gave judgment for the defendant, on the points of law arising upon the special verdict.

The plaintiff filed his exceptions to the opinions of the court, and now prosecutes his writ of error in this court, upon the following errors assigned:

1. The court erred in giving judgment for the defendant in the court below.

2. The judgment of the court should have been for the plaintiff upon the special verdict in this case.

Randall & Hagner, for Plaintiff:

The question now submitted by the special verdict and presented to this court are:

1st. Whether the terms of said deed and will (either or both of them) legally import and convey to Anna Clardy, such an absolute interest and estate as, by reason of her intermarriage with Thomas T. Clardy, vested the same in him as absolute owner? Or,

2d. Whether the estate vested in said Anna Clardy and her husband, being only a life interest, the residue of the interest and estate, after her death, vested in her children, the heirs of her body, who survive her, as purchasers, or remainder-men, or otherwise?

It is our duty to maintain and prove the affirmative of the first proposition and the negative (of course) of the second.

And first, to examine the will, which is prior in point of date.

The verdict refers to the 8th and 9th clauses as determining the estate which is to pass to Anna Cleardy.

Both parties will probably invoke other clauses of the will as influencing the decision to be made.

On the whole will, then, we contend:

1st. *That the terms used in the 8th clause, respecting the realty would have vested in her and did vest in her. at common law, an estate-tail general.*

We here premise that this proposition is laid down and to be discussed and proved, as furnishing the true test and indeed the only rule for ascertaining the nature and extent of the estate in the personalty, bequeathed to Anna Clardy under the 9th clause taken in connection with the 8th clause. As regards the realty, it is in conformity with the rule in Shelly's case—now and at all times an authoritative rule in England and America. See 4th Kent's Com., 221.

That rule is stated to be "that when the ancestor, by any gift or conveyance, taketh an estate of free-hold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, *the heirs* are words of limitation of the estate and not words of purchase." 4 Kent, 206. Hays on the disposition of real estate, p. 17, 46.

For the general rule we shall cite no other authorities directly,
376 but the court will find it confirmed and reiterated in citations made for other doctrine to be advanced.

The will in question contains precisely such a bequest or demise in its general terms, and we will now examine if any other supplementary terms in the will vary, restrict or control such limitation.

It may be contended that the words "lend and loan" used in reference to Anna Clardy's estate for life, vary and restrict the interest given to her, and, as containing evidence of a *"secondary"* intention variant from the general intention, overrule the latter. This we deny.

1st. Because it is one of those "petty distinctions" which in the language of Lords Eldon and Redesdale, in Jessen *vs.* Wright, 2 Bligh. 1, (quoted from 2 Jarman on Willis, p. 286,) should not overrule the paramount intention of the testator, as evinced by the use of the technical terms "heirs of the body."

2d. The terms are not technical nor appropriate, and being used in connection with other terms of clear, unequivocal legal import, shall not be allowed to qualify the meaning.

The most that these words could import would be, that the property was not specifically given, but only "its use" for life.

Conceding this effect, then we contend that such a bequest of the use or profits or interest of chattels, conveys the right to the chattels specifically and absolutely. Robinson *vs.* Fitzherbert, 2 Brown's C. C., 127. Butterfield *vs.* Butterfield, 1 Ves. Sen., 133. Bradley *vs.* Perixot, 3 Ves., 324. Keys *vs.* Goldsbro', 2 Har. & J., 369.

Another clause may be invoked by the other side to effect such variance or qualification in the terms "return to the heirs of her body share and share about." These words import a different order of distribution from that the law of descent would cast in England by the common law, and *there* the argument might have plausibility at least.

Here they can have no effect, where the law of descent or distribution and that wrought by the will are the same. That they produce no such effect in England, the following authorities will show. Pearson *vs.* Vickers, 5 East., 548. Doe *vs.* Smith, 7 T. R., 531. Doe, &c., *vs.* Cooper, 1 East., 229. Robinson *vs.* Robinson, 1 Bur., 15. 2 Jarman on Wills, 277, 280, 287.

But the 12th and last clause may be replied upon, to fix the construction of a life estate in Anna Clardy, by operating of the "trust" 377
assigned to be raised in the Executors, as Trustees, "to procure," such remainder to the "heirs."

To this we answer, 1st. That the raising of a trust (if such arise from the terms of the 12th clause, which we deny.) would produce not the asserted effect. Wright *vs.* Pearson, Amb., 358. Doe ex dem Thong vs. Bedford, 4 Maul. & Sel, 362. 8 T. R. 516-18. 1 Bro. C. C. 313.

2d. But in fact and law, this will raises no proper trust, technically so called.

No estate, vests in the trustees. No interest or property in the subject vests in them.

The estate, title and property in the slaves and lands had previously passed to the legatees in possession and expectancy.

There is certainly *no express* conveyance of title to the trustees, nor can one arise by implication, as here no power is conveyed "to sell," "to charge," "to settle," or to do any act from which such investure of estate or interest can arise to them. The case in the books nearest to the present, that I can find, is that of Pigot *vs.* Garnish, Croke, Eliz., 678.

This is, however, a leading case, as appears by reference to Fletcher on trustees, p. 12.

The authority there conferred was similiar to the present, and ruled to be a mere "naked power."

The above remarks apply particularly to the will.

The terms of the deed are not materially variant in their limitation, and should be taken even more strongly against the grantor than the testator, for an obvious reason.

Wills are construed to favor the intention of testator, while grants in deeds are always taken most strongly against the grantor. This is too plain a principle of law to need citation of authorities.

But we need not invoke this principle of construction. The only new clause appearing in the deed different from that in the will, is that the limitation is to the "surviving" heirs of the body of Anna Clardy. The cases I shall cite to prove the unimportance of this term is Richards *vs.* Lady Bergavinney, 2 Vernon, 324, where the terms used were—"and to such heirs of A's body as shall be living at her death"—terms fully equivalent to surviving heirs. *In this case A. was ruled to have an estate tail.* Sharp *vs.* Thompson, 1 Whart., 139. Kiffner *vs.* Knapper, 6 Watts, 18; Tidball *vs.* Lupton, 378
1 Rand., 194. Botts *vs.* Gillespie, 5 Rand., 273.

No trust is set up in this deed, and this point, therefore, does not arise.

II. The second general proposition. That the same terms of limitation being used in the 9th clause, connected with the 8th clause in regard to the slaves, the property in dispute, as were used in relation to the realty in the 8th clause, would have created in said slaves, also at law, an estate tail, if such limitation were allowed.—This so naturally results as a corollary from the first proposition and the facts above stated, that no distinct argument will be required to support it. It is also connected with and involved in the third general proposition, which I propound as follows:

III. The third general proposition: That terms of bequest of chattels real, or of other personalty, which in relation to devises of estates of inheritance would give either an express or implied estate-tail in the first legatee, give the absolute interst or property therein to such first legatee or taker. 4 Kent's Commen., p. 277

The reason given in Kent, and in all the authorities, is that such attempted limitation is personalty as an estate tail, is too remote and tends to produce a pepetuity.

As a rule of English Law the following cases establish it: Attorney Gen. *vs.* Bailey, 2 Brown C. C., 553; Robinson *vs.* Fitzherbert, Ibid, 127, Lord Kenyon's opinion; Lord Chatham *vs.* Tothill, 6 Bro., P. C., 450, this case is stated and commented on in 11 Wend., 259; Britton *vs.* Twinning, 3 Meriv., 176; Butterfield *vs.* Butterfield, 1 Ves. Sen., 133; Bradley *vs.* Perixot, 3 Ves., 324; Ross *vs.* Ross. 1 Jac. & Walk., 154. *American Authorities*—Dott and others *vs.* Cunnington, 1 Bay, 453; Stockton *vs.* Martin, 2 Bay, 471.—See also, 1 Hayward, 247, 163; 2 Ib., 130, 154; 2 Dess., 94; 4 Dess., 17; 1 Nott & McCord, 69; 7 Yerger, 519; 12 Wheaton, 568. A leading case and authority is 11 Wend., 259, app. 671, Patterson *vs.* Ellis. Lastly, case of McCardle *vs.* Beatty, Ct. of App. Fla.

IV. The fourth general proposition: The charge in gross raised in the 11th clause of the will, *"per se,"* and in the absence even of other suitable limitations would raise and confer an estate of inheritance in Anna Clardy. Bacon's Ab. Tit. Legacies, Let. C. 3; Denn ex dem Slater *vs.* Slater, 5 T. R., 335. Jackson dem. Deck-

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379 er, vs. Morrell, 6 T. R., 185, (Dig. N. Y., Rep., 4 Vol., p. 1264, art. 188;) Speaker *vs.* Van Alstyne, 18 Wen., 200, (referred to in 4 Dig. N. Y., Rep. p. 1258, art. 131-2.)

Cormack, for Defendant.

Long & Walker, on same side.

However edifying it may be to the "judicial scholar on whom his great master Coke has bestowed some portion of the gladsome light of jurisprudence," to trace out and dwell upon the intricate history of "*the rule in Shelley's case,*" we are content to enter upon the discussion of the construction of this will and deed according to the simple rules of law as at present understood to exist.—The brief and elegant review of the various decisions of the British and American Courts on this subject from the Year Books down to 1830, to be found in the 4th volume of Chancellor Kent's Commentaries (214 to 233) is quite sufficient to show what is now the law on this subject. "All the modern cases contain one uniform language, and declare that the words *heirs of the body,* whether in deeds or wills, are construed as words of limitation, unless it clearly and unequivocally appears that they were used to designate certain individuals answering the description of heirs at the death of the party," is the remark of Kent in concluding his review of the English cases. It devolves upon us to satisfy the court that in this case it "clearly and unequivocally appears" that those words are not used in their technical sense; for says Chan. Kent, (Com. 220) "there are several cases in which in a devise, the words *heirs or heirs of his body,* have been taken to be words of purchase and not of limitation in opposition to the rule in Shelley's case," and then enumerates the several classes of these cases: 1. "Where no estate of freehold is devised to the ancestor." 2. "Where the testator annexes words of explanation to the words heirs, as to the heirs of A. *now living,* showing thereby that he meant by the word heirs, a mere *descriptio personarum,* or specific designation of certain individuals." 3. "Where the testator superadds words of explanation, or fresh words of limitation, and a new inheritance is grafted upon the heirs to whom he gives the estate."

In order to determine whether the case at bar comes within either of these exceptions to the rule in Shelley's case, we will exam-
380 ine the two instruments under which we claim title to the negroes in controversy, as remaindermen, after the termination of the life estate of Anner Clardy. And first, as to the deed: We contend that the words *"heirs of her body"* mean children, and not general heirs, because the other accompanying expressions clearly afford that explanation. First: The property is declared only to be *loaned* to Anner Clardy, and given to the children. Second: Because the loan is expressly declared to be *for life* only, and this thrice expressed. Third: Because the remainder is limited to such heirs of her body "as shall survive her," which would be nonsense if applied to heirs generally, but consistent if *children* are meant.—Fourth: Because the property so given to the surviving heirs of her body is "to be equally divided between them, share and share about," which is a provision that might be inevitably defeated if heirs generally are intended.

Now we contend that these explanatory expressions bring this case within the second rule of exception above quoted from Kent, viz: "Where a testator (or in a deed the donor) annexes words of explanation to the word heirs, as to the heirs of A. *now living,* showing that he meant by the word heirs, a mere *descriptio personarum,* or specific designation of certain individuals." In this deed, instead of the explanatory words, "the heirs of A. *now living,*" we have the expression, "the heirs of her body which shall *survive her,*" which equally constitute a "mere *descriptio pensonarum,* or specific designation of particular individuals." The case given by Kent to illustrate the rule of exception is exactly in point with the case afforded by these instruments. Indeed it is too obvious to require argument that the rule of exception laid down by Kent is as clearly illustrated by this case as the one which he puts. In both, the word *heirs* is used—in the one the heirs of A. *now* living, and in the other the heirs of Anner Clardy living at her death. There is exactly the same reason for regarding the one as meaning children, and not heirs generally, as the other, viz: because it excludes the idea of any other.

To show that the case at bar comes properly within some one or other of the exceptions before mentioned, we will cite such American decisions as we have been able to find on this subject. Judge Carmack having already dwelt sufficiently upon the English cases, we shall make no reference to them.

Learned counsel upon the other side laid great stress upon the case 38
of Keating and Wife vs. Reynolds, reported in 1st Bay, 80, because "it is a case decided in South Carolina where this deed was made." We also invoke the particular attention of the court to that case, not only "because it was decided in South Carolina, where the deed was made," but also because it is a case directly in point to sustain our position. It appears in that case that Samuel Thorpe had two daughters, Martha and Sarah. He gave fourteen negroes "to her, the said Martha Thorpe, *and the heirs of her body forever.*" He gave fourteen other negroes "to the said Sarah Thorpe, *and the heirs of her body forever*" "But if the said Sarah and Martha Thorpe should die without having a lawful heir of their *body to live,* then and in that case he gave and devised those slaves above mentioned to be equally divided to the survivors." Martha died without issue living at her death, and her husband, Norris, sold some of her fourteen negroes to the defendant, Reynolds. Suit was brought by Sarah and her husbad, Keating, to recover said slaves from Reynolds, and the Supreme Court of South Carolina decided that Sarah and her husband should recover, because, in the language of Judge Waites, *"the heirs of her body to live* mean *children,* if they mean anything." So we think in the case at bar that the words "heirs of her body which shall survive her," "mean *children,* if they mean anything."

The decision in 1st Bay, 80, is not at all shaken by the decision in 2d Bay, 471, for "in the *habendum* of this deed (in 2d Bay, 471) the negroes were given to Miss Havens for life, and then *to the heirs of her body,* and in the warranty of this deed, he warrants the negroes to his daughter for life, and *then to the heirs of her body.*"—"The majority of the Judges were of opinion that as the *habendum* of a deed is that part of it which declares and limits the use of the thing conveyed, and as the negroes in question are limited in the *habendum* to the heirs of the body of Mrs. Stockton after her death, it created an estate tail of a chattel which was too remote, and vested the property in the first taker," &c.

In no part either of the deed or will, in the case at bar, are the words *heirs of her body* ever used except with accompanying words of explanation. And this circumstance strikingly distinguishes this case of Stockton *vs.* Martin (2 Bay 471) from the case at bar, and shows its total inapplicability. But it may be remarked that the decision in Stockton *vs.* Martin is erroneous in determining that the 38
habendum of a deed shall govern the *premises* in such a case. This particular question was ably discussed in the case of Rogers *vs.* Rogers, 3 Wend., 503—which case was briefly as follows:—A devise in these words, "I give, devise and bequeath to my son Thomas Rogers, Jr., for and during his natural life, and the *children* of his body lawfully begotten, after his decease, all that certain, &c., (describing the premises,) to have and to hold the last mentioned premises unto my said son Thomas Rogers, Jr., for and during his natural life, and after his decease to the *heirs* of his body lawfully begotten, and to their heirs and assigns forever." Held to convey to Thomas Rogers, Jr., a life estate only, remainder in fee (the statute turning estates tail into fee) to his children. In this case the *habendum to the heirs* (which would have brought the case within the rule in Shelley's case, and conferred the whole estate upon Thomas Rogers, Jr.,) was construed not to control the premises which devised to the children; and this for two reasons: first, because the *intention* of the testator is clearly that way, and intention must govern where *technical* words are not *uniformly* used; and second, because even in a deed the *habendum* must give way to the premises. Plowden, 153; 4 Cruise 229; 4 Cruise, title *deed,* chapter 20, sec. 77; 2 Cokes Rep. (Buckler's case) 55 a; 4 Cruse, 226.

From these authorities, therefore, it appears very clearly that the case of Stockton *vs.* Martain would have been a case directly in our favor had the point upon which it turned been correctly decided.—And this is also a perfect answer to any objection which has been or may be made, that, in the deed under consideration, the premises are to the heirs of the body surviving, &c., *habendum* to the heias generally; for, if the superadded words are sufficient to show that the words used in the premises mean children, no words in the *habendum* can control that inference.

The doctrine of the foregoing cases is also very distinctly stated in Bacon's Abridgement, Vol. 6, p. 198, where it is said, "testator bequeathed to his wife 'a negro girl named Hannah and my horses, &c., and my plantation and all the lands adjoining to it, during her life time,' held to pass but a life estate in the negro girl,"—citing Black *vs.* Ray, 1 Rev. and Bat., 334.

Also, "a bequest of a slave for life with remainder to the lawful heirs of B., who it appears from the will was alive, is a bequest to

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383 the children of B. and is to be divided among those who shall be *in esse* at the death of the first taker, and is not confined to those born at the death of the testator," citing Simms *vs.* Garrott, 1 Dev. and Bat. Eq., 393.

The leading case in Pennsylvania on this subject is that of the Lessee of Findlay *vs.* Riddle, 3 Binney, 139. In that case the facts were these, viz: John Findlay, the elder, gave a certain tract of land to his son, John Findlay, during his natural life, and after his decease, if he should die leaving lawful issue, TO HIS HEIRS, as tenants in common, and their respective *heirs* and assigns forever. But in case John should die without having lawful issue, then he gave said land to his brother James Findlay, and his *heirs* and assigns forever. After very long and able arguments on both sides, in which all the cases on this subject were cited and commented on, the Supreme Court decided that John Findlay *took only a life estate,* and Mr. Justice Yates, in concluding the opinion of the court, said, "I, therefore, feel myself authorized to construe the word *heirs,* in the first part of the devise, as *children* or *sons and daughters,* and as a mere *designatio personarum.*" See this remark of J. Yates, p. 161.

The same doctrine has been established in Virginia. In the case of Warners *vs.* Mason & wife, 5 Mun., 242, William Warner devised to his son, William, a tract of land "during his natural life, and then to his heirs, lawfully begotten of his body, that is, born at the time of his death, or nine calendar months thereafter," and for want of such heirs, remainder over to his two grandsons, Jacob and George. William Warner, the first taker, dying without heirs, devised the same land to his sister, Mrs. Mason, who took possession thereof. The grandsons, Jacob and George, brought ejectment for the land, and the Supreme Court decided that the words 'heirs of the body lawfully to be begotten, that is born at the time of his death,' &c., were words of purchase and not of limitation. Consequently, it was held that William, the first taker, took only a life estate, and that Jacob and George, the grandsons, took by way of contingent, remainder, William having died without children.

In the case of Higginbotham *vs.* Rucker, 2 Call, 265, it was decided thus: "A man makes a gift of slaves to his daughter and the *heirs of her body,* and in case she died without issue, that is, children of her body, the slaves to return to the grantor. This limitation is not too remote and, therefore, is good."

384 In the case of Dunn and Wife *vs.* Bray, 1 Call's Reps., 294, the words of the devise are: "I give and bequeath unto my son Winter Bray, one negro boy named Peter, and a negro wench named Dinah, and her increase, to him and his heirs forever; but in case my said son Winter should *die and leave no issue,* THEN I give all the said negroes hereinbefore devised to my said son Winter, to my son Charles and his heirs forever." Held, "that in the present devise the remainder over to Charles (which was clearly intended to take effect upon the death of Winter, without leaving issue living at the time of his death, and not upon a general failure of issue,) is good as an executory devise within the rule" of exception to the rule in Shelley's case. Here the *intention* is made to supply the words, "living at the time of his death," which are not in the will. In the case at bar similar words are inserted, viz: "which shall survive her."

Where the testator bequeathed the improvement of certain personal property to his daughter during her natural life and at her decease to be equally divided among her heirs, it was ruled that by the word *heirs* was intended *children,* and that the legatee took an interest for life in the property with remainder to her children. Ellis *vs.* the Props. Es. M. Bridge, 2 Pick., 243.

2d. But there is another rule laid down by Kent, 4th Vol., 222 for the purpose of determining when the words *heirs of the body,* &c., shall be construed as words of limitation and when of purchase. He expresses it thus:

"If the term heir, as used in the instrument, comprehended the whole class of heirs, and they become entitled, on the death of the ancestor, to the estate, *in the same manner,* and to the same extent and with the same descendible qualities as if the grant or devise had been simply to A. and his heirs, then the word heirs is a word of limitation, and the intention will not control the legal effect of the word."

We shall attempt to show that this property would not, under this grant and will "descend *in the same manner* as if the grant had been simply to A. and her heirs." If this property had been granted or devised simply to A. *and her heirs,* how would it have descended in the event that A. died leaving two children and twelve grandchildren by one of her deceased children? I answer, it would have descended so that the property would have been equally divided into three parts, of which A.'s two children would have taken two parts, 385 and her twelve grandchildren the other part—the grandchildren taking *per stirpes.* But does the property descend "in the same manner" under the provisions of this deed and devise, supposing the words heirs to have its legal meaning? Certainly not; for it is given "to the heirs of her body which shall survive her, *to be equally divided amongst them;*" now a grandchild comes within the technical meaning of the word *heirs,* in this deed and devise, its technical meaning and carrying into effect the provisions of the devise in the case supposed, we would have to divide this property, not into three, but into fourteen parts, of which each of the heirs, children and grandchildren, would take one part. The grandchildren in this case would take *per capita* and not *per stirpes,* so that it is very clear that the *heirs of* A. would not "become entitled to the estate of their ancestor *in the same manner, and to the same extent, and with the same descendible qualities* as if the grant or devise had been simply to A. and her heirs." Therefore, if Kent be correct, the word *heirs* in this deed and devise *must* be construed not as a word of limitation, but a word of purchase. See 3 Binney, 158, 166.

As to the will in this case, the view here taken is equally applicable as to the deed. The property is loaned to Anner Clardy for life, and "after her decease to return to the heirs of her body, share and share about;" so that the will falls literally within the two rules of exception shewn to control and explain the deed.

We, therefore, conclude that this case is clearly embraced in two of the rules which exempt wills and deeds from the operation of the rule in Shelly's case. The reported cases cited are offered rather to prove the application of these rules to the case at bar, than to prove the existence of those rules, which we contend they do abundantly. These authorities, we think, should be regarded as of more weight than those from England. They are regarded as leading cases, and are from the States of South Carolina, North Carolina, Virginia, Pennsylvania and New York.

It is obvious from the face of these instruments that if the children of Anner Clardy are deprived of this property, it will be in spite of the "clear and unequivocal" intention to the contrary of their grandfather, William Gore.

BALTZELL, J., delivered the following opinion: 386

The will and deed under which both parties claim in this case having been made in the State of South Carolina where the testator and grantor lived and where the property at the time was, the laws of that state as administerded by her judicial tribunals must form the rule of its decision. Story's Conflict, 402, 409; 4 Wilson and Shaw, 28, 37.

Referring to them we find that as early as the year 1795 a devise "of negroes to a daughter distinct from her husband during her life and at her death to the heirs of her body," was held to create an estate tail, the words were considered words of limitation and not ged to create an estate tail so as to vest an absolute interest in the daughter. Dott *vs.* Cunn., 1 Bay, 453. In 1833 the terms "I *lend* to my daughter Peggy Starke four negroes, and to another daughter other negroes *during their natural lives, and then to the heirs of their bodies,*" with an appointment of executors of the will "in trust for the intents and purposes therein contained," were likewise adjudged to create an estate tall so as to vest an absolute interest in the daughter, and that the marital rights of the husband attached giving to his administrator the right of the property after his death,—

Judge O'Neill who delivered the opinion of the court saying "I have struggled to give effect to what I believe the clear intention of the testator that Mrs. Starke should take an estate for life and her children at her death should take as purchasers. But the technical rule is too strong and too well settled that words heirs of the body must be considered words of limitation and not words of purchase and that consequently the estate vests in the first taker." Hinson and Wife *vs.* Picket, 1 Hill, 37. This case is decisive of all the points in the present controversy, the terms *"heirs of the body," "lend,"* and the trust in the will, or tantamount expressions thereto having been all very fully considered. The only difference is in the expressions "share and share about," to be found in the will before this Court, and "hath given to the heirs of her body which shall survive her," and to "be equally divided between her surviving heirs as their exclusive property," in the deed. We have not been able to find a direct adjudication in South Carolina upon these; the nearest approach to it being the case of Stockton *vs.* Martin in which the deed was "to the *daughter during her life and then* to her chil-

Joseph B. Watts, Administrator of Thomas T. Clardy, vs. James Clardy.

387 dren *share and share* alike, habendum to the daughter for life and the heirs of her body with a warranty to the like effect. The majority of the court held the habendum the controlling part of the deed and adjudged an estate tail so as to give the property to the first taker. 2d Bay, 471.

This case might be regarded as decisive so far as the words "share and share about" are concerned, as they formed a component part of the deed, and if not noticed by the court as material this of itself would be indicative of their opinion as to their immateriality. There is weight too in the fact that no case of recent date has been cited to us of the same court overruling or calling in question its authority, and none coming within our reach we have been strongly inclined to the opinion that it should be held as conclusive. We have not thought proper in a case like the present where a question is raised as to the law of a sister state to inquire into the grounds or reason for a decision made or given by her Courts and to say what they ought to have decided. This would be transcending our powers and assuming an office for which we are by no means disposed to assert our competency—it would be treating a court long distinguished for intelligence and ability with less than the regard justly its due either by courtesy or the rules of law. Our duty is to ascertain the law of that state, by no means to say what it ought to be. The decisions on this subject will, we think, be found in harmony with the English law which they profess to follow as will be seen in numerous cases to which a reference may be given, so that we have less reluctance to give to them all the weight of a decisive authority on the very point in question.

"The terms share and share alike create a tenancy in common." Bunch *vs.* Hurst, 3 Des., 288; Woodgate *vs.* Unwin, 4 Sim., 129; Westcott *vs.* Cady, 5 John. Ch., 334.

In the case of Doe and Candler *vs.* Smith "where a testator devised freehold lands to his daughter and the heirs of her body forever as tenants in common and not as joint tenants and in case of her dying without issue then over, it was held that the daughter took an estate tail." 7 D. & E., 532. So in Pierson *vs.* Vickers, 5 East., 548; Bennett *vs.* Earl Tankville, 19 Vesey, 170; Cole *vs.* Goldsmith, 7 Taunt, 209.

In Jenson *vs.* Wright decided in the House of Lords after full argument (and Lord Eldon said no case was ever better argued at
388 that bar,) the devise was to W. and after his decease to the heirs of the body of W. in such shares as he should appoint and for want of this then to the heirs of the body of W. *share and share alike as tenants* in common and if but one child the whole to such child, &c., it was held that W. took an estate tail." 2 Bligh., 1.

So in the recent case of Bosnal *vs.* Harvey with like provisions. In Atkinson *vs.* Featherstone, "the devise was to I. and E. his wife for their natural lives, and for the life of the longer liver of them and after the decease of the survivor to the heirs of the body of E. by I. already begotten or to be begotten, to be *equally divided among them, share and share alike,*" it was held an estate tail. 1 Barn. and Ad., 944.

Survivorship is by no means an uncommon form of an estate tail —thus a grant to A. and B. and the survivor and the heirs of such survivor, is of frequent occurrence. "The doctrine of survivorship is the distinguishing incident of title by joint tenancy, and therefore at common law the entire tenancy or estate, upon the death of any of the joint tenants went to the survivors, and so on to the last survivor who took an estate of inheritance." "The common law favored title by joint tenancy by reason of this very right of survivorship." 4 Kent, 360.

We do not intend to convey the idea that in respect to the estate tail, there a uniform entire joint tenancy. On the contrary, it forms an exception to the rule "for inasmuch as the devisees with some exceptions cannot either in fact or contemplation of law have common heirs of their bodies, they are by necessity of reason tenants in common of the estate tail." Co. Litt., 184 a; 2 Vern, 545; Cooper, 777.

"As the reason, however, applies only to the inheritance in tail, and not, to the immediate freehold, the devisees are joint tenants for life with several inheritances in tail, so that on the death of one of them, whether he leave issue or not, the surviving devisee becomes entitld for life of his share under the joint tenancy and the inheritance in tail descends to the issue if any subject to such estate for life." Jarman on Wills, 158.

Nor is restriction to particular heirs destructive to the estate tail —thus to the heirs male or female—to the first or next heir male. 8 Viner, 234. Such an estate (estate tail) may be created "by an expression denoting an intention to give the devisee an estate of inheritance descendible to his or *some* of his *lineal*, but not to his collateral heirs which is the characteristic of an estate tail as distin- 38
guished from a fee simple. 2 Jarman on Wills, 232.

The term "surviving heirs' is one of unusual occurrence in the books, for whilst we have "survivors," "surviving children" "sons" "issue" and "daughters," there is in the books no such word attached to heirs as far as we have been able to discover, and we are inclined to the opinion that so connected, it is without meaning, neither enlarging nor contracting the estate. The heirs of Mrs. Clardy from necessity are those who survive her at her death—they could not have preceded her. *Nemo est haeries viventis.* There is no heir until the death of the ancestor. The fair import of the clause then would seem to be that the estate is to go to the heirs of her body at her decease. If this view be correct the case is freed from difficulty, and the deed is a naked grant to the heirs of the body.

It may however be more satisfactory supposing that we are mistaken in this respect, to consider how far words superadded to the term heirs of the body, change the character of the devise and whether by possibility this word "surviving" may produce this effect. It seems that "if the superadded words of limitation operate to change the course of descent, they will convert the words on which they are grafted into words of purchase." Jarman, 276.

It is not to be inferred that the words heirs of the body, are incapable of control or explanation by the effect of superadded expressions, clearly demonstrating that the testator used these words in some other than their ordinary acceptation, and as descriptive of another class of objects. Some of the examples given of words producing this change are of a devise to a first, second, third and every other *son* of B. and the heirs of the body of such, first, second, &c., son.

Love *vs.* Daviers, 2 Ld. Ray., 1561. To the first son of the body of E. and the heirs male of the body of such first son, and for default of such issue, to the use of the second son of the body of E., and so to all and every other, the heirs male of the body of E., and to the heirs male of their body according to seniority of age.

Lisle *vs.* Gray, 2 Lev., 263. These cases it is said leave no doubt of the design of the testator and we conceive do not. 2 Jarman, 302.

The cases bearing the nearest analogy to the present are to this effect. A person devised to his three daughters to be equally divided, and if any of them died before the other then the one to be the other's heir equally to be divided, and if his three daughters died 39
without issue then over, adjudged that his daughters took an estate tail. King *vs.* Rumbal, Cro. Ja., 448.

In Richards *vs.* Lady Bergaviney, the devise was to the Lady Bergaviney, and such heir of her body as shall be living at her death with remainder over, and it was adjudged an estate tail. 2 Vernon, 324.

A devise to W. for life, and after his decease to the use of the heirs, male, of the body of W., lawfully begotten, severally, respectively, and in remainder the one after the other, as they and every of them shall be in seniority of age, and priority of birth, gave W. an estate tail. Lord Thurlow said where the estate is so given that it is to go to *every person who can claim as heir to the first taker, the word heirs must be a word of limitation.* All heirs *taking as heirs* must take by descent. Jones *vs.* Morgan, 1 B. C. C., 206.

Now it is not perceived that the word "surviving" clearly demonstrates that the testator used it and the word *heirs of the body* in some other than the ordinary acceptation of the latter expression, and as descriptive of another class of objects. It is clear that it is not embraced within any of the cases which have been held to alter the rule. Obviously those who take as surviving heirs claim as heirs to the mother at her death, and taking as heirs they take by descent. According to our view the property would descend to the whole class of heirs of Mrs. Clardy, and they would become entitled to the estate in same manner, and to the same extent, and with the same descendible qualities as if the grant had been simply to her and her heirs. 4 Kent, 222.

It is scarcely necessary to quote authority to the effect that where personal estate is bequeathed in language which, if applied to real estate, would create an estate tail, it vests absolutely in the person who would be the immediate donee in tail, and it is immaterial whether the bequest itself contain the words of limitation or refer to a devise of realty creating an estate tail. 2 Jarman on Wills, 492; 1 Beav., 150.

We have been asked to consider this question as a new one, and and as if the cases of Doe & Laning, Doe & Goff, and a few others asserting a doctrine contrary to those cited to sustain the rule in Shelley's case still continued to be authority in the English Courts. It has been insisted that these cases have not been overruled, and are quite reconcilable with the latter authorities; but we think dif-

ferently. That great jurist the late Chancelllor Kent, than whom no one could speak with greater truth and propriety on this subject says: "The rule in Shelley's case survived all the rude assaults which it received in the controversy under Perrin & Blake, and it has continued down to the present time in full vigor with commanding authority, and with its roots struck immovably deep in the foundations of the English law. All the modern cases contain one uniform language, and declare that the words heirs of the body, whether in deeds or wills, are construed as words of limitation, unless it clearly and unequivocally appears that they were used to designate certain individuals answering the description of heirs at the death of the party."

An English author of whose recent production the present Chief Baron of the Exchequer has spoken "as a very learned work," after noticing the case of Perrin and Blake, says: "since this solemn determination the rule in question, has been regarded as one of the most firmly established rules of property, and strictly speaking no instance can be adduced of a departure from it." 2 Jarm., 243; 14 M. & W., 706.

The same author says, after speaking of the various cases opposed to Doe *vs.* Laming, "we may then reasonably hope never to hear the case of Doe *vs.* Laming again cited as an authority in a court of law." 2 Jarm., 288.

In Jessen *vs.* Wright, Lord Redesdale said: "It is impossible to decide this case without holding that Doe *vs.* Goff is not law." 2 Jarm., 292.

It is said: "if the children of Anner Clardy are deprived of this property it will be in spite of the clear and unequivocal intention to the contrary of their grandfather, William Gore." To language of this kind we would oppose the forcible remarks of the Supreme Court of South Carolina in the case of Carr *vs.* Porter, with this additional observation, that after an acquiescence by the people of that State for upwards of fifty years in a law as announced by her courts, it is rather too late to call in question its propriety. The reply to such remark is best made in the language of the court responsible for the result to which we have arrived. They condemn with great force and propriety the idea of a Judge making a decision according to his own views of the intention of a testator.—"Wherever a construction has been given by a competent tribunal to any form of words, such decision has always been held obligatory on all succeeding Judges in cases of wills as in any other cases. Fearne speaking of the notion that we must lay aside all precedent in the construction of wills, and that a Judge must be governed by his own views, says, 'such a mode of construing wills, if ever fully established, would open an almost unlimited power to the Judge of disposing of the property of testators, and diverting the circulation of it to his own mind.' If rules and maxims of law were to ebb and flow with the taste of the judge, or to assume that shape which in his fancy best becomes the times, &c., I should be glad to know what person would venture to purchase an estate without first having the judgment of a Court of justice respecting the identical title which he means to purchase." 1 McCord, 71.

After the most mature consideration we are of opinion that the court below erred in giving judgment for the defendant. It should, in our opinion have been for plaintiff on the special verdict.

BAILEY *vs.* CLARDY.

BALTZELL, Justice:

This case is in effect decided by the opinion just delivered in the case of Watts, administrator, &c., *vs.* Clardy, and for the reasons given therein must be reversed, with directions to the Circuit Court to dismiss the bill, and dissolve the injunction of complainant.

JOHN W. SIMONTON, *vs.* PEDRO A. GANDOLFO.

Where the mortgage of real estate covered by a mortgage conveys to a purchaser, and the purchaser to complete his title procures the mortgagee to release to mortgagor, and promises in consideration of such release to pay a given sum to the mortgagee, Held:

That such promise need not be in writing.

Appeal from Monroe Circuit Court.

The plaintiff brought assumpsit against defendant, and in his declaration sets forth substantially, that on the 15th of January, 1847,

one Fielding A. Brown was possessed of certain lots in Key West by deed from one John Barcroft, trustee of the plaintiff, and that Barcroft as trustee held a lien on the same by mortgage executed by Brown for the purchase money. That Brown conveyed parts of two of said lots (4 and 5 in Whitehead's plan of said city) to defendant. That defendant agreed with plaintiff to pay him six hundred dollars upon the execution by plaintiff of a release to said Brown and his assigns of all claims or demands which said Barcroft, trustee as aforesaid, had "against said Brown as mortgagor as aforesaid for and on account of the said mortgage," and that the plaintiff on the 16th of April, 1847, executed the release.

The defendant demurred to the declaration on the ground that the assumpsit should have been in *writing*, and also so alleged in the declaration.

The demurrer was sustained in the court below and judgment entered on 22d November, 1847, for defendant.

Mr. Towle, for Appellant:

Two points are raised by the demurrer:

First. Is the contract declared on one within the statute of Fraud and void because not in writing:

Second. Could the defendant *demur* for the reason that no copy was given, and that declaration did not state that it was in writing.

I. To answer the second point first: Admitting the contract within Statute Frauds, (Duv. 206) yet the demurrer is not sustainable.

1. No copy of the cause of action is required to be filed. This case does not come under any of those mentioned in Duval, 96, Sec. 35. If required, the remedy is not by demurrer—the defendant should apply for a rule.

2. The declaration need not have stated the contract to be in writing. (Salk. 519 anon.) The plaintiff was not bound to anticipate objections which might be raised by defendant. 1 Ch. Pl. 222.

3. The demurrer is defective—in not being based upon matter appearing *on the record*. It assumes a fact, which the declaration nowhere states—to wit: that the contract was parol.

II. The contract was not within the Statute of Frauds.

1. The contract was not about LAND. The thing released is a *debt* due by F. A. Brown—not land. Though the mortgage created a lien on the land, still that is only an incident, and THAT is considered as personalty going to the executor and not the heir. Releasing the debt extinguishes the mortgage and no reconveyance is necessary. 4 Kent's Com., 193 and 194 in notes, 5th edition.

Again, the releasor was not even the mortgagee, but a *cestui que trust* who had no claim whatever upon the land but an equitable claim on the money and its income, &c.

2. It was not a *"sale"* which was contracted for. *Sale* implies a *transfer over*. Here was none, but a mere cancellation—extinguishment.

3. This contract is not within *our* statute of Frauds though it may be within the English statute. There is a very important difference between them. Our statute does not like the English avoid a *contract or sale*, but only a "contract for the sale." The foundation of the present action is not a "contract" to sell or to do any other thing *in futuro*, but a sale or release executed and complete.

4. It is not within even the English Statute. A "contract or sale" (to use the words of the statute,) which is executed or even party executed, is not void for want of a writing. Clarke *vs.* Vankirk, 14 Serg. & Rawl., 354; Teal *vs.* Anty, 4 Moore, 547; 2 Broderip & Bingham, 99; Hoby *vs.* Roebuck, 7 Taunt., 157; 3 Barn. & Ad., 899; Wilbur *vs.* Paine, 1 Ham., Ohio R., 251; Pomeroy *vs.* Winship, 12 Mass., 523; Chapman *vs.* Allen, Kirby, Conn. R., 400; Davenport *vs.* Mason, 15 Mass. R., 82-89; Crosby *vs.* Wadsworth, 6 East., 602; Miller *vs.* Hower, 2 Rawl., Penn. R., 53; Jones *vs.* Peterman, 3 Serg. & Rawl., 543; 2 Marsh., 433; Parkhurst *vs.* Van Courtland, 14 John. R., 15.

Carmack & Baker, for Appellee:

This is an action of assumpsit on a parol promise for the purchase of an interest in land, that is to say: the relinquishment of a mortgage held by the trustee of the plaintiff.

1st. As no written promise is declared on, or set out in the declaration, or copy of such writing given as required by the act of Legislature, Duv., 96, Sec. 35; it results that the declaration is upon a verbal promise.

2d. By the act regulating conveyancing, Duv., 206, Sec. 10, it is provided that no action shall be brought to charge any person for the sale of land, or of any uncertain interest in or concerning them, unless the agreement or promise upon which such action shall be

395 brought, or some note or memorandum thereof shall be in writing, and signed by the party to be charged therewith. See also sec. 1, of this act. Its phraseology imparts light as to construction of sec. 10.

Sec. 4. Stat. 29, Charles 2, which is in force here, uses the words, "or upon any contract or sale of lands, &c., or any interest in or concerning them." Rob. on Frauds, Append., 468.

If no action shall be brought none can be maintained.

A release or any agreement to discharge a mortgage is embraced by the statute.

A release according to Blackstone is the conveyance of a man's rights in land. 2 Bl., 324; Litt., 445, 465-6; 1 Inst., 264, 267; Am. Com. L. Title St. Frauds; Day's Digest; Kain *vs.* Sanger, 14 John., 89; Jackson, ex dem., Bain *vs.* Talver, 8 John., 370.

Baltzell, J., delivered the following opinion:

The defendant Gandolo demurred in the court below to the declaration of the plaintiff, assigning the following special grounds:

1st. "That the assumpsit declared on should have been in writing and so stated in the declaration."

2d. "A parol promise respecting the sale of lands is illegal and cannot be enforced in a court of law." Judgment on the demurrer having been for defendant the plaintiff has appealed to his court.

We do not regard the agreement as set forth to be within the statute of Frauds. Mortgages are not considered as conveyances of lands within the statute. 2 Burr., 969; 1 Pow. Mortg., 144.

In Massachusetts where it is held that the equity of redemption may not be transferred by parol, an action was maintained by the grantor against the grantee to recover the consideration acknowledged in the deed to have been paid. The Court saying "it is not a contract for the sale of lands, that contract was executed and finished by the deed. This is only a demand for money arising out of that contract." Scott *vs.* McFarland, 13 Mass., 311; Wilkinson *vs.* Scott, 17 Mass., 249.

In Hess *vs.* Fox. Executor of Fox, plaintiff declared on a special agreement to this effect, that plaintiff being indebted to Fox the testator in the sum of $400 secured by mortgage, it was agreed that plaintiff should convey the premises by absolute deed, and deliver them to Fox, and he should discharge plaintiff from the debt of $400,
396 and sell the premises at the best price, and pay over to plaintiff any surplus over the $400. This was insisted to be void within the statute of frauds. The court say after reciting the statute which is substantially the same as ours, "the meaning is that no interest in land shall pass otherwise than by deed or writing," and they held the agreement not within the statute but valid and binding. 10 Wend., 439, 440.

Now in that case the agreement was to the benefit of the mortgagor, in this it is the mortgagee that asks the aid of the court in his behalf. The principle we regard as the same, the statute not operating in the one case we cannot see how it can be made to bear in the other. There is another difference. Gandolfo is the assignee of the mortgagor, having purchased a portion of the lots. In reference to these he occupies the same position to the mortgagee as the original mortgagor, with the exception that he is not liable to judgment on the notes originally given. As assignee, however, a suit for foreclosure would properly be maintainable against him, and a decree for the sale of the lots be had against him. We then see that he had a direct and fixed interest of his own in the discharge of the mortgage. There was express benefit and advantage to him, and injury to the plaintiff in parting with the security of the mortgage by the release given, thus making an original independent promise in his behalf. 2 Peter's. S. C. R., 182; 5 Bing., 464.

A different result could not well be arrived at without holding the release of the mortgage void and the lots held by Gandolfo subject to the incumbrance. It is scarcely consistent with right, that he shall have the advantage and benefit of the release, and keep the money also which he was to pay the mortgagee for it.

The judgment of the court below will be reversed and the cause remanded with directions to overrule the demurrer of defendant to the plaintiffs declaration, and for further proceedings to be had therein agreeably to the principles of law.

Executor of Jesse H. Willis, *vs.* John S. Shepard. 39

A judgment in favor of one execution creditor of an estate upon a rule against another execution creditor of the estate, determining the right of the parties to moneys in the hands of the Sheriff is irregular, such mode of proceeding not being authorized by Common Law or Statute.

The proper course in such case is for each execution creditor to take his rule against the Sheriff.

Appeal from Leon Circuit Court.

Jesse H. Willis, plaintiff, in an execution against the executors of Alfred M. Gatlin, upon motion, obtained a rule in the Leon Circuit Court, against Alfred A. Fisher, Sheriff, John S. Shepard, assignee of the Union Bank of Florida, and William D. Moseley, plaintiffs in other executions in the same court, against the executors of Gatlin, to show cause *instanter*, why the said Sheriff should not pay over to the attorneys of the said Willis, certain moneys arising from a sale of slaves made by virtue of sundry executions against Gatlin's estate, including the execution in favor of Willis.

It does not appear what answers were made by the defendants to the rule, except that according to the bill of exceptions, the Sheriff at the hearing made a return of all the executions under which the sale was made, and of the levies and sales, &c., and that testimony was taken to prove various facts deemed important, and that other facts were admitted and entered by consent in the bill of exceptions.

The following entry of the final decision in the court below appears in the record:—

"Upon hearing the several parties in interest and claiming the proceeds of the said sale of the first Monday in December last: It is ordered, that the sum of four hundred and five dollars, the proceed of the sale of Ben Tillet be deducted from the amount in the Registry of the court, and that the residue of said sum, be distributed *pro rata* amongst and upon the execution in favor of said Willis, numbered 2981, and the executions numbered 2982, 2983, and 2984, in favor of the Union Bank of Florida, and the execution numbered 2985, in favor of William D. Moseley; the execution numbered 2887 in favor of the said Union Bank of Florida, upon which John S. Shepard, the assignee, ordered a stay of execution, 39
being considered as dormant, the stay thus ordered operating as a waiver and relinquishment of all the levies made under it, except that of the 7th of October, 1844, which has been otherwise disposed of. And the said Jesse H. Willis, by his attorney, prayed an appeal from the foregoing order, to the Supreme Court, which is granted; and the said John S. Shepard, by his attorney, also prayed a cross appeal therefrom, in case said appeal of the said Jesse H. Willis, shall be prosecuted by him, to the end that the questions be decided by the Supreme Court: First, Whether his execution, numbered 2887, is not entitled to the whole of the moneys in controversy. And, second, Whether if it be not entitled to the whole it is not entitled to a *pro rata* portion thereof, with all the other executions, which is also granted, and by consent of parties, bond and security is dispensed with on said appeals respectively, and by consent of parties, it is further ordered, that these several orders be entered as of the 20th day of November last."

"THOMAS DOUGLAS, *Judge.*"

Thompson & Hagner, for Appellants.

Long & Walker, for Appellee.

Baltzell, J., delivered the following opinion:

We have not been able to decide the important question presented to us in the argument of counsel, upon any rule or principle of law satisfactory to ourselves. The case in this court is between Willis's executor, appellant, and Shepard appellee, and there is also a cross appeal. In the court below it was entitled, Willis against Gatlin's executors, and was commenced by rule as well against Shepard as the Sheriff and Moseley, ordering them to appear and show cause why the Sheriff should not pay over to Willis's attorneys moneys arising from sale of certain slaves, &c. To this there was no answer by any one. The trial seems to have progressed between Shepard and Willis until finally an order was passed for "the distribution of the residue after deducting $405 the proceeeds of sale of a negro *from the amount in the registry of the court.*" Now we are not aware of any such mode of proceeding at common law or by statute as a rule between two individuals to try the right of money

in the hands of a third person, the Sheriff. There is no statute authorizing it that we are aware of, and by the common law and a special rule of the court also, a rule by way of attachment for contempt, was allowed against an officer to compel the payment of money when collected under execution. But the jurisdiction is against the officer, and the authority is ample to compel obedience to the order of the court. But where is the jurisdiction or authority for a rule of this kind between private individuals? Suppose a judgment in the present case in favor of one or the other parties, how is it to operate? Can it enforce obedience? Neither of the parties has the money, and the Sheriff is not a party, nor does it appear from the record that he has the money in his possession. To whom would the order be directed? We see a difficulty in the order of the court below to that effect—it is directed to no one.

But there is another objection to the present mode of proceeding. Shepard is defendant in the rule, and required to shew cause why the money should not be paid to Willis. He prefers no claim of his own, and according to legal principles no judgment could be given in his favor, yet in this court and the court below he claims, and is allowed, a share in the distribution. The proper course, in our opinion, is for such claimant to take his rule against the Sheriff—the allowance of one will be the refusal of the others. By an order of consolidation all can be tried together, and in case of appeal by any, the stay of the others may be had as directed until final decision.

Inn Blewitt *vs.* Nicholson, an application of a like character to decide questions raised in argument, and not by the case in the record was considered by the court, and deniend after mature consideration. We see no reason to change the determination then expressed. It is not matter of mere form, but of substance. We consider it by far safer and more prudent, more in the spirit of the constitution, and in harmony with the character of our institutions to keep within the range and limits of a rightful jurisdiction than to subject ourselves to the reproach of traveling beyond it, and exercising a doubtful and questionable power.

We are therefore of opinion that the order of the court below be reversed and set aside, and this cause remanded for proceedings not inconsistent with this opinion.

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00 THOMAS HARRIS AND LUKE MOORE *vs.* A. H. COLE.

An appeal is the only proper method whereby to bring up a degree in Chancery to this Court, for review and revision. A *Writ of Error* will not lie in such case.

Writ of Error to Circuit Court for Columbia county, to reverse a decree in Chancery.

Mr. McCants, for Plaintiff in Error.

Mr. Hagner, for Defendant in Error.

DOUGLAS, Ch. J., delivered the following opinion:

This is a suit in Chancery which was brought up from the Circuit Court of Columbia county by a writ of error, and a motion is now made on behalf of the defendant to dismiss it, on the ground that a writ of error will not lie in such a case.

This is the same ground upon which the case of Richard Bradford, administrator of Leigh Read, deceased, *vs.* Wm. Marvin and N. M. Martin, was dismissed on a former day of the present term of this court, and the motion must therefore prevail for the reasons assigned in that case, to which however we deem it proper to add another, not then adverted to, but which we consider material, viz: The difference between the object and purpose of a writ of error and an appeal.

The object of a writ of error is to review and correct an error of law, which is not amendable or cured at common law, by some of the statutes of amendment and jeofails. 3 Bl. Comm., 405; 1 Bac. Abr. title Error; 2 Saunders,46, note 6; Graham's Pr. B., 4; 1 Tidd's Pr. Chap., 43.

Tomlin in his Law Dict., 647, says "The writ of error only lies upon matter of law arising on the face of the proceedings, so that no evidence is required to substantiate or support it," and Bro. P. C., 515 is cited.

"The writ lies (says Viner) when a man is grieved by any error in the foundation, proceedings, judgment or execution, and thereupon it is called *"breve de errore corrigendo."* 9 Viner's Abr., 473, letter A., title Error.

An appeal is defined to be the removal of a cause from the sen- 401
tennce of an inferior to a superior Judge. The United States *vs.* Wonson, Jun., 1 Gallison's Rep., 13; or as Blackstone has expressed it, 4 Comm., 312: "A complaint to a Superior Court of an injustice done by an inferior one." Its object is to review the whole case upon its merits. An nappeal differs from proceedings in error under which the errors alleged to have been committed in the proceedings are examined, and if any have been committed the first judgment is reversed because in the appeal, the whole case is examined and tried as if it had not been tried before. 1 Bourvier's L. Dict., 114; Sergeant's Const. law article, upon courts of the United States, page, 50; Conn. *vs.* Penn, 5 Wheat. Reps., 424.

Of course we do not here allude to the appeal in cases at law provided for by our statute. (Thompson's Digest, 446; Duval's Comp., 108,) which it has uniformly been held only to bring up the errors in the proceeding, in the same manner as would a writ of error. And so Mr. Justice Story held under a statute of Masaschusetts similar to ours, on that subject above cited. After an able review of the question in which he refers to the various statutes of that State, relating to the matter, and to numerous authorities he says: "I am clearly of opinion that an appeal in a common law suit from a District Court removes error of law only, for the consideration of this (Circuit) Court."

Our remarks are intended to shew that according to our view of the law, an appeal is the only proper method whereby to bring up a decree in Chancery to this court, for review and revision, and when thus brought up, the whole case is before the court for that purpose.

In the case of Anderson and Thompson *vs.* Biddle, 9 Missouri Rep., 580, it was expressly ruled that "a writ of error will not lie to a decree in Chancery."

The motion is therefore sustained and the case dismissed.

Per Curiam.

RICHARD H. LONG, PLAINTIFF IN ERROR, *vs.* BENJAMIN F. ALLEN, USE, &C., DEFENDANT IN ERROR.

In an action upon a note given to secure the payment of the purchase money of lands, an equity existing in a third person is not sufficient to sustain a plea of failure of consideration.

A mere equity in another person is no defence at law, in an action brought to recover the purchase money. There must be fraud or eviction or something equivalent thereto; or admitted or unquestionable paramount title.

When the vendor of land has a patent from the United States, and the payment of the purchase money is resisted on the ground that there is an outstanding title in another person, evidenced by a receipt given to such other person by the Receiver of the Land Office, the defence is not such a one as can be set up in a court of law against the person holding and exhibiting the patent, and who is seeking to recover on a note given by the purchaser. Especially will a court not be inclined to admit such a defence, where it appears that, at the time of the purchase, the purchaser had knowledge of the existence of the claim so set up.

A bond or covenant constitutes a good and valuable consideration for a note given upon a sale of lands; and a want or failure of title is no defence to an action on the note.

A court of law, though the proper tribunal to try the title to land, will not try such title collaterally.

This case was brought up by writ of error from Jackson Circuit Court. The action, which was assumpsit, was brought by Allen as administrator of Richard C. Allen, deceased, for the use of the Kentucky Asylum for teaching the deaf and dumb, and was founded upon a note given by Richard H. Long, the plaintiff in error, to the said Richard C. Allen in his life time, and which, it was admitted, was
404 given to secure the purchase money for the northwest quarter of section twenty-two, in township five, of range ten, north and west, purchased from Allen, as the agent of the Deaf and Dumb Asylum of Kentucky.

The cause was tried before Judge MAGRAE, at the Fall Term of Jackson Circuit Court, 1846.

The defendant in the court below and the plaintiff in error here, pleaded *non asumpsit*, and a failure of consideration and want of title in the Deaf and Dumb Asylum.

To rebut the plea of a failure of consideration and want of title in the Deaf and Dumb Asylum, the plaintiff below offered in evidence the original patent for the land sold, signed by John Q. Adams, President of the United States, and dated on the 31st day of July, 1829, conveying the absolute title to the Asylum. The plaintiff also proved upon the trial that defendant went into possession of the land, and that he has always remained in the quiet enjoyment of the same.

The defendant, to supoprt his plea of failure of consideration and want of title, offered in evidence a receipt signed by R. K. Call, *Receiver* of the Land Office at Tallahassee, dated January 1, 1827, given to Charles Wiliamson, assignee of William T. Kilbee, for a sum of money paid by him for the identical land sold by Allen to defendant. This receipt of the Receiver of the Land Office was offered for the purpose of showing that the title to the land was outstanding and in another person, to wit: in Charles Williamson. The defendant moved the court to instruct the jury, that the receipt was evidence of title to the land in Williamson, which was received; and the court instructed the jury, that the receipt was not evidence of title against the patent.

Defendant moved the court to instruct the jury, that it was competent for them to inquire and decide from the evidence offered by said receipt and patent, whether the United States had not parted with the title to said land, before the grant of the patent—and if so, wheher the patent was not void, so that the plaintiff could not make a good title to defendant—which instruction the court refused, and charged the jury that it was not competent for a court of law to inquire into the validity of the patent in the mode proposed.

Defendant prayed the court to instruct the jury, that, under his replication, the plaintiff was bound to prove that the Kentucky Asylum was authorized, by its act of incorporation, to sell and convey
405 real estate belonging to it, and that, having failed to do so, the defendant was entitled to a verdict—which instruction the court also refused to give, but charged that the plaintiff was entitled to a verdict upon the evidence.

The bill of exceptions shows that the defendant adduced in evidence a paper which was called a title bond, given by R. C. Allen, for the Asylum, containing a covenant to make good and sufficient legal conveyance, upon payment of the note given by defendant.

The court in this case instructed the jury generally, that, whatever might be the law in regard to the validity and force of the papers submitted by the defendant, there being no other evidence to show fraud or mistake in the rendition and execution of the patent exhibited, the latter was conclusive in law as to the title of the plaintiff, and that the same having been tendered to the defendant as evidence of title, the latter could not at law, upon the evidence in this case, avoid the payment of the note sued on.

To all which opinions and instructions, the defendant below excepted; and by his counsel assigned for error in this court the instructions so given and refused.

Carmack, Stephens & Baker, for Plaintiff in Error.

The question presented by the assignment of error is, whether the plaintiff in error, Long, was not under the proof entitled to a verdict, on the ground that the title to the land purchased was not in the Asylum, but in Williamson, assignee of Kilbee.

1. Under the contract with the Kentucky Asylum, Long had a right to insist upon a title clear from suspicion. 1 Eng. Com. Law, case of Maberly *vs.* Robins, 214. 12 Johns., 247. 4 Taunton, 334.

A contract to make and execute "a good and sufficient deed to convey title is not performed unless a *good* title passes by the deed." Chitty on Cont., p. 729—note 1.

The party must be able to convey such a title as the other party has a right to expect. Idem.

2. Had the Kentucky Asylum a clear title to the land purchased by Long?

The evidence in the case proves that, before the patent under which the Kentucky Asylum claims, was obtained, a certificate for the same land was issued to Williamson.

It is admitted that, in an action at law between the patentee and the tenant in possession who holds against the patent, the patent 40
is conclusive of title. See Bagwell *vs.* Broderick, 13 Peters, 436. But it appears from the same case, that those who claim against the patent may file a bill in equity, and show that the patent issued by *mistake*—a court of equity being the forum in which the equities of the parties may be investigated. Williamson, then, as assignee of Kilbee, may, at any time, file a bill in equity against the Kentucky Asylum and those claiming under it, and upon showing that the patent issued by mistake, procure a patent himself for the same land—which patent, when obtained, (though younger than that held by the Kentucky Asylum,) would by relation take effect from the date of the entry, and thereby prove a prior *legal title*. Taylor & Quarles *vs.* Brown, 2 Cond. R., 243.

Chief Justice Marshall, who delivers the opinion of the court in the case above cited, says: "The principle on which relief is granted is, that the patent, which is the consummation of title, does in equity relate to the inception of title, and therefore in a court of equity, the person who has first appropriated the land in contest, has the best legal title, unless his equity is impaired by the circumstances of the case.

If this be true, as soon as Williamson shall have successfully asserted his title in a court of Equity, Long, or any other person who takes possession under the patent of the Kentucky Asylum, may be evicted. It depends, then, upon Williamson, whether Long shall have the land or not. If the title fail, it cannot be material to Long, whether Williamson causes it to fail, by going into a court of equity, or waiting for a patent and proceeding in a court of law. Let him adopt either course, the consideration fails, and the plea is sustained.

3. That the court was bound to notice equitable objections to the title. See Elliott *vs.* Edwards, 3 Bos. & Pull., 181. Maberly *vs.* Robins, 5 Taunt., 625.

4. It is no answer to say, that the bond for title was taken by Long, or tendered him by the Asylum; for when a note is given for the price of land, and the title fails, this is a good defence to an action on the note. Frisbee *vs.* Hofingale, 11 John. R., 50.

C. H. Dupont, for Defendant in Eror:

The defence set up by the defendant below, was that the Deaf and Dumb Asylum of Kentucky had not a valid title to the land, and could

407 not comply with the contract to make a good title to the defendant; and to support this defence, the defendant sought to give in evidence proof of an "entry" of the said tract of land in the office of the Register at Tallahassee, by another person in 1827.

The plaintiff to sustain the allegation contained in his replication, viz: that the Deaf and Dumb Asylum was prepared to convey to the defendant a good title, upon the payment of the purchase money, offered in evidence the patent of the government, conveying the said tract of land in fee to the said Deaf and Dumb Asylum. Upon this state of the case, the defendant in error assumes the following positions, to-wit:

I. In an action at law, the "patent" from the United States for part of the public lands is conclusive as to title. Bagwell *vs.* Broderick, 13 Peters, 436. McArthur *vs.* Browder, 4 Wheat., 488. 4 Con. Rep., 517.

II. The patent is the foundation and completion of the title, and establishes in a court of law the performance of every prerequisite, and no inquiry into the preliminary measures which ought to precede it, can be raised in a trial at law. McArthur *vs.* Browder, 4 Wheat., 488. 4 Con. R. 517. Stringer *vs.* lessee of Young, 3 Peters, 337.

It may be proper to remark, that the cases cited to sustain the foregoing propositions, were actions of ejectment, but I think that the following corollary may be legitimately deduced therefrom, to-wit: If in an action of ejectment, when "title" constitutes the primary question, the validity of a patent from the government may not be impeached, much less will it be tolerated, when the question of "title" is only incidentally involved, as in the case at bar.

III. In an action of assumpsit to recover money deposited upon a purchase of real estate, upon an allegation that the defendant has failed to make a proper title, the court will not consider whether the title is of a doubtful description, (such as a court of equity would not compel an unwilling purchaser to take,) but simply whether the vendor has or has not a legal title to convey. Bayman *vs.* Gutch, 7 Bingham R., 379. 20 En. C. L. R., 170.

IV. The vendee of real estate cannot avoid the payment of the purchase money by alleging a want of title in the vendor, so long as he retains possession of the premises sold. Archer *vs.* Bamford, 3 Starkie R., 175. 14 En. C. L. R., 176-8.

408 V. The possession of the patents of the United States is conclusive evidence of a title in the Kentucky Asylum to convey, and the validity of the same, as against any muniment of title less than a patent, can be inquired of only in a court of equity. Bagwell *vs.* Broderick, 13 Peters, 436.

Opinion by Justice BALTZELL.

This is a suit on a promissory note, payable at the Union Bank of Florida, given for the purchase of a tract of land, and the defence is a failure of consideration, based upon an equitable right in a third person. The case was tried upon the evidence, without reference to the pleadings, the court instructing the jury as to the points presented. The propriety of these instructions is now raised in this court. The error assigned presents the main question in the case—that under the proof defendant was entitled to a verdict, on the ground that the title to the land purchased was not in the Asylum, but in Williamson, assignee of Kilbee. Strictly speaking the instructions might have been refused, on the ground that the title was not as asserted but in the Asylum obviously, through the patent of the United States, which they held and tendered in evidence. The more appropriate question is, whether through the equity existing in Williamson, the defendant could maintain his plea of a failure on that account. To solve this question we must refer to the bond taken by defendant, on executing his note. This formed the consideration for it, and to the extent of the covenant contained in it, plaintiff is bound, and no further—it not being pretended that there was fraud in any respect. The covenant there is to make "good and sufficient legal conveyance, upon the payment and full discharge of the said promissory note." We do not consider it necessary, on the present occasion, to determine the relative effect of these arguments, whether they are dependent or independent—the point has not been argued before us, and the case may be decided upon other grounds, admitting, in our opinion, of neither doubt nor question.

In argument, and on the trial in the Circuit Court, the case was treated as if there had been a covenant for good and sufficient title—a covenant in the opinion of at least two of the most enlightened courts in the Union, of very different import from that of a sufficient deed of conveyance. The words, "good and sufficient deed," have no reference to the title; "It is a covenant relating merely to the va-

lidity and sufficiency of the conveyance in point of law to pass what- 409
ever right the plaintiff had in the lands to the defendant." "It is impossible," says C. J. Spencer, in a case reviewing the decisions in New York in this respect, "to torture the covenant to give a good warrantee deed of conveyance to mean that he will give a good title." 20 John., p. 132. 12 John., 436. 13 John., 350. 16 John., 268. 6 Cowen, 21-2. 15 Pickering, 553.

Even this question seems to be unsettled in the American Courts, the Supreme Court of Pennsylvania holding the adverse doctrine; nor do we design to express a positive opinion on the present occasion.

In the case under consideration, we find the plaintiff in possession of the patent of the United States, granted in July, 1829, nearly twenty years since, and during that long period it has not been assailed. The defence set up under Williamson is, in the pleadings, alleged to be a claim—not even a subsisting, or a good and valid one. At the best it is a mere equity—dormant from its existence in 1827, and never asserted in court or elsewhere, as appears from the record, to the present time. It has not disturbed the defendant's possession obtained under the purchase from the Asylum and which he has held for several years, nor is there an allegation that there is any fear of its disturbance, or that there is a design to assert the claim to his injury. Admitting that Williamson might, in a court of equity, have obtained his right over the patent and compelled a conveyance of the land, yet it by no means follows that the defence would be available to defendant here. But in addition to all this, by the plea in the case, this very claim of Williamson was known to defendant at the time of his purchase. Under such circumstances, to hold the defence available, would be going far beyond the decisions of any of the courts that have permitted objections of this character. The cases on the subject in the American Courts are based on the ground of fraud or eviction, or that which is equivalent, or of admitted or unquestionable paramount title. The general rule at common law, and that now prevailing, is that the bond or covenant constitutes a good and valuable consideration for the note, and, of course, a want or failure of title would be no defence to an action on the note. 1 Greenleaf, p. 352. 2 Wheat., p. 13. If there be no ingredient of fraud in the case, and the party has not had the precaution to secure himself by covenants, he has no remedy for his money, even on a failure of title." 3 Kent, 473.

The case of Frisbee *v.* Hoffnagle, cited by defendant's counsel, 11th 410
Johnson, p. 50, asserting a different rule, has been overruled—not only by the same court, 19 Johns., 77—21 Wend., 132, 134—25th Wend., 107, reviewing the entire ground, but by other courts—3 Pickering, 452. 3 Martin's La. Rep., 111. 8 Smede & Marshall, 742. In this latter case, the court say: "A court of law, although the proper tribunal for the trial of titles to land, will not try such titles collaterally. The proceeding must be direct, otherwise the title cannot be questioned. Where there has been an eviction, the defence of failure of consideration may be let in, because the superiority of the outstanding title is then established by a judicial determination." Hay, &c., *v.* Taliaferro, Mississippi Reports. In South Carolina, where defences of this character have prevailed to the greatest extent, the courts have evinced a disposition to retrace their steps, and admit that some of their decisions have led to extravagant results. Thus in Van Leer *vs.* Parr, upon the question whether Van Leer had or had not a good title to the lands against the contingent remainder men, &c., "I give no opinion," says one of the judges, "and the court ought still to avoid deciding upon the possible future rights of such absentees. Let them first lay in their claims. The series of our decisions has finally established this proposition in the laws of South Carolina, that, whenever in the sale of lands, the seller makes a general warranty of title, and a subsisting paramount title at law to the same lands belongs to a third person, as for instance an older grantee of the same lands, in such cases the purchaser is not obliged to wait for eviction, &c." 2 Richardson Equity, 324.

We are of opinion that this objection may not be set up at law in this action, so as to set aside this agreement, being more appropriate to a court of equity, where, if necessary or proper, the contract may be rescinded or modified upon such terms as the peculiar circumstances of the case may demand, and where Williamson, or those holding under him may be made parties, and the merits of his claim directly investigated.

An embarrassment has existed in our minds as to the proper disposition of the case, owing to the very defective character of the pleadings. The defendant sets up an arrangement to extinguish Williamson's claim, and avers that the Asylum has no title; plaintiff replies that he is now and will be ready to make title *whenever defendant is ready to offer to pay* the purchase money, and this last

411 seems to have been the issue submitted to the jury. As there was no offer to pay at the trial, or at any other time, the contingency had not arrived when it would be proper to determine such a question.—It was, in our opinion, an immaterial issue, and we were, at first, inclined to reverse the case and send it back, on that account; but as the point was not noticed in argument and both parties have desired a decision upon the merits, we have concluded to consider the question as if properly presented and raised by the pleadings and decided by the jury. If there were a prospect of the defendant presenting the matter of his defence anew, in another firm, we should direct a repleader. 1 Burrows, 301. Cowper, 510. 16 Johns, 227. Evans v. Gee, 11 Peters, 85.

The case will then be affirmed with costs.

Chief Justice DOUGLAS dissenting.

WILLIAM CURRY, APPELLANT, *vs.* WILLIAM MARVIN, APPELLEE.

The second section of the act of July 25, 1845, which limits the jurisdiction of the Supreme Court to cases where the matter in controversy exceeds the amount or value of fifty dollars, is not in conflict with that provision of the Constitution of this State, which declares that the Supreme Court, except in cases otherwise directed in this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, under such restrictions and regulations not repugnant thereto, as may, from time to time, be prescribed by law.

The word restriction means *limitation, confinement within bounds,*" and as used in the Constitution, applies to the amount and to the time within which an appeal may be taken, or a writ of error sued out. The word regulation more properly applies to the mode and form of proceeding.

Courts of justice cannot act upon the presumption that powers conferred by the Constitution will be abused—or, because they may be, determine that they have not been given.

Where the sum in controversy is less than fifty dollars, this court has no jurisdiction.

William Curry, being an auctioneer in the County of Monroe, instituted a suit in the Circuit Court of that county, to recover from William Marvin, the defendant, the sum of eighteen dollars and
412 twenty-nine cents, being one per cent. on the sum of eighteen hundred and twenty-nine dollars, the amount of sales of certain lots belonging to defendant, and sold for defendant by plaintiff. The sum sought to be recovered was the amount of tax imposed by the county commissioners upon auction sales, alleged in this case to be the aforesaid sum of eighteen dollars and twenty-nine cents.

The defendant filed a demurrer to plaintiff's declaration in these words: "The said defendant in person says that the declaration is not sufficient in law, because he says that the county commisioners of said county levied said tax of one per cent. on auction sales without the authority of law."

At the spring term of the Circuit Court, sitting in and for the county of Monroe, Judge LANCASTER presiding, the demurrer to plaintiff's declaration was sustained, and plaintiff appealed to this court. The only question considered here, as appears from the opinion of the court, was whether this court has jurisdiction of the case.

Thomas S. King, for Appellant,

Contended that the 1st section of the act of the General Assembly of July, 25, 1845, pamphlet 12, conflicts with section 2, article 5 of the Constitution, and that appeals may be taken in any case brought to the Circuit Court.

The object of the Constitution in providing for appeals, is to ascertain the legal rights of parties, and to secure them. Every such right is intended to be secured to each individual, and any provision abridging the means of obtaining it must be expressed without ambiguity. The words of the Constitution in art 5, sec. 2, that the Supreme Court shall have appellate jurisdiction, "under such restrictions and regulations," cannot be construed to authorize the Legislature to debar a party of his right of appeal. The words, "restrictions and regulations," apply to the modes and forms of proceeding in taking and prosecuting appeals. The restrictions were intended to be of the same nature with those which existed at the making of the Constitution, and operated then in prosecuting appeals. It will be seen, by reference to the laws regulating appeals and writs of error at that time, that there was no limit as to the amount in controversy, except in cases of $10 and under, over which justices of the peace had final jurisdiction. The restrictions in prosecuting appeals, then, are found in Duval, p. 109 to 112. The appeal must have been

taken within ten days after the session of the court at which judg- 41
ment was rendered, p. 108, sec. 1. Before it would be heard, there must have been a bond filed with securities, if plaintiff, for the costs—if defendant, for the amount of the judgment and costs; a copy of the proceedings must have been filed the first day of the term, or the case would be dismissed. Sec. 2 & 4, p. 108, 109. For a writ of error to operate as a *supersedeas,* there must have been a special order of court; and a bond filed in double the amount of the judgment or costs, and the writ must have been sued out within two years after judgment. Sec. 7 & 10, p. 109, 110. In judgments against officers of the court, the same bonds and limitations as to time are provided as in other cases. Sec. 3, p. 111, 112. By act February 12, 1836, before appeal taken, the costs accrued and to accrue must have been paid, p. 112. In criminal cases, before the appeal could operate as a *supersedeas,* there must have been bond and security given to abide the judgment or sentence, p. 112.

These provisions are restrictions upon parties—they are intended to restrain them from taking appeals as of course—or from unfounded and vexatious appeals, and to give full security upon the final decisions. They are mere "regulations"—which refer to the terms and order of proceeding in taking appeals, and are in part prescribed by the acts before referred to, and by the rules adopted by the Court of Appeals, under sec. 12, p. 110, where it is authorized to make rules for the "regulation" of cases brought to it. A restriction as to the time in which appeals must be taken, and to prosecuting them without giving bond and security, is something more than a regulation for the forms and order of proceeding in taking up and prosecuting an appeal. There is a wide distinction between these restrictions as to bonds and securities and limitations of time, and restrictions upon the right to which every individual is entitled, of appeal to a higher tribunal to obtain a legal claim, of which he is deprived by the judgment of the inferior court. Such a right can be barred only by clear and unmistakable language in the Constitution. The Constitution does not and intends not to prohibit an appeal to obtain a legal claim—its object is to provide such restrictions and regulations as will give full security and prevent injustice to parties, and of this nature are the restrictions and regulations that existed at its formation.

If the Legislature can restrict appeals to cases where the amount 41
claimed is over $50, it can restrict them to the highest amounts, and may exclude questions on the construction of a statute it may pass, or any question, except those of the nature it may specify, from appeal. Such a construction of the Constitution might otherwise work great wrong. A party may have a multitude of accounts, each under $50, amounting to thousands of dollars, the recovery of all which depends on the same principle of law, yet, because none of his accounts amount to $50, he may lose all for want of an appeal. Suits are often brought on small amounts, to test questions (which is the design in this case) involving principles on which large claims depend, and in the establishment of which the community is deeply interested. In none are they more interested than in settling the construction of statutes by the courts. No construction should, if possible, be given to the Constitution which might work inconvenience or injustice, or which militates against its spirit, as would certainly be the case if any one, however small his claim, were prohibited from appealing. Further: the Constitution can alone limit the jurisdiction of this court.

The 2d Sec. Art. 5, referred to, is the only one in the Constitution that gives jurisdiction to the Supreme Court. This is the clause from which it derives not only the power of "appellate jurisdiction only, except, &c.," but whatever power it has. This power authorizes its exercise of appellate jurisdiction, which is the only jurisdiction the court has, except the power given in the same section, to issue certain writs for maintaining its control over other courts. The clause conferring jurisdiction is connected with the words, "except in cases otherwise directed in this constitution," and is intended to convey the meaning as if read "the appellate jurisdiction shall extend to all cases, except to cases otherwise directed in this Constitution," as well as to read "the court shall have appellate jurisdiction *only,* except in cases otherwise directed in this Constitution." If, then, there be any limitation as to the amount in cases, it must be sought for in the Constitution. Such a limitation does not exist there.

Marvin, for Appellee.

Chief Justice DOUGLAS delivered the opinion of the court:

This case was brought up by appeal from the Circuit Court of Monroe County. The plaintiff in his declaration demands of the defendant

the sum of eighteen 29-100 dollars, the damage laid is ten dollars—making in the aggregate the sum of twenty-eight 29-100 dollars only. We are, therefore, met at the threshold of the case here, with the question, whether this court has jurisdiction in it?

The Constitution of this State, chap. 4, sec. 2, No. 1, of Thompson's Digest, page 50, declares that the Supreme Court, except in cases otherwise directed in this constitution, shall have appellate jurisdiction only—which shall be co-extensive with the State, under such restrictions and regulations not repugnant to this constitution, as may, from time to time, be prescribed by law."

The act of the General Assembly of July 25th, 1845, 1 Pamphlet Laws, page 12, Thompson's Digest, sec. 2, No. 5, pages 50, 51, prescribes that "the Supreme Court of this State shall have and exercise appellate jurisdictions in all cases brought up by appeal or writ of error from the several Circuit Courts, when the matter in controversy exceeds the amount or value fifty dollars." This act limits the jurisdiction of this court, and must govern the proceedings in this case, unless it is repugnant to and conflicts with the provision of the constitution above cited.

It is contended by the counsel for the appellant that it does so conflict; at least we understand the argument to be, that a strict construction of the article of the constitution before referred to, would make it thus conflict; that the words of that article, "the Supreme Court shall have appellate jurisdiction, under such restrictions and regulations, ought not and cannot properly be construed to authorize the Legislature to debar the party of his right of appeal, however *small* the sum or value in controversy may be. Those words, it is argued, apply only to the modes and forms of proceding in taking and prosecuting appeals. To this proposition as thus laid down, we cannot yield our assent. The word *restriction* is defined by the best lexicographers to mean *limitation, confinement within bounds,* and would seem, as used in the constitution, to apply to the amount and to the time within which an appeal might be taken, or a writ of error sued out. The word *regulation* has a different signification—it means method, and is defined by Webster in his Dictionary, folio 3d, page 929, to be "a rule or order prescribed by a superior for the management of some business, or for the government of a company or society." This more properly perhaps applies to the mode and form of proceeding in taking and prosecuting appeals and writs of
416 error. By the use of both of those terms, we think that something more was intended than merely regulating the mode and form of proceedings in such cases; and that the word *restriction, as used in the* constitution, supports and fully sustains the provisions of the 2d section of the act of 25th July, 1845, which by its terms limits the jurisdiction of this court to cases where "the matter in controversy exceeds the amount or value of fifty dollars."

It is further argued that "If the Legislature can restrict appeals to cases where the amount claimed is over fifty dollars, it can restrict them to the highest amounts, and may exclude questions on the construction of statutes it may pass." But it is not to be presumed that the General Assembly would thus abuse the authority which, by the clause of the constitution above cited has been conferred upon it.—The same argument would hold as to any discretionary power. All such powers may be misused; but courts of justice cannot act upon the presumption that they will be, or because they may, determine that they have not been given. These were more properly matters for the consideration of the convention that formed the constitution and the people who adopted it. The Constitution of the United States (Art. 3, Sec. 2,) provides that "The judicial power shall extend to *all cases in law and equity* arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens or subjects." In all cases affecting ambassadors, other public ministers and consuls and those in which a State shall be a party, the Supreme Court shall have *original jurisdiction.* In *all other cases,* before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make. 1st United States Statutes at large, 18. Thomson's Digest, App. 561. Under the power conferred by this Article, Congress (by the Act of 24th September, 1789, 1st U. S. Statutes at large, 80,) provided that "Final judgments and decrees in *civil* actions and suits in equity in a circuit court, brought there by original process, or removed there by appeal from the district court, where the matter in dispute *exceeds* 417 the sum or value of two thousand dollars, exclusive of costs, may be re-examined and reversed or affirmed in the Supreme Court.

Curry vs. Marvin.—Opinion of Court.

Now it may as well be said that, if the Congress of the United States can restrict appeals and writs of error to the Supreme Court to *civil cases* where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, it may restrict them to the highest amount; or that, if it may except one class of cases, it may except all or, at least, so large a portion as to render that high tribunal almost entirely useless. We have seen that the judicial power extends to all *cases* in *law and* equity, yet the Supreme Court of the United States has no appellate jurisdiction in *criminal* cases, and cannot revise the judgments of the circuit courts by writ of error or *habeas corpus,* in any case where a party has been convicted of a public offence. *Ex parte* Kearney, 7 Wheat. 38. It could not, if the excess of the fine were apparent on the record. *Ex parte* Tobias Watkins, 7 Peters, Reps. 568, 574. The appellate jurisdiction given to the Supreme Court by the Constitution, (Art. 3, Sec. 2,) being with such exceptions and under such regulations as the Congress shall make. If Congress has provided no rule, the Court cannot exercise the appellate jurisdiction; if the rule is provided, it cannot be departed from. Wiscart *v.* Danely, 3 Dall., 321, 327. 1 Peters Cond. Rep., 144, 146. The term *civil actions would,* from its natural import, embrace every species of suits which is not of a criminal kind. 3 Dall., 321. 1 Peters' Cond. R., 146; yet the Supreme Court of the U. S. has no revising power over the decrees of the District Court sitting in bankruptcy. *Ex parte* Christy, 3 Howard, S. C. Reps., 292. But "because there is no appeal given, it by no means follows (say the court in the latter case) that the jurisdiction is either oppressive or dangerous. No appeal lies from the judgments, either of the District or Circuit Court in criminal cases, and yet, within the cognizance of one or both of those courts, are all crimes and offences against the United States, from those which are capital down to the lowest misdemeanors affecting the liberty and the property of the citizens." And yet there can be no doubt that the denianl of appellate jurisdiction is founded in a wise, protectional public policy. The same reasoning would apply to the appellate jurisdiction from the decrees and judgments of the Circuit Court, which are limited to cases above $2,000, and cases below that sum embrace a large proportion of the business of that court." Ibidem, 317. So cases below the 418 sum of fifty dollars, may and generally do embrace a considerable portion of the business of our Circuit Courts; but the limitation of the right of prosecuting an appeal or writ of error to cases above that sum, is, we think, neither oppressive nor dangerous. And the appellate jurisdiction of this court, conferred upon it by the Constitution, being under such restrictions and regulations, not repugnant to that Constitution, as may, from time to time, be prescribed by law; and that jurisdiction having been limited by law to cases where the matter in controversy *exceeds* in amount or value fifty dollars; and that provision not being in our opinion repugnant to the Constitution; and the sum in controversy in this suit being *less* than fifty dollars, this Court has no jurisdiction of it, and it must, therefore, be dismissed.

Per curiam.

PHILIP COMERFORD, PLAINTIFF IN ERROR, *vs.* CHRISTOPHER C. COBB, ADMINISTRATOR *de bonis non* OF JAMES W. EXUM, DEFENDANT IN ERROR.

The regular mode of bringing the cause of action before the court is by craving oyer.

The word seal written in the scrawl attached to the name of the obligor, indicates the intention of the party executing the instrument to make it a specialty, and the intention must govern.

The word seal so written in the scrawl makes the instrument a writing obligatory or specialty, to which the plea of the statute of limitations is bad.

This case came up on a writ of error from Jackson Circuit Court. An action of debt was brought in that court by Christopher C. Cobb, administrator *de bonis non* of James W. Exum, on the instrument stated and set forth in the opinion delivered by the court, against Philip Comerford, the plaintiff in error in this court.

Comerford pleaded the statute of limitations—to which plea, Cobb, the plaintiff below, demurred, and for cause of demurrer, showed that the instrument sued on was a specialty, to which the statute pleaded does not apply.

419 The demurrer was sustained by the court; and the only question presented by the record is, whether the court erred in giving judgment for plaintiff upon the demurrer.

Keyes, for Plaintiff in Error, contended,

The statute of 1829 declares that a scrawl affixed as a seal shall be as effectual as a seal. Thompson's Digest, 348. It is clear that a scrawl is not, under the statute, *de facto,* a seal.

It is necessary that the instrument itself to which the scrawl is affixed, should bear witness that the scrawl was affixed as a seal. 1 Mun. Rep., 487, 491. 4 Mun. Rep. 442. Minor's (Ala.) Rep., 187. 2 Randolph Rep., 446. See 2 Cowen & Hill's notes. 10 Philip's Evidence, 1227, for the American learning on the point.

Some doubt may exist whether the point be properly presented. It is submitted that the statute, which requires the cause of action or a copy thereof to be filed with the declaration, makes the cause of action, or the copy when so filed, a part of the record. And as the demurrer to the plea of the statute of limitations presents the whole record to the court, the variance which appears between the cause of action and the description thereof in the declaration, is a ground well shown for the reversal of the judgment of the court below.

The court is also referred to 4 Ark. Rep., 196, and to 6 Ark., 117, where the point is mentioned as *res adjudicata.*

Carmack, Stephens N *Baker,* for Defendant in Error:

The record in this case presents the single question: Did the court below err in sustaining the demurrer to the plea of the statute of limitations?

1. Actions of debt founded on *specialty* are expressly excepted out of the statute of limitations. Th. Dig., 442, sec. 1.

In this case, the "cause of action" is described in the plaintiff's declaration as a *specialty,* "writing obligatory sealed with the seal," of which profert is made. The defendant, by his pleadings, admits the "cause of action" to be such as it is described in the declaration.

If the defendant in the court below desired to present the question, whether the cause of action was a *specialty* or not, he should have craved *oyer* and *demurred.* 1 Chitty Pl., 466-'7.

If this view of the subject be correct, it is unnecessary to enter into a discussion of the question presented by the argument on the other side, as to the effect of a scrawl.

420 By referring to the case cited on the other side,, 4 Ark., 195, the court will perceive that the question was presented by the defendants craving *oyer* and then demurring.

Justice LANCASTER delivered the opinion of the court:

The plaintiff, C. C. Cobb, Administrator, &c., brought suit in the court below against P. Comerford, the defendant in that court and plaintiff in error here, in an action of debt, and declared upon a writing obligatory. At the bottom of his declaration a copy of the cause of action is set forth in these words, viz:

"Twelve months after date we or either of us promise to pay Frederick L. Ming, Executor to the Estate of James W. Exum, deceased, the sum of one hundred and forty-nine dollars and fifty cents, for value received. December 29th, 1838.

(Signed), "H. J. MARLY, [SEAL.]
"CHARLES TRIPP, [SEAL.]
"PHILIP COMERFORD, [SEAL.]"

To this declaration sundry pleas were pleaded, but all were withdrawn but the plea of the statute of limitations, viz: *non accrevit* within five years; to which plea plaintiff demurred, issued was joined on demurrer and demurrer was sustained and judgment given for plaintiff.

The only question for this court to examine and inquire into is—whetner the demurrer was properly sustained, or not?

The plaintiff in error contends that the demurrer to the plea brings before the court the instrument declared on, as well as the record, and that it is bfore the court for its inspection. It may be as well to remark that the regular mode of bringing the cause of action before the court is by craving oyer; because it is no part of the record.—A copy appended to the declaration does not make he original any part of the record, and the court will only take notice of it where the defendant craves oyer and demurs. If the original had been appended to the declaration, instead of a copy, the point might have been different, as the pleadings are shaped. The authority referred to (4 Ark. R. 196, of Birtrand vs. Boid, strongly recognizes the position here taken. But, presuming the copy of the writing declared on to be accurately given, we have looked into the authorities referred to (1 Mumford, 487, 491, and 4 Mumford, 442,) to see whether they sustained the ground assumed by plaintiff in error. The principle

esablished in those cases seems to be that, where the writing con- 42
cludes with the words "Witness my hand," and the obligor signs his name with a scrawl at the end, it is not sufficiently shown he intended to make a seal, or he would have given stronger evidence of his intention; and instruments of the character involved in the principle were ruled, in those decisions, not to be sealed instruments. But in those decisions it is fairly inferrable, had there been sufficint from which to discover an intention on the part of the obligor to make a sealed instrument, the ruling had been different. The intention of the obligor, at the time of making the writing, if ascertainable, is to govern. Now, within the scrawl attached to the name of the obligor, Philip Comerford, the word *"seal"* is written, plainly and unequivocally indicating the purpose for which the scrawl was attached.

In the case of Dardenne vs. Bennett et al., 4 Ark. R. 456, the court, upon a review of the authorities, expressly rule that the clause *"in cujus rei testimonium"* is not essential to a deed or bond.

In the case of Birtrand vs. Boid, 4 Ark. R. 196, before cited, the decision was upon an instrument having a scrawl, with the word "seal" written in it, precisely as in this case. The statute upon which its efficacy depended is in these words: "every instrument of writing expressed on the face thereof to be sealed, and to which the person executing the same shall affix a scrawl by way of seal, shall be deemed and adjudged to be sealed." The writing was ruled to be within the provisions of the act, and to be regarded as a sealed instrument.

The statute of Florida is in these words: "A scrawl affixed as a seal to any instrument shall be as effectual as a seal." Thompson's Digest, 348.

This, then, in effect, is a sealed instrument and was so intended by the parties at the time of its execution. It is, then, in contemplation of law, a writing obligatory or specialty—to which the plea of the statute of limitations has repeatedly been held to be had. Indeed, it is not recollected that there is any conflict of authority on this point. No error has been perceived in the judgment of the court below; it must, therefore, be affirmed with costs.

DAVID GORDON, & SUSAN HIS WIFE, FORMERLY SUSAN E. FISHER, 42
PLAINTIFFS IN ERROR, *vs.* JOHN G. CAMP, DEFENDANT IN ERROR.

When money is the subject of bailment, or delivery to an agent, paid or unpaid, *assumpsit* is the proper remedy:—*assumpsit* in the form of money had and received usually being, in case of money, a substitute alike for trover, trespass, and case: though as a substitute for trover, there need be no previous demand.

The count for money had and received will be supported by evidence of the defendant's receipt of bank notes.

A count for money had and received may be proved by any legal evidence, showing that the defendant has possession of the money of the plaintiff, which in equity and good conscience he ought to pay over.

Assumpsit will frequently lie, where there has been non-feasance, misfeasance, or malfeasance, the plaintiff in such cases waiving the tort.

This cause was heard at the Fall Term of the Circuit Court of the Middle Circuit in the county of Leon, the Hon. THOMAS DOUGLAS presiding. The proceedings in the case in the court below are fully and clearly stated in the opinion delivered by this court:

Brockenbrough, for Plaintiffs in Error:

The declaration contains three special counts, and the money counts.

The plea is bad, because it does not state that he brings into court, or that he has the same identical Florida money, or what sort of Florida money he had, or that he made any effort to sell it, or what was the value at any time whilst he had it, or what was offered for it—but only that he could not sell it for its *fair and full value."* That was not his contract, but to dispose of to the "best advantage, &c."—which shows that the money was to be sold for the best market price that could be obtained, and this was to be the only test of value. Its intrinsic or full value, perhaps, was unknown to either party, and seems not to have entered into their contemplation.

But it is said the action is not well brought; that it was a gratuitous bailment, and the most that could be made of it would be an*tion on the case* for non-feasance. The authorities do not sustain this. Sufficient consideration for the promise—which is *express,* not implied—is laid in every court, and is expressed on the face of the note. The receipt of so much Florida money, (decided in this court to be *money,*) and averred in the declaration to be of par value in

specie is surely a sufficient consideration for a promise to remit the amount in specie, or Northern funds. It is admitted in the note and the plea to have been of *some value.* 423

Defendant's excuse is, he could not get enough for it. If this is not consideration enough for a promise in *assumpsit,* no action for money loaned, or had and received, or account stated, can be maintained. Opposite counsel seem to misconceive the case of Coggs *vs.* Bernard, in 2d Lord Raymond, as well as Mr. Smith, in his leading cases, and his American editors.

That case establishes that a mere trust or confidence reposed in a man, without reward, who undertakes to do something for another, either to his goods or money, is sufficient consideration to render him liable on an implied promise to perform it well after he undertakes it, and actually enters upon the trust, by taking possession of the money or chattels. That he may be liable on implied promise, or for breach of trust, or gross negligence, as the case may be.

It decides nothing as to the form of the action—whether it is to be a *special action* on the case for non-feasance, or misfeasance, or an action of trespass on the *case upon promises, (assumpsit,)* depends on the circumstances of the case to be conidered, and not on the quetion of liability, which was the only question in Coggs *vs.* Bernard.

Even when there is no contract whatever in the case, the American editors state (1 Smith, 198,) that "it may be proper to note, that where *money* is the subject of bailment, or delivery to an agent, *paid or unpaid, assumpsit* is the proper remedy," and he cites 6 New Hampshire, 537, Groves, et al. *vs.* Ticknor. And that he is speaking exclusively of cases where there is *no contract.* See p. 186, paragraph beginning *"unpaid agents"* Here there is an express contract. Why not folow its own words? Why seek to find what the law would do, if we had none?

As some evidence that I have not misunderstood Mr. Smith, I refer to his later work, 46th Law Library, 59, Smith on Contracts.—The cases which he there cites, along with Coggs *vs.* Bernard, are cases in *assumpsit* and cases very similar to the present. And in one of them, a very striking case, Coggs *vs.* Bernard, is cited by counsel, and the reporter in his note, see Shillibur *vs.* Glynn, 2 Meeson & Welsby, Exchequer R., 143.

And in the other case, precisely in point to this, and in *assumpsit*— 424
(see 2 Bingham, 414. Eng. C. Law, 485,)—Chief Justice Best cites with approbation the case of Coggs *vs.* Bernard, as sustaining him, and never seems to have dreamed that it was the less applicable because that was case, and Whitehead *vs.* Greetham was *assumpsit.* Because the principle of liability, and reason of liability, was precisely the same—only in Cogg *vs.* Bernard, *case* had to be brought because the liability was for spilling brandy, gratuitously to be carried; and in the other, *assumpsit,* because it was for failure to secure an investment of certain money deposited with defendant for that purpose, to be gratuitously invested.

The case of Rutgers & others *vs.* Sweet, 2 Johnson's cases, 92, was *assumpsit,* upon a receipt very similar to the one here sued upon. It was sustained. The distinction seems to be, between a *gratuitous* promise to do something in future without entering upon it, or receiving in *trust* the money or goods with which it is to be accomplished, or about which, the thing promised, is to be performed. In such case, no action lies in case, or *assumpsit.*

But it is undertaken, and the *trust* reposed by the delivery of the money or chattels, (whereby the party is prevented from performing it himself, or having another agent,)—in such case, the party neglecting his duty is responsible in *assumpsit* or in case, according to the nature of his contract, or the subject-matter, or the nature of the loss.

The case of Thorne *vs.* Deas, 4 Jo., 84, was a case of a gratuitous promise of one partner to another to effect insurance on joint property—nothing was given or advanced, and no trust reposed further than mere confidence in his word. Such a promise raises no liability certainly, whether in *assumpsit* or *case;* and that action was not sustained, though brought *in case.*

But this note was good on the *money counts.* Especially the account stated, *"I agree to pay,"* imports a consideration. Davis *vs.* Wilkinson, 10 Adolphus & Ellis, 98. 37 Eng. C. Law, 61.

Douglas & Hogue, for Defendant in Error:

1. The action of *assumpsit* is not the proper form of action in this case. It should have been *case.* An unpaid agent undertaking to perform anything, is liable to this form of action only, for damages resulting from the manner of his performance. 1st Smith's Leading Cases, 186, 169. Coggs *vs.* Bernard, 5 Durn. & East, 143.

2. The defendant in this case was a mere bailee, without reward, 425
and must have been guilty of gross negligence in order to render him liable as a mandatory; and this gross negligence would be the ground of action on the *case.* Id. & 1 Esq., 74.

3. Unpaid agents are only liable for such injuries to property, as they would be liable for if the property remained in the possession of plaintiff. 1 Smith's Leading Cases, 187.

4. The action of *assumpsit* can only be maintained, where there is such a conversion as that *trover* will lie, or where money has been received on deposit; and this because it is a *quasi* recovery of the thing. Smith's Leading Cases, 188.

Hawkins, Justice, delivered the opinion of the court:

This was an action of *assumpsit* brought by Gordon and wife against Camp, the appellee, on the following instrument of writing:—

"Tallahassee, Florida, February 5th, 1842.

"Received from Mrs. Susan E. Fisher three hundred and eighteen dollars in Florida money, which I am to dispose of to the best advantage for specie of northern current funds, and remit the avails to her at Warrington, Virginia, which I expect to do on or before the 1st August next, from Washington city, as I pass through that place for my former residence in Ohio. JOHN G. CAMP."

The declaration contains three counts upon the above agreement as a promissory note, and the usual money counts, among which is one for *money had and received* and one upon an *account stated.* To this declaration *non assumpsit* was pleaded and the following special plea, to wit:—

"And the said John G. Camp, by Douglas & Hogue, his attorneys, comes and defends the wrong and injury when, &c., and says that the said David Gordon and Susan E., his wife, ought not to have or maintain their aforesaid action thereof against him, because he says that at the time and at all times since the aforesaid sum of three hundred and eighteen dollars was placed in his hands for sale, it could not be sold for its fair and full value. And the said John G. Camp further saith that he, the said Camp, hath always, from the fifth day of February, 1842, the time when the said sum of three hundred and eighteen dollars Florida money, was placed in his hands for sale by said plaintiffs, hitherto and at all times been ready to pay over and return to the said plaintiffs the aforesaid sum of three hundred and eighteen dollars originally put into his hands for sale, and 426
that he is still ready to pay to the said plaintiffs the said sum of three hundred and eighteen dollars, and he now brings the same here into court, ready to be paid to the said plaintiffs, if they will accept the same; and this he, the said John G. Camp, is ready to verify.—Wherefore he prays judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against him, &c. [$318.00 Florida money filed with the plea.]"

To this plea there was a demurrer, which was overruled by the court. From this decision a writ of error was taken and errors assigned, to wit:—

1. The Court erred in overruling plaintiff's demurrer to defendant's plea.
2. The court erred in giving judgment for defendant.
3. The court erred in not giving judgment for plaintiff.

The main question in this case seems to be this: whether, upon the facts, as disclosed by the record, the action of *assumpsit* can be maintained. That action lies where a party seeks damages for a breach of a promise not under seal, and the promise may be *express* or *implied;* for the law always implies a promise to do that which a party is legally liable to perform; and the remedy conferred by this action is of a very large and extensive application.

It is contended here that *case* and not *assumpsit* should have been brought by plaintiffs, because an unpaid agent undertaking to perform any thing is only liable to the first action (*case*) for damages resulting from the manner of his performance, and that there is no contract; that the defendant was a mere bailee without reward, and must have been guilty of *gross negligence* to render him liable as a mandatory, and then *case* would have been the remedy. All this is no doubt correct upon the ground that there is no *contract,* and if in this case there is no contract, *express* or *implied,* the action of *assumpsit* cannot be sustained. Assumpsit will frequently lie, however, where there has been nonfeasance, misfeasance or malfeasance; for the plaintiff may waive the tort and rely on circumstances as forming a breach of promise. 6 East. 335. 3 Lord Ray. 1216. 1 B and C. 418. 1 Saunders Pl. and Ev. 111.

The plaintiff mainly relies upon the count in his declaration *for money had and received.* Such a count has been likened to a bill in equity, and may, in general, be proven by any legal evidence, shew-

427 ing that the defendant has possession of the money of the plaintiff which, in equity and good conscience, he ought to pay over. "It is a liberal action, in which the plaintiff waives all torts, trespass and damages, and claims only the money which the defendant has actually received." 2 Greenleaf's Evidence, 105.

In reply to this it may be urged that money was not, in this case, the subject of the bailment, yet Camp acknowledges the receipt of so much *Florida money*. What is the precise legal definition of this term, it is unnecessary now for the court to declare, though in the case of Williams *vs.* Moseley, it is clearly indicated its opinion as to another term substantially resembling it. It is sufficient as to the decision of the case at bar, that the court understands, that that which Camp received *was to be treated as money*, and the best evidence of it is Camp's own declaration. In such a case, that an action *for money had and received* is sustainable, seems to admit of no doubt.

Professor Greenleaf, in speaking of such an action, remarks: "In regard to things *treated as money*, it has been held that this count may be supported by evidence of the defendant's receipt of *bank notes*, or promissory notes, or credit in account in the books of a third person, or a mortgage assigned to the defendant as collateral security, and afterwards foreclosed and brought in by him, or a note payable in specific articles, or a chattel." 2 Greenleaf's Ev., 106. It is presumed in this case, that Camp received *bank notes*, though that fact does not appear upon the record.

In the case of Pickens *vs.* Bank, 13 East., 20, the facts were these—a stakeholder, receiving *country bank notes* as money, paid them over wrongfully to the original stakeholder, after he had lost the wager. An action *for money had and received* was brought to recover the money thus paid over, and it was contended the action would not lie, because *bank notes* were paid, and they were not money. Lord Ellenborough said: "Provincial notes are certainly not money; but if the defendant received them as ten guineas in money, and all parties agreed to receive them as such at the time, he shall not now turn round and say, that they were only paper and not money. As against him, it is so much money received by him."—See also page 130, same work. So in Mason *vs.* Waite, 17 Mass. R., 560. *A.* delivered *bank notes* to a carrier, who paid them to B., for a loss at a faro table—it was urged that, inasmuch as the bail-
428 ment consisted of *bank notes, assumpsit* would not lie, but the court ruled otherwise, C. J. Parker observing: "We cannot see, however, why the action for *money had and received* will not lie. The notes were paid and received as money; and as to any want of privity, or an *implied promise*, the law seems to be, that where one has received the money of another, and has not a right conscientiously to retain it, the *law implies a promise* that he will pay it over." So in Ainslee *vs.* Wilson, 7 Cowen Rep., 662, it was held, that *property* paid or received *as money* will support the action for money paid, or *had and received*, the same as if money itself had been paid or received. And if money has been misapplied, the law will raise an *assumpsit*, where it has been received for the use of another. Dumond *vs.* Carpenter, 3 Johns. R., 183. Again: "if a party gives another that which may readily be turned in money, it may be treated *as such* in an action for money had and received. Doug. 137. 4 Bing., 178; and where the property delivered to defendants is saleable, the receipt of money may be presumed, particularly *after a lapse of time*. Ib., 4, T. R., 687. 3 B. & P., 559. 2 Saunders' Pl. & Ev., 672." We refer also to the authorities cited by counsel of appellants, viz: Whitehead *vs.* Greetham, 2 Bingham, 464. Shilliber, *vs.* Glynn, et al., 2 Mee. & Welsby. Ex. Rep., 143. 10 Ad. & El., 98. The American annotator upon the case of Coggs *vs.* Bernard, (1 Smith's Leading Cases, 188,) speaking upon the subject of bailment, after giving his views as to *unpaid agents*, holds this language: "It may be proper to note, that where money is the subject of bailment, or delivery to any agent, paid or unpaid, *assumpsit* is the proper remedy; *assumpsit* in the form of *money had and received* usually being, in case of money, a substitute alike for trover, trespass, and case; though as a substitute for trover, there need be no previous demand. See Graves et al. *vs.* Ticknor, 6 New Hampshire, 537. We have looked at that decision—it is lucid and able, and fully sustains the foregoing remarks.

The defendant in the suit pleads a tender, with a *profert in curia* of three hundred and eighteen dollars of Florida money. The tender admits the existence and validity of the debt or duty, insisting only upon the fact, that there has been an offer to pay or perform it. It admits the contract and facts stated in the declaration, and goes only in bar. 2 Greenleaf on Ev., 562. 2 Saun. on Pl. & Ev., 836-'7. The plea does not state that the tender was made *before the commencement of the suit*, and is, therefore, insufficient. Ordinarily, 429
the tender should be made at the time the money became due; but if no day of payment is fixed upon, proof of tender before suit brought would be sufficient. 2 Greenleaf, 567. 2 Saunders' Ev., 237. The plea, too, in other respects, is exceptionable, if the tender was intended as one of specific articles, for it does not state that the Florida money tendered is the same that was received; nor does it set forth that Camp endeavored to dispose of it to the best advantage, but merely that it could not be sold for its full and fair value.

In conclusion, we are not to be understood as deciding, that the plaintiff is absolutely entitled to recover the full amount which the receipt of Camp calls for upon its face. The action, as we have seen, is an equitable one, and the plaintiffs are entitled to recover such damages as they are entitled to *ex æquo et bono*, they being dependent upon the value of the bailment entrusted to his charge.

We think, for the reasons herein set forth, the demurrer to the defendant's plea should not have been overruled by the court below, and that the judgment of the court was erroneous. It is, therefore, ordered that the judgment of the court below be reversed, and that the cause be remanded thither, for further proceedings in accordance with this opinion.

WILLIAM D. MOSELEY, TENANT, &C., APPELLANT. *vs.* JOHN DOE, EX DEM. HENRY R. EDWARDS, APPELLEE.

The lien of a judgment is not lost by mere delay to sue out execution.

An execution sued out after a year and a day is not void, but voidable only.

The right of the plaintiff to sue out execution after such time can be questioned only by the defendant; it cannot be impeached collaterally.

The lien of a judgment growing out of a matter of record, is constructive notice to all the world.

Real property levied on under a junior judgment and sold, is still subject to the lien of an older judgment; and the Circumstance of not proceeding upon the older, until a subsequent lien has been obtained and carried into execution, will not displace the prior lien.

Appeal from Circuit Court of Jefferson county.

The jury found a special verdict, which is recited at length in the 43
opinion pronounced by the court, and which sets forth the facts of the case. Upon this finding, the court below, Judge BALTZELL presiding, held the law to be for the plaintiff, and gave judgment accordingly—from which judgment, defendant appealed.

S. W. Carmack & James T. Archer, Esquires, for Appellant.

L. A. Thompson, Esquire, for Appellee.

Opinion by Chief Justice DOUGLAS:

This is an action of ejectment, instituted in the circuit Court of Jefferson county, on the demise of Henry R. Edwards, the appellee, against Richard Roe, Wm. S. Hill tenant in possession, to recover the premises in the declaration mentioned. Wm. D. Moseley, the appellant, who, on motion, admitted the defendant, in the place of the said Roe and Hill, and thereupon he (the said Moseley) confessed the lease, entry and ouster in the declaration mentioned, and put in the usual plea of not guilty—upon which issue was joined, and the cause was submitted to a jury upon the evidence, who returned a special verdict, which, amongst other things, set forth: That, on the 4th day of November, A. D. 1839, and before that time, one John D. Edwards, of the county of Jefferson, was seized in his demesne as of fee, of and in the messuages, lands and tenements, with the appurtenances, in the declaration mentioned; that, on the said 4th day of November, A. D. 1839, one William Wilson, by the consideration of the Superior Court of the Middle District of Florida, in and for the county of Jefferson, recovered judgment against said John D. Edwards, for the sum of fourteen hundred and forty-nine dollars and thirty cents for his damages, and the sum of four dollars and forty-eight cents costs—on which judgment a writ of execution was issued in due form of law, on the 8th day of June, 1842—the said judgment not having been revived by *scire facias*, against the said defendant; that, on the 2d day of November, 1840, one William G. Ponder, by the consideration of the same court, recovered judgment against the said John D. Edwards, for the sum of three thousand two hundred and one dollars and eighteen cents for his damages, and the sum of $4 52-100 for his costs—on which judgment a writ of *fi. fa.* issued in due form of law; that, on the 23d day of April, 1841, one Harriet T. Wilson, administratrix of Robert H. Wilson, by the con-

Moseley vs. Edwards.—Opinion of Court.

431 sideration of the same court, recovered judgment against the said John D. Edwards, for the sum of thirteen thousand six hundred and thirty-nine dollars, sixty-two cents, for her damages, and the sum of ——— for costs—on which judgment a writ of *fieri facias* issued in due form of law; that, on the 5th day of November, A. D. 1844, Christopher Hagan and Harriet Hagan, by the consideration of the same court, recovered judgment against the said John D. Edwards, for the sum of fifteen thousand three hundred and forty-three dollars and fifty-seven cents for their damages, and $6 12-100 for their costs—on which judgment a writ of *fieri facias* issued in due form of law; that, on the last specified judgment, an alias writ of *fieri facias* issued in due form of law on the 21st day of October, 1846, which was levied on divers property of the said John D. Edwards, including the premises in question; and that, by virtue of said *fieri facias,* the interest of the said John D. Edwards in the lands levied on was sold by the sheriff, on the first Monday (the 7th day) in December, 1846, by consent of parties; and that at said sale, William D. Moseley, the defendant, purchased all the interest of the said John D. Edwards, in and to the lands and tenaments, &c., including therein the premises in dispute, at and for the price of ten dollars, and received a conveyance therefor in due form of law, executed from Smith Simpkins, Sheriff of Jefferson county; that, William G. Ponder having, on the 11th day of November, 1846, sued out a *pluries* writ of *fieri facias* on his judgment, did claim and receive the said sum of ten dollars, the price of said land; that one William Denham having obtained an assignment of the judgment, heretofore specified, of William Wilson, caused an alias writ of *fieri facias* to be issued thereon, on the sixteenth day of February, A. D. 1847, in due form of law, and placed the same in the hands of the said sheriff of Jefferson county—by virtue of which last mentioned writ of *fieri facias,* the said sheriff levied upon the following described property, viz: the west ½ of the southwest ¼, Sec. 27, T. 1, R. 3 N. & E.—east ½ of the southeast ¼ of Sec. 29, T. 1, R. 2, N & E.—the northeast ¼ of the northeast ¼ of Sec. 32, T. 1, R. 3, N. & E.—northwest ¼ of the northwest ¼ of Sec. 30, T. 1, R. 3, N. & E.—southeast ¼ of the southwest ¼ of Sec. 28, T. 1, R. 3, N. & E. October 16th, 1847.

The above lands were advertised according to law, and sold on the 6th day of December, being the first Monday of said month, Henry
432 R. Edwards bidding twenty-four dollars; being the highest bidder, they were knocked off to him. That the said Henry R. Edwards, the plaintiffs lessor, being such highest and best bidder at said sale, and being declared the purchaser of said lands, which are the premises in the declaration mentioned, the said premises were in due form of law conveyed to him by deed, duly executed by James R. Tucker, Esquire, Sheriff of said county. And we the jury further find, that, on the 10th day of March, A. D. 1848, the said defendant, William D. Moseley, was in possession of the said premises by his tenant, William S. Hill.

And the jury having submitted to the court the question, whether the said plaintiff or the said defendant was in law entitled to judgment upon the facts presented in said special verdict, the court pronounced judgment for the plaintiff, and the defendant appeals to this court. The facts were all fully stated in the special verdict, but as there is no controversy about them, it is deemed unnecessary to recite them more fully.

The only errors assigned are, that the court erred in rendering judgment for the plaintiff, and in not rendering judgment for the defendant. And the only question presented for our consideration is, whether the sale of the lands in question, by virtue of the *fieri facias* issued upon the junior judgment of the Hagan's, carries the title against the elder judgment rendered in favor of William Wilson.

The question arises under our act of the Legislature, entitled "An act in relation to liens created by judgments," approved February 12, 1834. Duval's Com., 369. Thompson's Digest, 351, 352; the first section of which declares that every judgment at law and decree in equity, which shall be entered and pronounced in any of the courts of this State, shall create a lien, and be binding upon the real estate of the defendant or defendants, *as at common law.*

The second section declares, "That no judgment at law or decree in equity shall create a lien upon the real estate of the defendant situated in any other county than the one in which the same shall have been rendered or pronounced, until the said judgment or decree shall have been recorded in the county in which the real estate, so sought to be bound, may be situated.

The counsel for the appellant contend, that as a judgment created no lien upon the lands of the defendant at common law, the words *as at common law,* at the close of the first section of our statute above cited, must refer to the lien given by the statute of West. 2, 13 Ed- 433
ward 1st; and by that statute they insist that the liens dependend upon the right of the plaintiff to sue out an *elegit,* citing 1 Call Reps., 125. 4 Hen. & Mumford, 51, and 2 Brock. Rep., 254; and so, under our statute, the lien, they argue, depends upon the right of the plaintiff to sue out a *fieri facias;* that, after the lapse of "a year and a day," the right of the plaintiff to sue out a *fieri facias* was suspended, until the judgment should have been revived by *fieri facias,* and the lien was also suspended. Consequently a *fieri facias* issued upon a junior judgment, and levy upon and sale of the land defeated the lien of the elder judgment, and vested the title in the purchaser. This construction, however, we consider too far fetched. From the peculiar phraseology adopted, it is to be sure somewhat difficult to give those words any meaning. The common law was in force by virtue of the act of Nov. 6th, 1829, "For the adoption of the common and statute laws of England," &c. (Duval's Comp., 357, sec. 1. Thompson's Digest, p 21, No. 2,) when the above cited act was passed. If, therefore, the common law had made judgments a lien upon the lands of the debtor, to have passed an act declaring that judgments should create a lien upon the real estate of the defendant, "as at common law," would have been not only useless but absurd. It is our duty to give those words a sensible construction, if possible; if we cannot, we must reject them altogether. We do not feel authorized to say, that a statute giving a lien "as at common law," means a lien according to a British statute. By the common law, lands and tenements were not subject to be taken in execution at the suit of a common person, except in case of an heir, who had been sued upon a bond of his ancestor, in which he was expressly named. To remedy this obvious defect, came the statute of West, 2, 13 Edward 1st, Ch. 18, which did not in express terms give a lien upon the lands of the debtor, but provided "That when debt is recovered or acknowledged in the King's Court, or damages awarded, it shall be from thenceforth in the election of him, (the plaintiff,) to have a writ that the sheriff *fieri faciat* of the lands and goods of the debtor, &c., and the one-half of his land, until the debt be levied upon a reasonable price in extent." Peck's Reps., 30. Upon this is founded the writ of *elegit,* by which all the goods of the debtor are delivered at their approved value into the hands of the creditor, and the one-half of his lands are extended. There is nothing in this statute which indicates the time from which the land shall be bound; but by the 434
construction of the courts, immediately after its enactment and ever since, the judgment has been held to bind the land, and the plaintiff might have execution of the lands which the defendant had at the time of the judgment, although he had aliened them *bona fide* before execution awarded. When the writ was issued and levied, it had relation back to the date of the judgment and cut out all intermediate incumbrances, and remained a lien until the debt was discharged.—Now, when this lien attached, it was subject to all the incidents of any other lien of a similar character—a mortgage for instance—and "the principle is believed to be universal," (said Ch. J. Marshall, in Rankin & Schatzell *vs.* Scott, 12 Wheat., 177,) "that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien be instrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claimant." This is not the provision of a statute, but results from the principles of general justice and equity, and is, therefore, one of the incidents of a lien at common law. The position assumed by the counsel for the appellant is, that, as the judgment of Wm. Wilson was rendered in 1839, and had not been revived by *scire facias,* he had lost his right to sue out execution upon it, and consequently his lien was gone, *sub modo,* at least. Our statute, by the natural import of its terms, leaving out the words, "as at common law," makes a judgment at law or decree in equity a lien upon the lands of the debtor, which binds them from its rendition. May it not be that the Legislature anticipated that, even upon this phraseology, the very objection here made might be taken, and, therefore, *"ex abundanti cautela,"* added the wards, "as at common law," in order to ensure for their statute lien the same incidents as the common law gives to other positive liens, from the date of the judgment or decree. We know not what other or better construction we can give them. The learned author of the Digest has left them out as "useless verbiage," or "superfluous matter," (see note at page 352,) and surely they can well be spared. If, however, that be the proper view of the matter, then those words would seem to favor the proposition, that the lien of a judgment is not lost by mere delay to sue out execution. But the position that it is thus lost, we think is not sustained by the authorities. The augument is, that the lien under the statute of West. 2. 13th Edward 1,

435 Chap. 18, depends upon the right to sue out an *elegit*—ergo the lien under our statute depends upon the right to sue out a *fieri facias*, and that the holder of the judgment rendered in favor of Wm. Wilson, as above stated, lost his right, by the delay that had occurred in regard to it; but *"non sequitur,"* he had so lost his right that he could not at any time sue out a *fieri facias*. No one but the defendant in execution could question that right; it cannot be impeached in this collateral manner; it is not void, and it is voidable only at the instance of the party against whom it was issued. Oxley *vs.* Mizle 2 Murphy, 250. 3 Bacon Abr., New Ed., Title Execution, page 723, letter H, note. McCrea *vs.* Bartlett, 8 John., 361. Jackson ex dem. Roosevelt *vs.* Roosevelt, 13 John., 97, 102. Ridgeley's Executors *vs.* Gartrell, 3 Harr. & Mc Hen., 449, 450. Simmons *vs.* Wood, 6 Yerger, 521. Overton *vs.* Perkins and others, Mart. & Yerger, 367. Day *vs.* Sharp, 4 Wheat., 339. 1 Supp. to U. States Dig., 744, No. 172.

In Virginia, there is no statue which in express terms makes a judgment a lien upon the lands of the debtor; as in England, the lien is the consequence of a right to take out an *elegit*. During the existence of this right, the lien is universally acknowledged. Different opinions (said Ch. J. Marshall, in the case of the United States *vs.* Morrison et al., 4 Peters' Reps., 136,) seem at different times to have been entertained as to the effect of any suspension of that right. Tucker, Pres., in the case of Watts et al., *vs.* Kearney and wife, 3 Leigh, 293, said, that, however long the judgment may have been out of date, there is no doubt that if it is susceptible of being revived at all, the lien upon the lands yet in the hands of the debtor would be revived *eodem staut.*

The case of Ridge *vs.* Prather, 1 Blackford's (Indiana) Reps., 401 to 405, is this: Prather obtained judgment against Gilwick in 1816, and had execution and *fieri facias* thereon; the sheriff returned the execution *executed* by a replevin bond the same year.—Gilwick afterwards died. Upon *scire facias* issued in 1823, against the heirs and terretenants of Gilwick & Silly, the replevin surety, the sheriff *inter alios*, returned Ridge terretenant of land that was Gilwick's at the time of the judgment. Ridge came in, and pleaded that he was a *bona fide* purchaser for Gilwick without notice, after the expiration of a year and a day from the time of the judgment on the replevin bond, and before the issuing of the *scire facias*.
436 Upon demurrer to this plea, there was judgment for Prather, the plaintiff, in the Circuit Court, and this judgment was affirmed by the Supreme Court, after a full discussion and a thorough examination of the principles upon which it is founded. The statute of Indiana makes judgments a binding lien upon the lands of the debtor, and is derived from Pennsylvania, (ibid., 402,) whose statute on this subject is similiar to our own. Carkhuff *vs.* Anderson, 3 Binney's Reps., p. 4, was as follows: "In 1799, Hollenbach obtained judgment against Craig; in 1801, Craig sold and conveyed his land to Anderson; in 1802 Hollenbach revived his judgment by *scire facias*, and Clarkhuff purchased the premises at sheriff's sale. In ejectment against Anderson, it was held that Hollenbach's judgment was a lien on the land, and Clarkhuff recovered." In Green & others *vs.* Allen, Wash. C. C. Reps., 280, the court held, "That the lien of a judgment which bound real estate was not lost, if, after *testaum fieri facias* had been levied and returned, the plaintiff in the writ ordered further proceedings to be stayed." In Campbell, use, &c., *vs.* Spencer et al., 4 Ala., 552, cited by the counsel for the appellant, the court, after stating the case, say: "From this statement, it appears a *levy and sale was made under these execution sufficient for their satisfaction.* and in a contest with junior judgment creditors who have acquired a lien on other property, it must be regarded as a satisfaction. To hold otherwise, would be to permit the sheriff virtually to destroy the lien created by the law in favor of the judgment of the plaintiff in error, and to prefer those judgments younger than his, which were capriciously discharged by him out of the money belonging to Marks and the Branch Bank at Mobile. It was their duty to attend to the application of the money obtained by the sale under their executions, and by neglecting to do so, they will be remitted to their claim against the sheriff, and will not be permitted to interfere with the lien of a junior judgment creditor subsequently obtained." It appears, therefore, that this was a contest between rival executions for the proceeds of the sale, and in such a contest, the court said, (page 553,) "if the lien is not lost in some of the modes here pointed out, the date of the respective judgments will determine the priority of right." It is true that, in this case, the court said that a *bona fide* purchaser under a *fieri facias* upon a junior judgment, would be protected, citing Den. *vs.* Hill, 1 Haywood, 72, where the court says: "Were it not so, dormant judgments might be revived a long time afterwards, and the innocent vendee evicted, without the possibility of 436
ever regarding the purchase money," and that, in such a case, the lien of the elder judgments would be lost by the laches of the plaintiff.—But as to this it may be remarked, that this was not the question before the Alabama Court; the lien there had been lost by a levy and sale of sufficient property to pay the judgment, and neglect of the parties to see to the application of the money; and, besides, neither of those States have a statute like ours. Their statutes only subject lands to the payment of judgments, and places them as regards this question upon no better ground than an *elegit*. Indeed, in the case of Den. *vs.* Hill, 1 Hay, 81, it is said, "ever since the year 1732, the writ of *fieri facias* has issued in North Carolina against lands and tenements, as well as goods and chattels; the act of George II. declaring that they should be subject to the same proceedings and process and be held in the same manner as personal estate." This writ stands upon the same footing that it did before the 29th, Charles II.; therefore, the property of the debtor is bound from the test of the writ, citing 2 Bac. 352. Salk. 322, and 8 Coke, 71. The case of Scribe vs. Deane et al., 1 Brock., 166, was decided in Virginia, where the lien is created by the statute authorizing an *elegit*. Bliss *vs.* Bull, in 9 John. Rep., 132, relates to personal property only, and the court say: "There being no evidence of an actual levy by the sheriff on the goods and chattels of A., the sale to B. was valid, and not barred by the execption." We do not perceive its bearing upon the case under consideration. In the case of Porter's lessee *vs.* Cocke, Peck's R., 30, the lien of the elder judgment was postponed, because an injunction had been obtained, and after its dissolution, the plaintiff agreed with the defendant, in consideration of a partial payment of the judgment, to stay the execution six months. In the meantime. in execution on a junior judgment came to the hands of the sheriff, under which he sold, and the sale was held to be valid. This case is also clearly distinguishable from the one before us.

These are all the cases cited in the brief of the appellant's counsel, and they do not seem to us to sustain the proposition assumed. In Forsyth *vs.* Marbury, decided by Judge Law, and reported by R. M. Charlton, 325, 326, it is said that "the act of 1799 bound all the property of the defendant, from the signing of the first judgment."—"It is not apprehended," said that very able and learned judge, "that the statute of Geo. II., chap. 7, touches the question of lien; it only enabled the land to be sold *absolutely* as personal property, 4
but the execution had relation back so as to bind from the judgment. It is not an absolute right in the property itself which the creditor obtains by his judgment, either in England or in Georgia; the legal title is not transferred from the debtor to the creditor. He has, however, a *special interest*, which, although indefinite in extent, may be rendered definite by a levy; an equitable interest which is perfected by the sale, the sheriff's deed completing the transfer of the property itself, and conveying the legal title. The Master of the Rolls in Brace *vs.* Dutchess of Marlborough, 2 P. Williams 49, says, "a judgment creditor has no right in the land—he has neither a *jus in re.* nor *ad rem;* all that he has is a lien upon the land." The Supreme Court of the United States in Conrad *vs.* Atlantic Insurance Co., 1 Peters' Reps., 443, say: "it is not understood that a general lien by a judgment constitutes *per se* a property or right in the land itself. It only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor for this purpose relates back to the time of the judgment, so as to cut out intermediate incumbrances. Thus, while the creditor acquires no absolute property in the estate of his debtor, he has an interest which is capable of being defined, and which cannot be defeated save by some act of the party himself, by which it shall be lost or displaced. By pursuing the means pointed out to him by law, he is capable of converting his general lien into a specific title, which relating back to the date of his judgment, must prevail over all subsequently acquired adverse interests and rights; and thus this lien affords complete security against subsequent purchasers and incumbrances. Before this is done, the debtor having the legal title, it is true may sell and incumber the property; but whoever takes it must hold it subject to the lien, which lien growing out of matter of record, is constructive notice to all the world. A purchaser can acquire no other rights than those which were vested in the seller, in whose shoes he stands.—So, if the property be levied on by a junior judgment, it is still subject to the lien of the elder judgment. In the language of Chief Justice Marshall, the circumstance of not proceding upon the elder judgment, until a subsequent lien has been obtained and carried into execution, will not displace the prior lien. Rankin et al., *vs.* Scott, 12 Wheat., 179. 6 Peters' Cond. Reps., 506. Take (said the Chief

Justice) the common case of mortgages—it has never been supposed that a subsequent mortgagee could, by obtaining and executing a decree for the sale of the mortgage property, obtain precedence over a prior mortgage, in which all the requisites of the law had been observed. If such a decree should be made, without preserving the rights of the prior mortgagee, the property would remain subject to those rights in the hands of the purchaser. The implied lien created by the first judgment retains the preference over a lien created by a second judgment, so long as an *elegit* can issue on the first. A *statutory lien* is as binding as a mortgage, and has the same capacity to hold the land, so long as the statute preserves its force. The cases cited of execution against personal property, we do not thing apply. In those cases, the lien is not created by the judgment, or by matter of record.

In Andrews *v.* Doe ex Dem. Wilkes, 6 Howard's Mississippi Rep., 554 to 568, Chief Justice Sharkey, delivering the opinion of the Court, said: "The question is whether a prior sale, under a junior judgment, destroys the lien of the elder judgment. It is freely conceded by counsel (says the Chief Justice) that, as a general rule, it does not; but that this case forms an exception, inasmuch as the liens accrued under different jurisdiction—[one of the judgments having been obtained in a court of that State and the other in the District Court of the United States.] But as the question is fairly before the court for the first time, it is proper that it should be judicially settled," and, after citing the act of the Legislature of Mississippi of 1824, which declares "That in all cases the property of the defendant shall be bound and liable to any judgment that may be entered up,, from the time of entering such judgment, proceeds as follows: "This is emphatically a lien on all property in favor of a plaintiff. A lien is a right given by law to have a debt satisfied out of a particular thing. It may originate by contract or by operation of law and, in either case, the effect is the same—the property being bound and liable to satisfy the judgment, is as much a lien as though it had been created by act of the parties. The judgment is not only a lien, but it is a lien of record, which is notice to every one. The instance of a mortgage lien is a familiar one. There can be no difference in principle between a mortgage and a statutory lien. The one is as binding as the other." And in Ridge *v.* Prather, above cited, it was expressly held that the lien is not limited to a year and a day. Love *vs.* Harper et al., 4 Humphrey, 116, is to the same effect. In Overton *v.* Perkins, Mar. & Yerg. Rep., 367, it was held that "An execution issued and levied on land more than a year after the rendition of the judgment is voidable, but not void;" and in Simmons & Whyte *v.* Wood's lessee, 6 Yerg. Reps., 518 to 522, Carton, Chief Justice, delivered the opinion of the court. "The first objection," he said, "is that an execution issued more than a year and a day after the judgment was rendered, is void, and a Sheriffs' sale by virtue thereof communicates no title to the purchaser. This position cannot be sustained by the rules of the common law. Whyte's judgment was rendered after the sale to Wood and cannot challenge it, because the sale was made after a year and a day"—citing Overton *v.* Perkins and also 8 John. Rep., 362, and 13 John., 557 and authorities there cited, which, he says, show the true rule. The case cited from 8 John. is Jackson ex dem. McCrea *v.* Bartlett, in which it was expressly ruled that, in an action of ejectment against a purchaser of land under a sheriff's sale, the regularity of the execution cannot be questioned—page 365, citing Levintz, 403. 3 Caines Cases, 37 and Shirley *v.* Wright. 1 Salk., 273. That from 13 Johns., 97, 102, is Jackson ex dem. Roosevelt *v.* Delaney and Russell, in which it was held "That the objection that the sale took place long after the return day, and that the execution had not been issued until after a year and a day after judgment, cannot affect the sale." In Butler *v.* Haynes, 3 New Hamp. 22, it was held by Richardson, Chief Justice, that "where an execution issues after the death of him against whom it runs, it is not a nullity, nor can its validity be called in question collaterally."

In Shotwell *v.* Murray, 1 John. Chancery Reps., 512, the judgments under which the lands were sold, were both in favor of the same person. The plaintiff had the first sale made under his younger judgment, and then had the same lands levied on, in the hands of the purchaser, and resold under the elder judgment. The chancellor decided that the purchaser under the younger judgment held the land, subject to a re-sale under the elder judgment.

Since the statute of West 2, 13 Edward I., it has been considered that when a man has judgments for debt, or is conusee of a statute, and the debtor before execution aliens by fine, and five years pass, yet the plaintiff may still have execution. 3 Bacon's Abr., new edition, title Execution, page 725. These authorities, we think, clearly show that the judgment of the court below upon the special verdict was right.

It has been urged that this case comes within the spirit, if not the letter, of the statute of frauds; that the failure of the plaintiff in the elder judgment to sue out execution tended to hinder and delay creditors, and was therefore, as to them, a fraud in law. But we do not perceive the force of the argument. Junior judgment creditors were not prevented by it from proceeding; they might, at any time, pursue their remedies against the property of a debtor. It would have been sold, to be sure, subject to the lien of the elder judgment—so much as it was worth more, it is to be presumed, could have been realized from it. The plaintiff in the elder judgment had a right, in any event, to be paid out of it, unless he voluntarily relinquished his claim or it was displaced by some act of his or "the party holding it," and the judgment, being a *debt of record,* was notice of that right to all the world. Upon what reasonable ground could junior incumbrances be permitted to disturb it? Upon what principle could such a lien be divested in favor of one who knew of its existence? He can have no superior right to urge—not even an equity to set up against it. He purchases with knowledge of the prior lien, and it is supposed that he gives what an encumbered property is worth; and, in this case especially, there is surely nothing to induce a belief that the purchase was not thus made, as we are shewn by the record that ten dollars was the whole amount paid as the purchase money for several tracts of land.

The judgment of the Court below, is therefore affirmed.

Per curiam.

R. B. & D. W. Post and David C. Wilson, Appellants, *vs.* William S. Carpenter, et al.

This Court having appellate jurisdiction only, to be exercised in cases brought up by appeal or writ of error from the several circuit courts, the decision of a judge sitting in vacation, is not such a decision as an appeal lies from.

The Appellants, Post and Wilson, sued out writs of attachment against property belonging to William S. Carpenter, an absconding debtor. Other creditors also commenced suit by attachment against the said Carpenter, but the writs sued out by Appellants were first levied. The attachments of Appellants and the other creditors were levied on sundry bales of cotton at St. Marks, in the county of Wakulla, which cotton was, by order of the Judge of the Middle Circuit, sold, and the proceeds paid into the registry of the Court, to abide the final judgment to be rendered in said suits.

At the Fall term of the Circuit Court held in and for the county of Wakulla, 1848, judgments were entered up in favor of the several plaintiffs in attachment, and the proceeds of the sales of Cotton not being sufficient to pay off and discharge the debts due to all the attaching creditors, the counsel for Appellants moved the court to grant an order directing the proper officer to appropriate the said proceeds to the payment of the debts for which attachments had been first levied; or to direct payment according to priority of levy.

This motion was adjourned to be heard at a subsequent day, in Leon county, by agreement of counsel: and afterwards the motion, having been heard and argued before the Hon. Thomas Baltzell, Judge of the Middle Circuit, was overruled. From which decision the said Post and Wilson, claiming to be entitled to the moneys by reason of priority in the levy of their attachments, appealed.

The counsel for the respective parties interested agreed upon a statement of facts for the purpose of procuring a decision upon the question involved in the motion.

But the only question entertained or considered by this Court was that of jurisdiction.

A. E. Maxwell and *Douglas & Hogue* for Appellants.

Chief Justice Douglas delivered the opinion of the Court:

In this case, as appears by a statement of facts presented in this Court, a motion was made at the Fall Term of the Circuit Court holden in and for Wakulla county, in the year 1848, for the distribution of certain moneys, the proceeds of property of the one William S. Carpenter, which had been sold by order of the Judge of said court, after it had been levied upon by the sheriff of said county by virtue of sundry writs of attachment, at the suit of different parties, against said William S. Carpenter; in which suits judgments had been respectively rendered in favor of the plaintiff therein; which

443 motion, by consent of parties, was adjourned to be heard in Leon County.

The case comes before us on the following statement, which is appended to the statement of facts above mentioned, viz:

"And the motion aforesaid, having been argued before the Judge aforesaid and considered by him, was refused and overruled, and all the parties decided to be entitled to share the said moneys pro rata. From which an appeal is taken by the said R. B. & D. W. Post and David C. Wilson."

To which statement is annexed an agreement in the following words:—

"It is agreed by and between the undersigned attorneys in the said suits of attachment that this motion be sumitted to the Supreme Court, upon the foregoing statement of facts, and that he decision of said court thereupon shall be as binding as if brought up upon a more formal record. January 15, 1849." Which agreement is signed by the attorneys of the respective plaintiffs in attachment, but is not signed by William S. Carpenter, the defendant in the said several suits of attachment, or by his attorney.

Under these circumstances we are asked to take jurisdiction of and adjudicate this case. But, after the most mature deliberation, we think that we are not warranted in so doing. That an attorney, in an action at law, has a general power to refer his client's cause to arbitration and, by entering into a reference, to bind his client, we entertain no doubt. This principle is sustained by numerous authorities. See Watson on Arbitration and Awards, pages 49 and 50. 8 Law Lib., and cases there cited. But we are not prepared to admit that they, or even the parties themselves, can by such an agreement make this court the arbitrator; and it is very evident that, if we hear this cause, we hear it in that character. The Judgment, if any was really entered in this case, appears from the statement itself to have been given in vacation, and there is nothing in that statement to show that there was any agreement that it might be entered *nunc pro tunc*, or, indeed, that any judgment has been entered in this case upon the records of the Wakulla Circuit Court.—It was, to be sure alleged at the bar that it was understood and agreed by the attorneys of the respective parties, that it should be so entered. This, however, is not sufficient; but if such an agreement had been entered into in writing and filed by them in the proper
444 court, it may be very doubtful whether that, of itself, would have authorized an appeal from such judgment to have been taken *nunc pro tunc*. We are inclined to the opinion that it would not, and that, if appeal could have been taken at all upon such a judgment, a special agreement would have been necessary to have authorized it. But this question, not being now before us, we do not decide it—the time to do that will be when the question arises.

This court has appellate jurisdiction only, and that is to be exercised in cases brought up by appeal or writ of error from the several Circuit Courts—see Thompson's Digest, pages 50 and 51. No. 1 and No. 5. The judge, sitting in vacation, is not, for this purpose and in contemplation of these provisions, a Circuit Court, and no appeal lies, therefore, to this court, in such a case, from such a decision; and we are informed by the Judge who acted in this matter, that he would not have done so had he not understood that no appeal was intended; and, if we rightly comprehend his views, the decision that he made was, according to his understanding of it, rather an extra-judicial one. The only statute in this State which provides for appeals in cases at law, [and the common law afforded no such remedy,] may be found in Thompson's Digest, page 446, No. 1, and in Duval's Comp., page 108, sec. 1; and it declares that "If a party, in either of the Circuit Courts of this State, shall feel aggrieved by a final judgment, sentence or decree made or pronounced by any or either of said courts, it shall and may be lawful for such party, during the session of the court at which such judgment, sentence or decree is rendered or pronounced, or within ten days thereafter, to obtain, in court, if the appeal be made in term time, or in the clerk's office, if it be in vacation, his, her or their appeal to the Supreme Court of this State." No such appeal was thus taken or obtained in this case, and no record of the Circuit Court is brought up. Consequently, this Court has no jurisdiction in it, and the case must be dismissed.

Per curiam.

ISAIAH D. HART, APPELLANT, *vs.* ORLOFF M. DORMAN, APPELLEE. 445

When partial payments are made, the rule, with respect to interest, is to apply the payment in the first place to the discharge of the interest due at the time of payment. If the payment exceeds the interest, the surplus must be applied to the discharge of the principal, and interest is then to be computed on the balance of the principal remaining due.

When the payments are less than the interest, the surplus of interest unpaid is not to be considered as principal; but interest continues on the former principal, until the payment taken together exceed the interest due; and then the surplus of interest is to be applied to the reduction of principal, and interest again to be computed on the balance.

There is nothing in the statute of this State which makes this mode of calculating interest and applying partial payments improper—nor is there anything peculiar in that statute, or distinguishing it from the statutes of other States, where the rule is recognized.

Appeal from Duval Circuit C...

The plaintiff, Dorman, brought an action of *assumpsit* to the Spring Term, 1848, of the Circuit Court for the County of Duval, against Hart, the defendant below. The suit was founded on a promissory note, on which partial payments had been made, and the interest was calculated according to the rule laid down in the opinion of the court, and the payments applied according to that rule.

At the Fall Term, 1848, of said court, Judge HAWKINS, presiding, plaintiff moved the court for a judgment by default in this cause; and it was ordered that said motion be granted, and that the clerk assess the damages—which having been done in accordance with the rule before referred to, judgment was entered for the plaintiff for the sum of two hundred and nineteen dollars and thirty-six cents.

From this judgment, the defendant feeling himself aggrieved, appealed to this court.

J. W. Bryant, for Appellant, contended,

1. That, under our statute, which provides that "no person or persons shall, upon any contract whatever, take, *directly or indirectly,* for the loan of any money, &c.," "a higher rate than eight per centum," "when no rate of interest is expressed," (Duval Comp., p. 78,) any computation which gives more than that rate, involves compound interest, and, therefore, any judgment rendered upon such computation, is illegal.

2. That several payments having been made *within* the term of 446
one year, interest being computed to the time of such payment, and the amount of payment being deducted, left in each instance a new principal, *composed in part of interest,* which had accrued within the year; thereby interest was computed upon interest, within the term of one year.

The proposition that paying interest *only,* will finally pay the principal, is based upon the supposition, that the party to whom the interest is paid, permits the sum to be continually idle—for, if *invested,* of course it produces returns.

Thompson, for Appellees, contended,

That there was no error in the mode of calculating the amount of damages due for principal and interest in this case, and referred to the following authorities: Meredith *vs.* Banks, 1 Halstead R., 408. Connecticut *v.* Jackson, 1 John. Ch. R., 13-'17. Smith *v.* Shaw. adm., 2 Wash. C. C. R., 167.' 17 Mass. R., 417. 1 Pick., 194. 3 Cowen, 86, n. 1 A. K. Marshal, 584. 2 Hayne, 17. Fonblanque on equity, 654, n., and other authorities there cited.

Chief Justice DOUGLAS delivered the following opinion:

This suit is founded upon a promissory note, upon which several payments were made after it fell due, leaving, however, a balance unpaid, for which a judgment was rendered against the defendant—from which he appealed to this court.

No errors have been assigned, and the only one alleged by the counsel for the appellant in the argument of the case, was as to the calculation of interest, and the application of the partial payments. How that was done is not stated in the record; but we understand, from the course of the argument that the payments were applied in the first place to the interest, and it appears from the record that they all exceeded it, unless it was one of nineteen dollars and eighty-two cents, *by bill rendered.* But it was insisted by the attorney for the appellant, that the interest should have been calculated upon the principal of an account stated, according to mercantile usage, and it is said in a note to Fonb. Equity, vols. in one, Ed. 1831, page 664, (side 440,) that "it is usual amongst merchants in stating their accounts, to let the principal continue upon interest, and to compute the interest upon the payments as they are successively made;" but the

annotator adds: "It is the debtor who gains, and the creditor who loses by this mode—for it is susceptible of mathematical demonstration, that a debt will be wholly extinguished in the course of a few years, (and the time will be longer or shorter, according to the rate of interest,) by the payments of interest, without paying a cent of principal; and Chancellor Kent makes the same remark, in the case of Stoughton *vs.* Lynch, 2 John. Chy. Reps., 214; and in Wasson *vs.* Gould, 3 Blackford Reps., 21, the court held that this mode is not correct—that it subjects the creditor to a loss which he ought not to bear, citing Stoughton *vs.* Lynch. In the case of the State of Connecticut *vs.* Jackson, 1 John. Chy. Reps., 17, Chancellor Kent held the rule for casting interest, when partial payments have been made, to be, to apply the payments in the first place to the discharge of the interest then due. If the payment exceeds the interst, the surplus goes toward discharging the principal; and the subsequent interest is to be computed on the balance of the principal remaining due. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal; but interest continues on the former principal, until the period when the payments, taken together, exceed the interest due; and then the surplus is to be applied towards discharging the principal, and interest is to be computed on the balance of principal as aforesaid;" and this rule is sustained by Penrose *vs.* Hart, 1 Dall., 378. Lightfoot *vs.* Price, 4 Hen. & Mumford, 431. Wasson *vs.* Gould, 3 Blackford, 21. Smith *vs.* administrators of Shaw, 2 Wash. C. C. Reps., 167 to 169. Williams and others *vs.* Houghtailing and Bevier, 3 Cowen Reps., 87, note A.—Fonblanque Eq., page 654, note above cited. Meredith *vs.* Banks, 1 Halstead's Reps., 408 & 409, *note.* Story *vs.* Livingston, 13 Peter's Reps., 871. Edes *vs.* Goodridge, 4 Mass. Reps., 103; and the United States *vs.* McLemoire, 4 Howard's S. C. Reps., 288. And this rule is (we think) more entirely free from objection than any other that has been adopted.

The interest was calculated, and the payments were applied, as we understand, according to this rule, in the case now under consideration; and we do not perceive how it gives compound interest. It is believed that there is nothing peculiar in the provision of our statute relating to interest, as the counsel for the appellant seemed to suppose; nothing which would make this mode of calculation of interest, and applying partial payments under it, give usurious interst; nothing which would not be equally usurious interest under the statutes of at least twenty-six other States of this Union, which have been looked into and examined, including the States, the decisions of whose courts we have just now cited, and in one of which, it will be observed, the rule itself was laid down, and that, too, by one of her ablest jurists; and we have not been able to find, nor have we been referred to, a decided case, or any elementary work, in which the mercantile mode above stated is sustained; and in Meredith *vs.* Banks, 1 Halstead's Reps., 408, it is expressly repudiated, as well as in Wasson *vs.* Gould, 3 Blackford Reps., 21, above cited. The judgment of the court below is, therefore, in all things affirmed.

Per curiam.

BAZIL G. O'BRYAN, APPELLANT, *vs.* WILLIAM M. REED, APPELLEE.

When, by a separate agreement, any submission is intended to be made a rule of court, an agreement to that effect in writing must be signed by the *parties*, and filed in the office of the clerk of the court of which said submission is to be made a rule. An agreement signed by one of the parties is not sufficient.

When after an award is made, the parties agree to open it, and refer the matters in difference between them back to the arbitrators, the agreement so to do will be a fatal objection to a motion asking that the award be made a rule of court, and that judgment be entered theron and execution issue.—In such case, there is no award to be enforced.

Where the record shows admissions by the party seeking to enforce the award, that matters had been submitted to the arbitrators which were not adjudicated by them, and that others were adjudicated which they omitted to state in their award, the award, it would seem, should not be enforced, in the face of such acknowledgements.

If an agreement to open an award is signed by the attorney of one of the parties, though he had no authority, yet, if the party for whom he assumed to act subsequently ratifies the act, it is valid.

Appeal from the Circuit Court of Hamilton County.

The record in this case shows the following state of facts: The parties on the 13th of April, 1847, mutually executed bonds, and agreed to submit all matters in controversy between them to arbitra- 449
tors, to be indifferently chosen by them, which was done.

On the 23d of April of same year, the arbitrators, so chosen, made an award—by which among other things, they awarded to O'Bryan, the appellant, the sum of four hundred and seven dollars and ninety-seven cents.

At the foot of the bond of submission, signed by Reed the appellee, there is an agreement also signed by him, but not by appellant, to the effect that the award be made a judgment of the Circuit Court of Hamilton county.

Subsequently, the parties agreed to open the award, and to submit to the arbitrators all matters which they had failed to adjudicate, and all such as they had adjudicated, but had not set forth in their award. No other award was ever made by the arbitrators.

At the spring term, 1848, of the Circiut Court held in and for the County of Hamilton, the appellant, by his attorneys, moved that the bond of submission and award be made a rule of court, as stipulated and provided for in said bond, and that judgment be entered thereon and execution issue according to law. This motion being heard at the fall term of said court, the Hon. THOMAS BALTZELL presiding, was overruled.

From this decision the defendant prayed an appeal, which was granted.

Randall, for Appellant:

The record in this case sets forth the rule which was applied for and refused, and the refusal of which error is precidicated.

The stipulation that the award be made a rule of court, also appears of record.

The award was made and signed, 23d April, 1847, but no where does it appear when it was *published*—by delivery of a copy or other notice.

On its face and its terms it is *final* and *complete,* as respects the matters in controversy. It declares and decides, in the outset, that Reed is indebted to O'Bryan, in a certain sum absolutely due, viz: the sum of $407 97-100.

It then directs and awards certain acts to be done and omitted by plaintiff, O'Bryan, which we prove by his own affidavit, and by that of Purviance, one of the arbitrators, that he (O'Bryan) fully complied with, doing what was prescribed to him, and omitting to do 450
what was forbidden him in the award.

It is fully in proof, also, that defendant Reed, accepted at his hands performance of the acts enjoined upon O'Bryan, such as the return of the draft or order on Blood; that Reed also received the benefit of the withdrawal or dismissal of the suit then pending against him; that he held on to the joint chattels reserved to him by the award, and the debts or claims due to the partners mutually for lumber.

Thereis no evidence that defendant, Reed, has done one act, either to comply with the terms of the award, or to set it aside by course of law, further than by opposing the granting of this rule.

No motion or ruling was made or attempted in court to carry out the provisions of the bond of submission, or to enforce or set aside the award, until the rule entered by O'Bryan in February, 1848.

The cause of this delay, as appears by the proofs, was the effort made by the parties (which failed through Reed's opposition) to settle their dispute amicably, *on the principles of the award,* and without invoking the aid of the court; *but we deny* that O'Bryan ever consented or designed to give up or release the award made.

The *proposal* (for it in effect was no more) to *open* the award, to make it "more in form"—not being legally executed by Reed, but by the act of his attorney in signing his name to it being disavowed, and found fault—was no more than a mere inchoate, unexecuted *project*—not binding on either, and left the original award unimpaired and in full force.

Moreover, it will be seen that such projected new submission did not profess to do more than to make the original award more formal, and to extend to O'Bryan a longer time to return the order on Blood, or to indemnify Reed for his *non-return*—a matter rendered altogether useless and superfluous by O'Bryan's actual return of said order, as proved by Purviance. That proposed submission also provided, "that the award be entered on the docket of the court."

No new valid submission, then having been made—no new *award* allowed to be made by defendant—*the old award,* the only one in the cause, stood good, until *set aside,* on motion and proofs of its illegality or insufficiency, by one or other of the parties.

In the court below it was objected, that the application for the rule was too late—that it should have been made at a prior term of court,

451 the term next after the date of the award, viz: at the fall term, 1847.

To this objection we have a two-fold answer. One, a denial of the fact on which it is founded; and next, as to the law applicable to the fact assumed.

1st. We answer, the objection assumes (from the absence of proof) that the award was made when it bears date. This by no means follows: for *in legal contemplation,* until the parties are duly notified by delivery of a copy, if the submission so provide, or by *publication,* is of no award. 2nd Archbold's Prac., 1251, (note.) Watson Arb. & Aw., p. 131, last. Edn. p. 81, old edition. 2d Archbold's Prac., 1230.

Here, too, it appears in the proofs, that the award was *retained* or held back, by mutual consent and for further negotiations, which, however, ultimately led to nothing.

But, before proceeding to the other branch of the enquiry, viz: *the law applicable to the fact,* it may be convenient to dispose of another objection, which was, "that the submission should have been made a rule of court, prior to the award being made." This we respectfully deny to be the law in England, or in Florida. In England, under the statute 9 and 10th William III., sec. 15, (which corresponds substantially with our act of the Legislature on the same subject,) the *submission* and *award* may both be made a rule of court *at the same time.* Watson Arb. & Aw., p. 14, top. 27 & 8 margin, and cases cited. For the statute 9 & 10 Wm. III., sec. 15, see p. 13 & 14, Watson's old edition—p. 46, new edition.

The language of Watson is, "that where there is consent of parties to this effect, the statute has been construed largely," &c.; and "thus a consent in the arbitration bond to make the award a rule of court instead of the submission, will, it seems, warrant the interposition of the court under the act."

Let the court now compare the terms of the act of Florida, (p. 399 of Thompson's Digest,) with the statutes of 9 & 10 Wm. IIId., and it will be seen that they alike say, "That the *submission* shall be made a rule of court," &c. Yet such terms justify the parties, *when they consent,* to make the *award,* as well as the submission, a rule of court; and for the veryobvious reason, that the *award* in such a case becomes *part* of the submission, if not the very submission itself.

452 And now recurring to the first objection, that our rule was not entered in time, and waiving the answer, that *"non constat,"* when in legal contemplation the award was made, we answer as to the law.

2d. By denying that there is any thing in our statute, which imposes the duty *upon the party claiming the benefit of the award,* and *seeking its enforcement,* to have it entered a rule of court, at the term *next ensuing* the making thereof.

On the contrary, we hold, that the only provision of the statute, viz: the 4th section, limiting the time of filing a rule, contemplates and embraces the proceeding on the part of him who seeks *to set it aside,* and not of *him* who claims its benefit, and *seeks to sustain it.* See 4th sect., act Nov. 17, 1828, Thomp. D., 400. Duv. 236. Here it is manifest, that the time prescribed is *by way of* limitation, but it applies alone *to the party who moves to set it aside.*

If it be objected, "that the party last referred to could not make such motion before the submission and award were filed," we answer—that it is perfectly competent for either party to make such preliminary motion *to enter the rule,* with a view to the final action of the court, either to set it aside, or to establish it as the judgment of the court. The submission and award belong equally to both parties, and their rights are reciprocal.

It is laid down in Watson, (new ed., p. 265,) that the entering the submission a rule of court, is an essential preliminary to *any motion* touching the award. And in 2d Arch. Pr., p. 1253, it is laid down as the first practical proceeding to set aside an award.

Thus, then, Reed, who now objects to this award and seeks to set it aside, or *rather to treat it as a nullity,* should *himself* have made the preliminary motion or rule, to enter the submission, &c. to secure redress, if the award were liable to be impeached.

An award made under a submission by deed, stipulating that the same be made a rule, and become the judgment of a court of record, (as is the case before the court,) is a grave and solemn *act* and creates liabilities on both sides, which may not be lightly avoided, or escaped by inaction and neglect.

The statute of 9 & 10 Wm. III., and the Florida statute on the same subject, and in effect and substance the same, (the last being no doubt substantially copied from the first,) *both* limit the time to make motions to set aside awards; and by reference to Watson, (new ed., p. 269, old ed, p. 156,) and to 2d Arch. Pr., p. 1251, (London ed.,) it will be seen that the utmost rigor is insisted on as *to* 453 *time,* and scarcely an excuse allowed for delay, when the object is to defeat these salutary domestic judgments.

And now, as to the construction of the Florida act, where in the absence of *decisions* under that act, we must resort to analogous reasoning. By the 4th sec. of the Florida statute, (p. 401 of Thomp. Dig.,) the motion to set aside the award must be made at the term ensuing—that is, (it is conceived,) at the term next after the rule is entered, or at the same term, if ten days' notice of such motion can be given. But let it be borne in mind, that, under the doctrine and directions cited above, from Watson and Archbold, the defendant himself might have entered the rule of court, as his own pleasure and convenience, whereon to ground *a motion* to set aside the award. But relying as he did upon our taking the initative, and moving the rule, that section would have given him the whole of the spring term to make such motion.

Next comes the 6th sec., (Thomp. D., 401,) which provides that "if no motion be made to set aside any award, &c.. it may be entered of record at the ensuing term of said court." "Ensuing term of said court?"—ensuing what?

Why, evidently, ensuing that term wherein the other party had time to the end thereof (the court not holding ten days) "to move to set it aside." This is certainly the most reasonable principle of construction, and one which assimilates this proceeding to all others, where time is given to a party *to object,* on *"rules nisi,"* or other proceedings.

No such rule can be made absolute—no interloctuory or other order or judgment be confirmed, until such time shall have elapsed.—The motion to confirm or make absolute is always postponed, until the time allowed to vacate or set aside shall have expired.

The language of the section is, "If no motion be made to set aside any award made as aforesaid, it may be entered of record at the ensuing term of said court, during the term thereof."

According to every rule of grammatical construction, the term "ensuing" must of necessity refer to the next and only antecedent, viz: "The motion to set aside the award," which, by the 4th section, must be made at the first "term ensuing the filing of the same."

Reason and grammatical construction, and uniform decisions under a similiar law, concur in this interpretation.

Suppose the counsel of Reed had moved at the spring term, 1848, 454 after entering on the order book the rule moved by plaintiff, (and nothing we have seen prevented him from anticipating the action of plaintiff,) and had moved then "to set aside the award."

"Es debito justiciae," or *"ex gratia"*—as a matter of legal right, or by indulgence of the court, (the term consisting of less than ten days,) that whole term would have been allowed him wherein to make such motion.

So, if *plaintiff* had, at the fall term, 1847, (the first term ensuing the making of the award, taking *its date,* and not its *publication,* as the test of when made,) then entered his motion to make the award a rule of court, he could not have had his rule made absolute, for the same reason, until the spring term, 1848, when he did apply for it.

But that motion being made first at the spring term, 1848, of necessity the rule or order to set up and establish must have been postponed until the next, or ensuing term, viz: the fall term, 1848.

The court will see that defendant has altogether failed at any time to move in the matter. He has availed himself of all the privileges and advantages of the award, (as our proofs exhibit,) he has thereby (we contend) waived all legal right of making said motion, or of impeaching the award, on any grounds, but of legal defects apparent on the face of the proceedings.

And now, on general principles, we would ask, what reason can apply for coercing a party seeking to obtain an award to this extreme diligence, in limiting him to a short day, wherein to enter his rule?

It is not usually the policy of the law nor needful, to oblige the creditor or claimant to use summary or stringent methods to obtain the benefit of his claim. His own interest and selfish feelings, in such case, usually require restraint, rather than stimulants to activity.

Our proofs further show and assign a satisfactory reason for the short delay; and not a suggestion has been made that defendant was injured thereby. Delay is what the debtor seeks as *beneficial,* what the creditor avoids as *injurious.*

The policy of England and of this country both concur in sustaining awards, the judgments of those cheap "domestic forums."—No stronger evidence of this is required, than the laws passed to encourage them, and the liberal and *enlarged* principles of construction applied to them universally.

The award and submission here are both in writing and under seal, and their evidence of a certain, durable character. Had they been by "parol," there might be reason for *urgency* in setting them up.

And yet awards may be made by *"parol,"* if the terms of the submission do not forbid it ;and it seems the courts can enforce the execution of parol awards by *attachment.* Watson on Arb. & Aw., p. 307, 81-'131.

So also the submission may be by "parol." Same p. 6. But it is conceded that neither in England, nor under our law, could such be made a rule of court.

But, again, we ask the court to regard the terms of this 6th section? They are—"it (i. e. the award) *may be* entered of "record at the ensuing term of said court."

The term, *"may be,"* is *directory* and *permissive,* not *imperative* or *restrictive.* The permission is for the advantage of the party seeking it. The statute states the *nearest,* but not the *latest* time for its exercise.

The legislature could not contemplate, that a party seeking to recover his debt would himself cause needless delay, nor would they be likely to deem any limitation of time in such case necessary.

Lastly, it appears that this time or delay was agreed to in this case as a mutual favor; and, further, that while the defendant has received all the benefit of the provisions of the award in his favor, plaintiff, by this very arbitrament and award, has parted with every thing, and received nothing.

W. P. Duval, for Appellee:

I. In this case no bill of exceptions is filed. Such facts only can becomes a part of the record and be brought before this court as are contained in a bill of exceptions. The exceptions must be taken and signed at the trial of a cause, unless further time for making them up be given by the Judge. 2 Tidd's Prac., 910, 911. 9 Wheat., 651. 5 Cond. U. S. R. 4 Peters, 102. 5 Id. 248. 4 How. 4, 198.

Therefore, the affidavit of B. G. O'Bryan and H. E. Purviance, the notice to Reed by O'Bryan, on page 2nd of the record, and the statement of facts by the clerk, on page 14, except that the motion was argued and disposed of, cannot be noticed by this court. Besides, such testimony is illegal in a proceeding in arbitration. The 456 court can have before it only the submission bond or agreement, the award and the entires by the clerk of the proceedings on the record; except where motion is made to set aside an award, when the statute (Duval, 236, sec. 5,) allows affidavits to be received.

II. The Appellant is not entitled to his motion that the award be made a rule of court, because,

1 .There is no "award" on which the court can act. There is a writing, purporting to be a bond, by Reed, to submit to an arbitration, 13th April, 1847. An award was made, in pursuance thereof, signed 23d April. An agreement was then entered into between the parties, (endorsed on the award,) that the award should be opened, omissions inserted, various other material alterations made and, in fact, a different and new award made by the arbitrators. No such new award appears on the record. By the Appellant's own agrement, then, there is no award that can be made a rule of court.

But the appellant alleges that this agreement is void, because it is proved that Reed disavowed the authority of his attorney to sign the agreement. The evidence of this disavowal, he says, is in the affidavits. It has already been shown that the affidavits had no place in the record. Moreover, they show only that the affiant *understood from Peden that Reed denied his authority.* But Peden, as attorney at law, could submit the case to arbitration. 7 Cranch, 436. 4 Cond., 560. Buckland *v.* Conway, 16 Mass., 396. Talbor *v.* McGee, 4 Munroe Ky. R., 377. Evans *v.* Thompson, 5 East., 189.—3 East., 466.

2. If the agreement between O'Bryan and Reed be void and we take only the bond of Reed and the award in pursuance of it, there can be no rule entered.

There must be mutuality in a submission to arbibtration—a mutual bond or agreement. 2 Arch. Prac., 323.—The statute, (Duval, 236, sec. 2,) requires that the agreement be signed by the *parties.* They must both consent. There is no evidence of such mutuality of consent on the record. But one bond is filed, and that signed by Reed alone. If the consent of one only is sufficient, what would be the consequences? The one making it is liable on his bond in case he do not perform the award, and is liable if he choose to revoke his submission before award made and rule of court entered. 2 Arch. Prac. 324. But there is no bond or agreement to hold the one not consenting to the performance of the award. Should the award be that he should pay money, judgment could not be entered against 457 him. He has entered into no agreement that execution might issue against him . It can be issued only where he has made the consent *in writing,* and the rule is entered in pursuance of it. If the award be that the party signing the consent do something else than the payment of money, and he do not perform, he is considered in contempt of court and will be put in jail. Duval, 236. But he not signing his clear of any such consequences. The court has no hold on him. The record shows that he has not submitted to its authority. Such a one-sided proceeding would be contrary to the statute and to every principle of law.

3. This award can never be entered of record. The statute, Duval, 236, directs that it be entered at the *ensuing* term of court. It is attempted to be enforced the second term after it was made.—Where a party pursues a mode allowed by the statute he must comply precisely with the course it points out.

4. An award should be so plainly expressed that there would be no uncertainty as to the manner in which it is to be executed. Schuyler *vs.* Van Derbeer, 2 Caines, 235. See also 9 Johns., 43.

A part of the award is that "the order given O'Bryan by Reed, on Blood, (amount, one hundred and sixty-seven dollars and eighteen cents,) be returned to Reed within thirty days, or charged to O'Bryan and deducted from the above award." It is not *certain,* though probable, that the intention of the arbitrators was that $167 18 be deducted from $407 97. Other things respecting money are awarded after the $407 97, before this order on Blood is reached. There is a more material uncertainty. Shall O'Bryan return the order, or shall he have the option of having it charged to him by Reed. See Barnes, 166. Or is it to be returned to Reed within thirty days, and if not, then to be deducted from the award. This is a matter of speculation.

5. The award should have been final, which it is not. In Pedley *v.* Goddard, 7 Term R., 73, the defendant was to pay plaintiff a sum of money within twenty-one days, (which was after the time limited for making the award,) unless defendant should exonerate plaintiff, by affidavit, from certain payments and receipts. The award was held not to be final, and void. In this case the award on the order to Blood is also in the alternative and should to be performed within thirty days, which was after the time limited for making the award.

There is nothing certain or final as to "the order on Stewart."— 458 Who is to have the order? Shall Reed? Probably. Has O'Bryan got it in his possession, and is he to deliver it to Reed? Suppose he has it; there is no award that he deliver it to Reed.

The award is, in respect to other matters, uncertain, defective and not final, and therefore void.

The agreement endorsed on the award shows that it was otherwise defective and incomplete. The admission of O'Bryan, to this effect, is equal to an affidavit to set aside the award, or an admission of mistake by the arbitrators.

6. Where there is no cause in court, the award, as to costs, depends entirely upon the terms of submission. If the submission gives the arbitrator no authority as to costs, he cannot award them.—Arch. Practice, 228. In this case no such authority was given.

Randall in reply:

In answer to the first point taken by counsel for appellee, it will be sufficient to say that there was no occasion whatever for a bill of exceptions. The ruling of the court appealed from was a motion in writing, founded on specialties and sustained by affidavits, with a view to a statutory remedy. Thomp. D., 399.

By reference to English works touching the enforcing of the performance of awards, (2 Arch. Prac., 1255,) it will be seen that affidavits are required from parties seeking the enforcement. And this answers the assertion on the other side that affidavits are only admissible on the part of him seeking to set aside the award.

The terms of the 5th section of the Florida statute, (Thomp. Dig., 400,) repudiate this motion.

To the second point taken by counsel for appellee, the argument already made is deemed a sufficient reply. So, also, with regard to the third and fourth objections.

As to the fifth court need only turn to the case referred to under this head, in 7 Term R., to see that there is not the least similarity in the cases. Every thing that was directed to be done by O'Bryan has been done. If the directions of the award have, in all respects, been complied with by him, and Reed has had the benefit of the compliance, it is final.

Opinion by Chief Justice DOUGLAS:

This case comes up by appeal from a decision of the Circuit Court

O'Bryan vs. Reed.—Opinion of Court.

for Hamilton county, made at the last Fall term, overruling a motion which had been entered upon the order book of said court; and a bond of submission and award, filed 17th day of February, 1848.—This motion was at the spring term of that year continued until the said fall term, and is in the following words, to wit: *"Ex parte.*—Basil G. O'Bryan, in a matter of arbibtration between Basil and William M. Reed, Middle Circuit of Florida, Hamilton Circuit Court. Motion that the said bond of submission and award be made a rule of court, as stipulated and provided for in said bond of submission, and that judgment be entered thereon and execution issue according to law."

The first section of our statute, entitled an act concerning arbitration and awards, (Duval's Comp., 255, Thompson's Dig., page 399,) provides for submitting matters of difference, &c. to arbitration, and declares that the parties to such admission "may stipulate and agree either in the bond, &c. of submission, or by a separate agreement, that said submission and arbitration shall be made a rule of any court in this State;" and the 2d section enacts, "That when any submission is intended to be made a rule of court as aforesaid, an agreement to that effect in writing, *signed by the parties,* shall be filed in the office of the clerk of the court of which said submission is to be made a rule, and the clerk shall enter said rule."

The motion was made by the appellant, and it appears by the record of the proceedings in the cause, including certain affidavits filed by the appellant in the court below, (but which the appellee by his counsel insists are not a part of the record, because they were not brought into it by a bill of exceptions,) that, on the 13th day of April, 1847, the parties to this proceeding, under bond mutually executed by them, agreed to submit all matters in controversy between them to arbitration—that arbitrators were mutually chosen by them, to whom those matters were submitted, and that said arbitrators, on the 23d day of April, 1837, made an award

At the foot of the submission bond of the appellee, the only one in the record, is the following, viz: "And it is further agreed that said award be made a judgment of the Circuit Court of Hamilton county, and said State"—which agreement is signed by (Wm. M. Reed) the appellee.

Whether such an agreement was appended to the bond by O'Bryan or not, the record does not show; and there is no authority to enter
460 such a rule, unless the agreement to that effect in writing, *signed by the parties,* be filed; at least such is the express provision of the statute ,from which we should not be inclined to depart, without some good cause shown, (if at all.) Here no cause is shown—it does not appear that there is any such agreement signed by the parties; or if, upon the equity of the statute, separate agreements signed by the parties were sufficient, and we were at liberty to presume that O'Bryan had signed one at the foot of his bond; it is not shown that any effort was made to have it filed in court. If, therefore, such an agreement was signed by O'Bryan, it cannot effect the case; but besides this, although the motion to make the submission and award a rule and judgment of the court, is alleged to have been made pursuant to that agreement, and substantially in accordance with it, yet we find by reference to the record, that, after the award was made and published, an agreement was entered into by and between the parties, that it should be opened and the matters referred to the same arbitrators, to make a new award; and that it was thus referred back, and one of the arbitrators, (Mr. Purviance,) whose affidavit was taken and filed by the appellant in the court below, in support of said motion, states that he did, at the instance of the said O'Bryan and Peden, acting as attorney for Reed, make out the *draft* of another *award,* but the said draft was never executed or signed by the arbitrators.

It has been objected on behalf of the appellant, that there is no evidence to show that said Peden had any authority from the appellee to make the said agreement to open the said award, and that the appellee disaffirmed the agreement, and denied his authority to make it; but in looking into the affidavit of Mr. Purviance, before mentioned, which contains all that is said in the record of any such disaffirmance and denial of authority, we find that he states as follows, viz: After stating that the arbitrators under the bond of submission mutually executed between them ,said O'Bryan and Reed, dated the 13th April, 1847, made an award, which was designed to be a final award at the time, goes on to say, "That subsequently the parties met at the house of the affiant, for the purpose of further negotiating touching said award, with a view to explain away obscurities in it, (if any such existed,) and to extend the time for O'Bryan to return the order on Blood, or make indemnity for the same." "That, at such meeting, *Reed was represented by James A. Peden. Esq., his attorney,* who made and signed an agreement touching the award, 46
which affiant afterwards understood from Peden that Reed disaffirmed, and denied his (Penden's) authority in the premises." Now the latter clause, "which affiant afterwards understood from Peden," &c., is all that the record discloses of the disaffirmance and denial of Peden's authority by Reed; and that, it will be observed, is hearsay testimony only, and is opposed by the statement of Purviance himself who says Reed was represented by *James A. Peden, Esq., his attorney,* and by the action of Reed in relation to this matter, who, when this motion came on to be argued in the court below, objected to any judgment on the award, and assigned amongst other reasons this :"because by the terms of the agreement atached to the award the same was opened, and another was to be made, thereby sustaining this statement of Mr. Purviance, and recognizing and affirming the acts of James A. Peden, Esq., *as* his attorney in the premises; and now, in this court, he again recognizes and re-affirms it, by objecting to a reversal of the judgment rendered by the court below in this case, upon the same ground. It is a familiar principle, that "the acts of one having no authority will be made valid by the ratification of the person for whom he assumed to act." Lent *v.* Padleford, 10 Mass. Reps., 230, 236, Odiorne *v.* Maxey, 13 Mass. Reps., 179, 192. Wood *v.* Carpenter, 4 Wendell's Reps., 219. Baker *v.* Byrne, 2 Smedes & Marsh, 193. A principal may recognize an authority, *"ex post facto,"* and makes the act his own. Haggles *v.* Washington County, 3 Miss. Reps., 496. 3d U. States Dig., 244. 2 Kent's Comm., page 478.

By this agreement, the award was opened, and, therefore, there is now no award to be enforced, and this of itself is a fatal objection to so much of the motion as asked to have "the award made a rule of court, and that judgment be entered thereon and execution issue," and saves us the necessity of enquiring whether this would have been the proper mode of enforcing such an award, of looking into the other objections against it which have been presented for our consideration.

There is one matter, however, in relation to this award, which we deem it proper for us to notice, which is, that, by the agreement to open it, th parties agreed "that the arbitrators insert all matters which they *have omitted,* in the purview contained, and which they *have adjudicated, but omitted to set forth."* This agreement, it is to be observed, is signed by the appellant, and if it were not valid as an 46
agreement to open the award, for lack of authority in Peden to make it, still it would seem to be a sufficient acknowledgment by the appellant that matters had been submitted to the arbitrators, which were not adjudicated by them, and that others were adjudicated, which they omitted to state in their award, and with such omisisons before us acknowledged by one of the parties, we should hesitate much before we should make an order to enforce the award against the other: for that an award does not embrace all matters submitted to the arbitrator, is one of the very reasons assigned in the books for setting it aside. Watson on Arbitration and Award, 159, 8 Law Lib. Whether the affidavits referred to are properly a part of the record or not, is of no importance to this case, as our decision would have been the same, had they not been in it. We looked into them to as certain if they really contained any legal and substantial proof of the alleged disaffirmance and denial of Peden's authority by Wm. Reed, the appellee. Had they done so, we might have left ourselves constrained to examine that question. Finding, however, that they contain no such proof, and that the hearsay evidence on the subject is more than neutralized by the positive statement of the same witness, and what is of more importance, the authority of Mr. Peden having been fully recognized and affirmed by the appellee, and no agreement, such as the statute prescribes, to make the submission a rule of court, having been filed; we can perceive no error in the judgment of the court below.

If such an agreement had been filed, or if it had been clearly shown that an agreement to make the submission or award a rule of Hamilton Circuit Court had been appended to the bond of Mr. O'Bryan, the appellant, and that he was unable to file it from the fault of the appellee, or his refusal to permit him to do so, or at least without any fault on his own part, we are not prepared to say but that the motion ought (under such circumstances) to have been so far sustained, as to have permitted the rule to be entered, to stand until a new award should be made. There seems to have been no time limited in the agreement to open the award, within which the new one was to be made; as no such agreement was filed, and no such proof was shown, it is unnecessary for us now to decide that question. For reasons stated, the judgment is affirmed.

Per Curiam.

Bradford, Adm'r et al. vs. Marvin and Martin.—Statement of Case.

RICHARD H. BRADFORD, ADMINISTRATOR, ET AL., APPELLANTS, *vs.* WILLIAM MARVIN & NOAH M. MARTIN, APPELLEES.

The right of the vendor to an equitable lien upon the lands sold is a right that exists, but may be waived, if the vendor takes a collateral security, binding others as well as the vendee.

The taking of separate or independent security, if it is not *pre se a waiver of the vendor's* lien, is at least *prima facie* evidence of such waiver; and the *onus* is upon the vendor, to show that it ought to have that effect.

Where the vendor simply takes the note or bond of the vendee, and makes a conveyance, he retains a specific lien upon the land, subject, however, to be defeated by the intervention of creditors or purchasers without notice.

Where the vendor has parted with the title, the surety has no right to claim to be substituted to the rights of the creditor, unless he has paid the money—and even then, he has no greater rights than the creditor himself had.

The surety may compel a sale of the lands to save himself harmless, where the title has been retained by the vendor.

Marvin and Martin, in the year 1844, filed their bill of complaint in the late Superior Court of St. John's county, against Mary Eliza Read, Teresa Bellamy Read and Richard H. Bradford, administrator of the estate of Leigh Read, setting forth and showing that, on the 12th day of March, eighteen hundred and thirty-nine, the said Marvin was seized and possessed of three thousand five hundred acres of land, being a part and portion of an undivided tract of four thousand acres, ceded by the Spanish Government to one Don Francisco Roman Sanchez, and described in said cession as being situate ten miles to the westward of the Alachua road, leading to St. Mary's and bounded on the north by the Sante Fee river, and on the other sides by vacant lands, and since surveyed under the authority of the United States, and lies in township six and seven south, range eighteen, and is known upon the plat of said survey as the claim of Francis R. Sanchez, and which said premises are situate in the county of Alachua, in the Eastern District of Florida aforesaid; and was also at the same time aforesaid seized and possessed of an undivided estate and interest of, fifteen hundred acres, being part and parcel of another tract of land, containing two thousand acres, ceded by the Spanish Government to one Don Jose Simeon San-
464 chez, and described in said cession as being situate on the Santa Fee river, and bounded on the west by lands of Don Francisco Roman Sanchez, and other sides by said river, and which has since been surveyed under the authority of the United States, and lies in township six and seven south, range eighteen, in the county of Alachua, and is known upon the plat of said survey as the claim of Jose S. Sanchez and others. And that the said Marvin being so seized and possessed as aforesaid, did, on the day aforesaid, bargain, sell and convey to one Leigh Read, of the county of Leon, all of his estate and interest in the said two tracts of land, for the consideration of five thousand dollars, *to be paid* at five years, with annual interest, and *did receive at the time* of said sale and conveyance the promissory note of said Read, and of Noah M. Martin, as his surety, for the said sum of five thousand dollars, payable five years after date, with interest annually.

That one year's interest on said note or purchase money was paid by the said Read at the time it became due, and that no part or portion of the principal of the said note or purchase money, or of the interest thereon, except as above stated, was ever paid by the said Read in his lifetime, or by his representative since his death, or by any other person, and that the same is still due and owing.

That Noah M. Martin was induced to become the surety of the said Read, for the payment of the said purchase money, in the full reliance and expectation that the premises purchased by him would always be worth the price agreed to be given, and that the proceeds of a sale of them would always in equity and good conscience be held and considered by the said Read, and by the law of the land, as a sacred fund, for the payment of the said purchase money, in preference to any other debt or claim against the said Read.

Since the sale and conveyance aforesaid to the said Read, and the giving of the said note, to wit: Sometime about the year eighteen hundred and forty, the said Read died seized of the said premises and intestate, leaving heirs surviving, his widow Mary Eliza Read, and an infant daughter named Teresa Bellamy Read, his only heir at law, both of Leon County, in the Territory aforesaid; and that one Richard H. Bradford, upon the death of said Read, was duly appointed the administrator, and is now the administrator of the estate of the said Read.

That the said purchase money has sometime since become due, and he has frequently applied to said administrator in a friendly man- 465
ner, and requested him to pay and discharge the principal and interest thereof, but that the said administrator refuses so to do, and has informed your complainant that the estate of the said Read is insolvent, and that he has not assets in his hands to pay the said purchase money.

That in equity and in good conscience the said lands ought to be held and considered in the hands of the said administrator, and in the hands of the said Teresa Bellamy Read, as a fund for the payment of the said purchase money, in preference to any other claims against the estate of the said Read; and praying that the premises aforesaid may be decreed to be sold, and out of the moneys arising from the sale thereof, he, the said Marvin, may be paid the amount which may then be due him, as and for the purchase money aforesaid.

In 1846, this cause having been transferred to the Circuit Court of St. Johns county, Richard H. Bradford filed his answer, insisting that there was no equity shown in the bill; admitting the sale and conveyance, and the execution of the promissory note, signed by Read and Martin, and averring that the estate of Read was hopelessly insolvent. That judgments for large amounts had been recovered against him as administrator, and that said judgments had priority over the claim of Marvin, the complainant; that he had no assets except the lands mentioned in complainant's bill, and some other property of small value; that the widow claimed dower in the lands, and that her claim was to be preferred to others. A separate answer was also filed by the widow; and the infant heir answered the bill by her guardian appointed for the purpose.

In June, 1847, a final decree was made in the cause, by the Hon THOMAS DOUGLAS, Judge, as follows:

"This cause coming on to be heard this day, and the said parties complainant being represented before this court, by Messrs. Forward and Fairbanks, their Solicitors, and the said defendants being represented by S. L. Burritt, Esq., their Solicitor, and the bill, answer and evidence in this cause having been read, and argument thereof had, as well on the part of the said complainants as on the part of the said defendants, and the cause having been submitted to this court for its decree and determination, and this court having maturely considered the same, doth order, adjudge and decree, that the lands described in and set forth in the bill of complaint, and 466
whereof conveyance was made to said Leigh Read, deceased, by said William Marvin, on the 12th day of March, eighteen hundred and thirty-nine, are and hereby declared to be subject to the lien of the said complainants for the purchase money thereof; and that the said lands are and shall be deemed to be held by the defendants, subject to such lien, and as a trust fund, out of which the note given by the said Leigh Read, deceased, and Noah M. Martin, for the purchase money, shall be first paid, in preference to any other debts or claims against the estate of the said Leigh Read, deceased.

"And, it is, therefore, further ordered, adjudged and decreed, that unless the said Richard H. Bradford, administrator of Leigh Read, as aforesaid, shall or do within sixty days from this date, pay or cause to be paid unto the said complainant, or his solicitor or solicitors, the amount due upon said purchase money which hath been reported, upon reference of the same to the clerk of this court, as special master, to be the sum of five thousand, nine hundred and eighty-five dollars and eighty-three cents, with interest from the date hereof until paid; that the said premises mentioned and described in the bill of complainant shall be sold by or under the direction of the sheriff of the county of Alachua, by virtue of this decree, in the same manner and under the same notice and advertisement, as required by law in case of sales of real estate upon judgments and execution at law, and that the said sheriff execute a deed of said premises, and put the purchaser or purchasers in possession thereof; and the proceeds of such sale shall be applied first to the payment of the taxed costs and expenses of this suit, and then to the satisfaction of the purchase money and interest aforesaid; and the balance, if any, shall be paid to the said R. H. Bradford, as administrator of Leigh Read, deceased."

From which decree, defendants appealed to this court.

Branch and *Burritt* for Appellants:

The doctrine that the vendor has *a lien upon the land sold* for the purchase money is derived from the civil law. Although it seems to settled and acquiesced in, in England and many of the States of this Union, its introduction was resisted in America until a comparatively recent period. Its policy may be well doubted, and in some States, as in Massachusetts, Connecticut, Pennsylvania and North Carolina,

Bradford, Adm'r et al. vs. Marvin and Martin.—Argument of Counsel.

467 the doctrine has either been rejected altogether, or exploded after trial.

The decision of this court will determine whether it is to be adopted in this State and form a part of its laws. It is a new question in this State; and this court, being in no way hampered by former decisions, is at liberty to decide as its wisdom shall deem best for the welfare of the State. It being no part of the *common law*, there is no obligation to adopt it, unless its own merits are such as to recommend it.

The spirit of our laws is decidedly against all *secret trusts, liens and incumbrances.* Hence our registration laws, which require all conveyances, incumbrances, trusts and liens on land to be recorded, so that the world may have notice of them. These provisions of the law are to enable purchasers and others to act understandingly, and prevent a person in possession of land from obtaining credit on what does not really belong to him. The doctrine that the vendor has an implied lien on the land is in direct opposition to these wise and wholesome provisions. It allows a vendor to have a mortgage, (as it were,) *secret*, and the existence of which can only be known to the vendor and vendee. It raises a *secret* or *implied trust* in favor of the vendor, which lies dormant and has no tangibility, until called into existence by a court of chancery. Such a doctrine not only, in many instances, works great injury, but is calculated to promote and produce litigation. The vendee being in possession and having an absolute deed, may sell to a third party whose utmost caution could not detect the secret lien existing upon it; and thus he would buy a law suit even if he did not lose the land.

It also enables the vendee to obtain a false credit by hiding from the eye of the world the encumbrance on his estate.

If the vendor wishes to retain a lien on the land sold, our statute has pointed out the manner in which it may be done. How far it is competent for this court to evade that statute by allowing it to be done in another and a different manner, it is not necessary in this case to inquire.

In the case before the court it is not necessary to discuss whether this doctrine of an *implied lien* of the vendor should be recognized or discarded; for the facts and circumstances of it are such as to take it out of the principle, admitting it to exist.

Admitting, then, that the vendor has a lien on the land sold for the
468 purchase money, all the authorities agree that this lien *can be waived by the acts of the vendor.*

Appellants contend that he has waived it:

1. By taking the bond or promissory note of the vendee.

The court will find that the only questions which have been discussed or mooted in the courts of England are, first, whether the lien existed at all, and, second, whether the taking of a separate security, as the bond or note of the vendee, without security, was not a waiver. It will find, also, that whilst it has been decided *that a lien existed*, the question whether taking a bond or note without security is a waiver is still open and undecided. The following cases, decided in England and America, take the ground *that the taking of a separate security, as the note of the vendee, without security, will be a waiver.*

The case of Winston *v.* Anson, in 1st Simons & Stuart, cited below, is the latest in England, and of the highest authority. Winston *v.* Anson, 1 Simons & Stuart R., 434. Tarwel *v.* Heelis, Amb. R., 734. Nairne *v.* Prowse, 6 Vesey R., 752. Wragg *v.* Comptroller General, 2 Dess. S. C. R., 509. Womble *v.* Battle, 4 Iredell E. R., 182. Kauflett *v.* Bowen, 7 Serg. & Raw. R., 64. Semple *v.* Burt, Ibidem. 6 Conn. R., 464. 17 Conn. R., 583.

2. Appellants contend: That Marvin, the vendor, by taking the negotiable promissory note of Read, with Martin as security thereon, and payable at *the expiration of five years*, waived the lien which he might have had on the land.

All the authorities agree that taking the promissory note of the vendee, with a third party as security, is a waiver of the lien. There is not an authority to the contrary. 4 Kent's Comm., 151 and 152. Fish *v.* Howland, 1 Paige R., 20. Gilman *v.* Brown, 1 Mason C. C. R., 191. Brown et al *v.* Gilman, 4 Wheat R., 255. 4 Cond. R., 445. Cox *v.* Fenwick, 3 Bibb R., 183. Cole *v.* Scott, 2 Wash. R., 141. Wilson *v.* Graham's Ex., 5 Munf. R., 297 Hardin R., 48. 1 Blackf. R., 416 and 246. Eskridge *v.* McClure and Walker, 2 Yerger, 84. 3 Alabama (N. S.) R., 302. 5 Hammond R., 35. 2 Story's Equity, (sec. 1226, &c.) pages 471—6.

3. Appellants contend: That the court erred in giving the lien of Marvin, if he had any, a preference over the judgment creditors of Read.

It appears from the bill and answer that the estate of Read is insolvent, and the answer expressly sets forth that there was a large number of judgments against the estate of Read. Bayley *v.* Green- 46
leaf, 7 Wheat. R., 46. 5 Cond. R., 229.

The statute requires all conveyances, mortgages and transfers of any interest in real estate *to be recorded, to be good against creditors.* Thompson's Digest, 180.

4. The appellants contend: That the court below erred in not allowing the claim of Mary Eliza Read, widow of Leigh Read, *to dower* in said lands.

The claim to dower vested in the widow, immediately upon the execution of the deed to Leigh Read, her husband. It became a *legal claim*, and cannot be postponed to the claim of the vendor, which is *merely equitable.*

The statute points out the only mode in which her claim to dower can be divested. Thompson's Digest, 179.

Forward and Marvin, for Appellees:

The bill states that the complainant (Marvin) in 1839 sold a tract of land in Alachua county to Leigh Read for $5,000, payable in five years, and took Reed's note, with the other complainant (Martin) as surety on the note for the purchase money. Reed afterwards died, having paid no part of the purchase money, and the heir and administrator refusing to pay for the land, this bill is filed to subject the land to the payment of the purchase money. The principal facts are admitted in the answers.

The complainant's counsel contends—

1st. That the vendor of real estate has in equity a lien upon the land for the purchase money, as against the vendee and his heir and representative.

This lien is created by law, and is an actual interest or right in the land, which cannot be lost or impaired but by agreement. 2 Story's Commentaries on Equity, 462-'3, 475. 15 Vesey Jur., 329. (Sumner's edition.) 1 Schoales & Lefroy, 132. 6 Vesey Jur., 759, 760. 1 Johnson's Chancey, 308. 9 Cowen, 316.

2d. The taking of Martin as surety upon the note does not by itself extinguish the lien or waive it. The lien, which is a vested right, can be extinguished, lost or waived, only by the *agreement* of the vendor, which agreement is not to be *implied* or *presumed*, but proved *as a fact*. The inquiry is, as to the *fact* of an *agreement* on the part of the vendor to waive his lien. If there is *no agreement* then there is no waiver. The *vendee*, relying upon the waiver, must 47
prove the *agreement* to *waive*. 2 Story's Equity, 469. 1 Schoale & Lefroy, 132

The taking of Martin as surety is only evidence, *testimony tending* to prove another *fact*, the agreement to waive, and is not sufficient ALONE and without other circumstances, to establish the fact that the vendor *agreed* to waive the lien. 2 Story's Equity, 469. 15 Vesey, 329, great case. 3 Russell, 488, in 3 Cond. Eng. Chancery, 495. 1 Schoales & Lefroy, 132. 1 Brown's Chancery, 372, note A., to the case of Blackburn *v.* Gregson, (Perkins' American edition.)— 2 Ves. & Bea., 306. 9 Cowen, 316. Cross on Law of Lien, 89, 90, 91, 92, 93.

The case of Gilman *v.* Brown, in 1 Mason, 212, is new and unprecedented. It is the opinion of an able judge, but unsupported by previous authorities, and was uncalled for by the facts of the case.

3d. The surety (Martin) is entitled to have the land sold. Stump *v.* Rogers, 1 Ohio Reports, 225. Green *v.* Crocket, 1 Dev., and Batt. Eq., 390. Arnold *v.* Hicks, 3 Iredell Eq., 17. 1 Randolph, 53. 1 Deveraux, 151. 2 Bland's Chancery, 199, note C.

SHLAO

HAWKINS, Justice, delivered the following opinion:

The questions arising in this case for the decision of the court are these: 1st. Can a vendor enforce a specific lien in equity against a vendee for the land sold, the vendor giving the vendee an absolute deed in fee simple, and, in return therfor, taking the promissory note of the purchaser, with a third person thereon as security?

2d. Can the surety, without having paid the purchase money, be entitled to have the lands (so sold) set apart as a specific fund for the payment of the note?

We have given the subject the consideration due to its importance, and more especially as it is the first case that has arisen in our courts involving a solution of the above propositions.

The right of the vendor to an equitable lien upon the property sold, seems to have derived its source from the civil law, and constituted what was termed a *tacit hypothecation*, or secret mortgage. It has been much discussed in the courts of England and in this country, and the doctrine exists and is fully sustained in England and in most of the States of the Union; but difficulties have arisen out of the

Bradford, Adm'r et al. vs. Marvin and Martin.—Opinion of Court.

question, what shall constitute a waiver of the implied lien? This, indeed, is the very question before the court.

During the argument, all the British cases *pro* and *con*, both before the Revolution and since, having a bearing upon the question, were cited and commented upon with great ability, and it seems they cannot be very easily reconciled with each other. Judge Story, however, remarks, in Gilman *v.* Brown, that "on a careful examination of all the authorities, he does not find a single case in which it has been held, if the vendor takes a collateral security, binding others as well as the vendee—as for instance a bond or note with a surety or an endorser, or a collateral security by way of pledge or mortgage—that ,under such circumstances, a lien exists on the land itself." If such be the case, the American authorities are not *contra* but *ultra* merely those of England.

Without going into detail as to the British authorities, it will be sufficient as to them to quote the neat and precise summary of Chancellor Kent. He remarks: "It has been a question much discussed as to the facts and circumstances which would amount to the taking of security from the vendee, so as to destroy the existence of the lien. In several cases it is held, that, taking a bond from the vendee for the purchase money, or the unpaid part of it, affected the vendor's equity, as being evidence that it was waived; but the weight of authority and the better opinion is, that, taking a bond, note, or covenant from the vendee for the payment of the money, is not of itself an act of waiver of the lien, for such instruments are only the ordinary evidence of the debt. Taking a note, bill, or bond, with distinct security, or taking the distinct security by itself, either in the shape of real or personal property, from the vendee, or taking the responsibility of a third person, is evidence that the seller did not repose upon the lien, but upon independent security; and it discharges the lien. Taking the deposit of stock is also a waiver of the lien, and, notwithstanding the decision of the Master of the Rolls, in Grant v. Mills, holding that a bill of exchange, drawn by the vendee, and accepted by him and his partner, did not waive the lien, the *sounder doctrine and the higher authority is*, that, taking the responsibility of a third person for the purchase money, is taking security, and extinguishes the lien." 4th Kent's Com., 152, 153.

The text of Chancellor Kent is fully sustained by the American authorities. Indeed, so far as we have been able to extend our re-
472 searches, there appears a uniform current of decisions going to establish the doctrine, that the taking of independent or collateral security is a waiver of the lien.

In Virginia, it has been decided directly; Judge Pendleton observing, that, "If he (vendor) hath taken a security, or the vendee hath sold to a third person without notice, the lien is lost." Cole *v.* Scott, 2 Wash. Reps., 141. So, too, in the case of Wilson *v.* Graham's Ex'rs., 5 Mumford, 297, 299. 2 Tucker's Notes, 454.

The doctrine of lien and this principle of waiver certainly exists in several other states, viz: Tennessee, Ohio, Kentucky, Alabama, Georgia, Indiana, Mississippi, New York, and probably others beside. See Eskridge *v.* McClure & Walker, (Haywood & Whyte Justices,) 2 Yerger Rep., 84. Williams *v.* Roberts, 5 Hammond R., 35. Cox *v.* Fenwick, 3 Bibb., 183. Hardin Rep., 48. 3 Alabama (N. S.,) 502. 3 Kelly's Georgia Rep., 345. 1 Blackford, 249, 416, *Evans v. Goodlet.* Lagon et. al., *v.* Badallet and others. Clower *v.* Rawlings, 9 Smedes & Marshall, 128, and Fish *v.* Howland, et al., 1 Paige Ch. R., 20, where the British authorities are all reviewed, and the subject ably discussed by Chancellor Walworth.

Judge Story, a portion of whose opinion we have already quoted, (Gilman *v.* Brown, 1 Mason, 191,) has given the sanction of his name—a name carrying with it the greatest possible respect and veneration—to this principle of waiver, by the taking of collateral security. The case of Gilman *v.* Brown was taken to the Supreme Court of the United States, where the doctrine of Judge Story, as to this waiver received confirmation from that court, Chief Justice Marshall delivering its opinion. He remarks: "The notes, too for which the vendors stipulated, are to be endorsed by persons approved by themselves. This is a collateral security, on which they relied, and which discharges any implied lien on the land itself for the purchase money. We think this, on principles of English law, a clear case of exemption from lien." Brown *v.* Gilman, 4 Wheat, 455. We have already seen that Chancellor Kent adopts an adverse principle to that of Lord Eldon, as to waiver of the lien, and coincides with the Supreme Court and Judge Story.

With such an array of opinions and decisions pronounced by judges, eminent for all that is great and illustrious in jurisprudence, a court can feel no diffidence, difficulty, or solicitude, as to arriving at a proper conclusion.

We are not prepared, however, to go as far as some decisions, 473
which declare, that the taking separate or independent security is, *per se*, or *ex proprio vigore*, a waiver of the lien of the vendor upon the land sold; but we adopt the maxim of *in medias res* as most conducive to justice, and say this, that where a separate or independent security is taken by the vendor, other than the personal security of the vendee, it is *prima facie* evidence of a waiver of the equitable or implied lien upon the land sold, and the *onus* is upon the vendor to prove that it ought not to have that effect.

To enable vendors and purchasers to understand their respective rights, it is certainly well that some explicit and general rule, one easily understood and as easily followed, should be declared; thereby obviating in numerous instances the necessity of a resort to a Court of Chancery by parties, to have their several rights subjected to the construction of that court, upon the varying and peculiar circumstances of each particular case.

We may here be permitted to remark, that such a rule seems based upon sound policy. It is very true, that when an individual parts with his land, he should receive the purchase money—that is sheer justice; and as long as he indicates by his act—for instance, the simply taking the bond or note of the purchaser—that he relies upon the land itself as a means of payment, the law says, he shall retain a specific lien upon the property sold, subject, of course, to have it defeated by the intervention of creditors or purchasers without notice. But when he carves out an independent security for himself, in exchange for the land sold—when he creates for himself a distinct and separate fund to which he can look for payment—when he gives an absolute deed for the land, thereby rendering it subject to other claims and the contingency of sale, it does appear that the vendor has no right to complain. The evil, if any, is easily averted by ordinary care, either by taking a mortgage, which on being recorded is notice to all the world, thereby carrying out the policy of our registration laws, and in many cases preventing third persons from giving credits to the vendee, on the faith and security of the very land sold; or by retaining the title, simply giving a bond for a conveyance, upon the payment of the purchase money. These modes are familiar to every one, and generally are pursued in those every day transactions when real property is bought and sold. If the mode and manner of payment are all that are intended by the taking of a
474 note, with an endorser upon it, it would seem they would be sufficiently indicated without invoking the liability of a third person, who frequently would feel that his contract was something more than mere form; and certainly the simple note or bond of the purchasers would be quite sufficient to set forth the amount, place and time of payment.

It is said, too, that because a party takes one security, it is not a *sequitur* that he relinquishes another. Very true, but then let him fashion his contract accordingly, and thereby rebut the inference and presumption raised by the law; unless he do so, in the words of Judge Story, "the rule may properly apply, that *expressum facit cessare tacitum*, and where the party has carried out his own security, the law will not create another in aid." This was manifestly the opinion of Sir William Grant in a recent case, where he asks, "If the security be totally distinct and independent, will it not then become a case of substitution for the lien, instead of a credit given because of the lien?"

An argument upon the plea of the justice of the case was strongly pressed and urged upon the court. Such an appeal must, at all times, commend itself most favorably to the consideration of a tribunal, whose duty it is to mete out even-handed justice to the parties litigant before it. But the court cannot enforce a legal or equitable right, where it is clearly waived; and more especially where the rights of third persons are concerned, as the record in this case clearly shows. The administrator of the estate of Reed possesses the character of a trustee for all interested or having claims against it, and he states that there are heavy judgments. Though that fact has exercised no influence upon our decision, yet it affords an argument by way of response to the plea of justice, so strenuously contended for; for where there is equity, there must be equality. Arguments, too, upon the hardship of a case are, Chancellor Kent says, "the quicksands of the law," and if allowed to prevail, would soon choke up and destroy all established precedents.

As to the second proposition, we are not aware that the surety, Martin, can successfully invoke the aid of a court of equity to set apart the land sold by Marvin, as a specific fund for the payment of the purchase money, where the vendor has not retained the title, but parted with it absolutely, and where also the surety has not paid the money or any part of it.

475 Courts of equity hold sureties, entitled *upon payment* of the debt due by the principal to the creditor, to have the full benefit of all the collateral securities, both of a legal and equitable nature, which the creditor has taken as an additional pledge for his debt. 1 Story's Com., 477. So the surety, who *has paid the debt of the principal*, is entitled to stand in the place of the cerditor, as to all the securities for the debt held or acquired by the creditor, and to have the same benefits from them as the creditor. Pr. & Sur., 252. Bing on Surety, 352.

The surety, if he has apprehension of loss or injury from the delay of the creditor to enforce the debt against the principal debtor, may file his bill, *quia timet*, to compel the debtor to discharge the debt, provided the surety's obligation to pay has become absolute. So he may compel the creditor to sue the principal, and collect the debt due from him in discharge of the surety. 2 Story Eq., 144.

Martin, in this case, does not seek to be substituted to the rights of Marvin, upon the plea of having paid the money, but asks that the land be held primarily liable. But suppose he had paid the money, could he, upon the principal of subrogation, have any greater rights than the creditor, Marvin, himself? If Marvin had retained the title in himself, questions involving the specific execution of agreements, and others might have arisen; but these are not now before the court.

There were several cases cited by counsel for the appellees, which they contended would authorize a sale of the land to save the surety, Martin, harmless. They were cases where either the *money was paid* by the surety, or where the *title was retained by the vendor*, and turned virtually upon the principle of substitution and subrogation.—We have given them a careful perusal, and do not regard them as at all analogous to the case at bar.

With these views, we are of opinion that the decree of the court below was erroneous, and should be set aside. It is, therefore, ordered, adjudged and decreed, that the decree rendered in the court below be set aside, vacated and annulled.

Justice LANCASTER dissented.

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476 THOMAS J. HOLTEN, PLAINTIFF IN ERROR, *v.* THE STATE.

The affidavit made before a justice of the peace, charging the commission of a criminal offence, the writ issued by the justice, and the *mittimus* directed to the sheriff, form no part of the record in a criminal case, and ought not to be inserted in it.

A copy of the charge of the court to the jury, admitting it to be a full and true copy, cannot rightfully be sent to the jury in a criminal case after their retirement. The charge of the court is part and parcel of the trial of the cause, the whole of which the constitution requires to be public.

The sending the charge of the judge to the jury after their retirement, is tantamount to re-charging the jury at their room, in the absence of the prisoner and his counsel—and to which, if done in their presence, they would have had the right of excepting, or of moving additional instructions, and excepting to a refusal to grant them.

If a charge is such a case can be sent at all, it should be the original, and not a copy.

During the whole of the trial of a capital case, the prisoner has a right to be, and must be, present. This is a settled and well-established principle of criminal law; and this principle is violated by sending the charge of the court to the jury, if such a step is taken in the absence of the prisoner.

The prisoner in a capital case must be personally present during the whole of the trial, and at every step taken in the cause. He has the right to discuss questions both of law and fact—and if, in any stage of the trial, any proceeding is had by which he has been deprived of such right, it is the denial of a right which the constitution guarantees to him. At very stage of the proceedings, he must have an opportunity of coming into court, and being heard. If any other course is pursued and he is convicted, it cannot be said to be "by due course of law"

Even in a civil case, no communication whatever ought to take place between the judge and the jury, after the cause has been committed to them and they have been charged by the court, unless in open court, in presence, if practicable, of the counsel in the cause. This principle applies with greater force in a criminal and especially in a capital case.

An indictment ought to be certain to every intent—but the abbrevation or character & for "and" is not such an obscurity or ambiguity as will render the indict ment bad

The right of the court to order the record to be amended after verdict and judgment, so as to show the words "a true bill," which words were not entered by the clerk, when the Grand Jury presented the bill of indictment, is not clear, and may well be doubted.

A court at which an indictment is found, must be held at the time prescribed by law and by the proper judge; and the record must show that a Grand Jury was impanneled and sworn, and it must set forth their names, and the time and place, when and where the indictment was found—and if at an adjourned term, when the original term commenced. 477

Where the record shows that the Grand Jury presented a bill of indictment—The State v. A. B. Felony, "a true bill"—it cannot be held to be the finding of a true bill for murder. And the fact that an indictment for murder is spread out in *extenso* on the record, does not cure the defect—for the record also shows that the grand jury did not find a true bill for murder, *but only for felony.*

Manslaughter is a felony, and where a *bill of indictment for murder* is found "a true bill," but endorsed "felony—a true bill"—*non constat*, but that the Grand Jury could not agree upon a finding for murder, and so found for felony, which might mean manslaughter, or any other felony.

If, in a capital case, the prisoner must be present at every stage of the trial, for the purpose of discussing questions both of *law* and fact, *quaere*, must he not also be present in the Supreme Court, where matters of law touching his case, are brought up to be discussed, settled and adjudicated?

At a Circuit Court, held in and for the county of Jefferson, Middle Circuit of Florida, on the 29th day of November, 1848, the Grand Jury came into court, and presented the following bill of indictment, viz:

"The jurors of the State of Florida, in and for the body of the county of Jefferson, upon their oath present—That Thomas J. Holton, late of the county of Jefferson aforesaid, in the circuit and State aforesaid, laborer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the first day of August, in the year of our Lord one thousand eight hundred and forty-eight, with force of arms, in the county aforesaid, in and upon one John F. Stafford, in the peace of God and said State of Florida then and there being, feloniously, wilfully and of his malice aforethought, did make an assault; and that the said Thomas J. Holton, with a certain wooden stick of no value, which he, the said Thomas J. Holton, then and there in both his hands had and held, the said John F. Stafford, in and upon the head of him, the said John F. Stafford, then and there feloniously, wilfully and of his malice aforethought did strike, and beat, and wound, giving to the said John F. Stafford, then and there with the wooden stick aforesaid, in and upon the head of him, the said John F. Stafford, one mortal wound of the length or three inches, and of the depth of one inch, of which said mortal wound the said John F. Stafford, from the said first day 477
of August, in the year aforesaid, until the fifth day of the same month of August, in the year aforesaid, at the county aforesaid, did languish, and languishing did live—on which said fifth day of August, in the year aforesaid, the said John F. Stafford, at the county aforesaid, of the said mortal wound died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Thomas J. Holton the said John F. Stafford, in manner and form aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder, against the form of the statute in such case made and provided, and against the peace and dignity of the State of Florida."

This indictment was endorsed, "State of Florida *v.* Thomas J. Holton. Indictment for a felony. Found Nov. Term, 1848. A true bill. Allen R. McCall, Foreman."

On the first day of December, at the same term of the court, the said Thomas J. Holton was led to the bar, arraigned and pleaded not guilty to the foregoing indictment. And thereupon came a jury, who having heard the evidence and arguments of counsel, retired to consider of their verdict. And on the second day of December the jury elected, tried and sworn in this cause came into court, and rendered the following verdict: "That the said Thomas J. Holton is guilty of murder, in manner and form as in the indictment against him is alleged," and concluded by recommending the prisoner to mercy.

Whereupon the prisoner, by his counsel, moved the court in arrest of judgment and for a new trial, on the grounds hereinafter stated—which two motions were, by agreement, argued and considered together.

The bill of exceptions shows, that after the argument of counsel and before the jury retired, the counsel for the prisoner moved the court to charge the jury as follows: "But if the jury believe, from the evidence, that the prisoner did not think the blow was likely to produce death, then that the jury should acquit the prisoner"—which was refused by the court, and to that refusal the prisoner, by his counsel, excepted.

The court gave the following charge: "If the jury believe that the deceased came to his death by a blow from defendant, stricken with a stick upon the head, and that such blow was likely to produce death, and that this blow was given not in self defence, nor in the

479 belief that defendant was in imminent danger of bodily harm, and without adequate provocation, the defendant is guilty of murder. If you shall be of opinion, that some new injury or violence, subsequent to the blow stricken by defendant, was made by another, so as to enlarge the wound or create a new one, and that this caused, of itself, the death, then you will find the defendant not guilty." Defendant's counsel moved to add the words, "or accident," to this last charge, which was done.

It also appears from the record, that after the jury had retired, the judge gave instructions to the sheriff, that if the jury did not agree in one hour to adjourn the court until the next morning. Between 11 and 12 o'clock at night the jury sent to the judge by a bailiff for his charge. The clerk was directed to make out a copy—which was done, and the foregoing charge, not sealed or certified, with the exception of the words "or accident," was sent to them, without the consent of the prisoner or his counsel.

Upon the argument of the motion for a new trial and in arrest of judgment, this proceeding was shown for cause.

The counsel for the prisoner also showed in the second place—That the indictment contained abbreviations for the word "and" in divers places, against the form of the statute in such case made and provided. And a third cause shown was, that it did not appear by the record that "a true bill" had been found, the only entry on the record touching said case and the action of the Grand Jury, being the following: "The Grand Jury came into court and presented the following bill of indictment, to wit: "State of Florida *v.* Thomas J. Holton, felony." But the court overruled the said motions, both for a new trial and in arrest of judgment, and proceeded to pass sentence upon the prisoner.

The record also shows, that after the motion for a new trial and in arrest of judgment was overruled, the defendant by his counsel prayed the court to sign and seal his bill of exceptions, which was done. And it was thereupon further ordered, that the writ of error asked for in this cause, when issued, shall operate as a *supersedeas;* and there being an omission to state that the Grand Jury presented the indictment in this case "a true bill," it was further ordered that the same be done *nunc pro tunc.*

The judge who tried this cause filed, in compliance with the statute, the following reasons for overruling the motion made in behalf of the prisoner, viz:

480 The principal ground is the sending to the jury the charge of the Court, in the absence of defendant's counsel. In this I see no cause of objection. It is not pretended that any addition was made to the charge, as pronounced by the court in the presence of the prisoner, his counsel and the jury. The charge was matter of record under the statute and might have been delivered by the judge with the other papers to the jury on their retirement. But complaint is made of the omission of the clerk to add the word *accident* to the second instruction. I cannot perceive that this alters its character, and it is more correct, in point of law, without it. If, indeed, I were satisfied that this omission had injured or caused a prejudice to the prisoner, I would, without hesitancy, grant the new trial; but on further consideration, I am satisfied that there was no evidence in the case making it necessary or proper, or entitling the prisoner to the benefit of it. There is not a word from any witness as to any further injury after the blow by the prisoner, either from any other person, or by accident. The witness who went home with the deceased says he took his head in his lap, and was not even questioned as to further injury, and no other witness was introduced to prove such injury.—The main reliance of the counsel of the defendant was upon such a defence, and in deference to their position, and in favor of life, thinking, by possibility, I might be mistaken, this charge was given. If a new trial were had, I would not, on the testimony in the case, feel justified to give the charge to another jury. I, therefore, do not see the propriety of ranting the trial because of this omission. I consider the verdict, too, of the jury as negativing the defence.

The charge of murder I consider as sufficient, without regarding the abbreviations.

Nor do I regard the objection available, as to the omission of the clerk to enter the bill returned as a true bill. By statute, the foreman is directed to endorse the bill "a true bill," which has been done in this case. This is the true evidence of its having been so found. If there is an omission by the clerk to notice it on the record, the court, on discovering that fact, will have the record amended so as to state the truth, just as the entry, "a true bill," on which a party had been arraigned, when in fact there was not a true bill, would be corrected, to acquit him. Seeing no reason, from an attentive consideration of the facts of the case, to doubt the correctness of the finding of the jury, and not perceiving any in the objections raised, the motion for a new trial and in arrest of judgment is 481 overruled.

The following are the errors assigned in this case, by the counsel for the plaintiff in error:

1. It was fatal errors to the proceedings to send the instructions of the court to the jury—especially to send a copy, and that not a full and perfect copy.

2. The indictment is bad, because it contains abbreviations and contractions in various parts, such as & for "*and.*"

3. It did not appear of record, that the Grand Jury had ever found a true bill; and though the court ordered the record to be altered, it could not be done.

4. The court erred in refusing the instruction asked as an amendment to those granted.

Brockenbrough for plaintiff in error:

The caption of the indictment states that it was found at "November Term, 1848," whereas no such Term is known to our law—but the "Fall Term," which occurs in October; and, if it were an adjourned Term, that should have been shown. But this and other minor objections are passed to consider the three following, assigned as errors:

1. That it did not appear by the record when judgment was given that any "true bill" had been found.

2. That the indictment contained abbreviations and contractions, such as "&" for "and," contrary to the statute—and. rejecting these abbreviations, the indictment would be vague, insensible, repugnant and without the necessary averments to constitute a good indictment for murder.

3. That after the jury retired a paper was sent to them without consent of prisoner or his counsel, during a recess of the court, which purported to be the instructions of the court, but which were not either the original instructions as given, or a certified copy, or a true copy, but left out an essential and important word, which might affect the whole case, and which was added by the court, at the instance of prisoner's counsel.

I.—Under first head, when motion was made in arrest and judgment was given, the only entry *v.* Holton was this: "The Grand Jury presented the following: The State *v.* Thomas J. Holton, felony."

Our constitution declares, "That no person shall be put to answer 482 any criminal charge, but by presentment, *indictment,* or impeachment." Thomp. Dig., 3.

Our statutes prescribes, "That all indictments shall be signed by the prosecuting attorney, and endorsed on the back by the foreman of the Grand Jury, when so found, '*a true bill,*' and when not found, 'not a true bill,' and signed by him." Thomp. Dig., 522.

This much is necessary to make the paper formal, of lawful form. But it is still *in fieri,* it is not yet a lawful accusation. A deed is formal, when signed and sealed in the presence of two witnesses—but is yet not *a deed till delivered,* and in some instances and respects *till recorded.* And a will is formal, with three witnesses by our law, who sign in presence of testator—but it is still no will, till he is dead—and must be admitted to probate, to complete it as evidence.

So, all prescribed above may be done, and yet a party never be indicted, because the jury may change their minds at any time, till the indictment *is delivered by the foreman to the clerk in open court. in presence of the Grand Jury.* It is that delivering which makes *the accusation*—that is the *presentment.*.

No one can dispute these propositions: 1. No man can be legally convicted till he is legally accused. 2. He can be legally accused of murder only by indictment. 3. He cannot be indicted, except by a decision of twelve Grand Jurors against him. 4. That decision can only be known to the court, and the prisoner, and the world, by the RECORD, showing their assent to that fact in open court, when called expressly for that purpose.

If there is any other mode of showing the assent of twelve, it is not to be found in the books. The invariable practice has been to call them, and to record their presentment—"a true bill," or "not a true bill,"—no other evidence can be shown to have ever been resorted to, but that record, in any case. In making up the rolls in England, where the case has been removed for trial in any of the various modes there practiced, if there has been any error or omission is transcribing, it is to this original record of fact, which no where else exists, to which they resort to amend all the rest. There is no case in which they have altered this, or amended, or added to it. When the Grand Jury have given their bill and been discharged, the record then made must forever stand, because there is nothing extant *to amend or alter by.* The body which established the fact,

has vanished forever. It can no more be altered by a court, than a constitution or law, after the adjournment of a Legislature, can be altered by the Executive—or a judgment of a court altered by a Grand Jury. *It is the judgment of the Grand Jury*—a co-ordinate branch of the court—to be entered by the clerk, in presence of the judge. It is a thing which the judge cannot control, except to see that it is properly recorded at the time, in presence of the Grand Jury. He *cannot*, even in presence of the Grand Jury, alter their decision, or add to it, or require them to alter, or add to it. He is obliged to ask their consent, if they are content that the court may alter matters of form, not altering matters of substance; and *if they consent*, he may then alter matters of form *in their presence*, but not after they have retired. All this ceremony must be very idle, if he can afterwards *enter a verdict, where he finds none*. The record is said to be in the breast of the judge until the end of the term, and until that time, he may alter, and amend, and change—but what?—Surely only *his own decensions and opinions*, and the accidental misprisons of his clerk. The record of other people's decisions, opinions and verdicts, are not in the breast of the judge—they never are there. The verdicts are in the breast of the juries, till they are *recorded*, and they are upon the record, *and no where else*. The record of a verdict is as conclusive and irrevocable to the jury, as the end of the term to the judge. It is more so. There are some matters he may amend or alter afterwards, the jury never can. If the jury who give the decision cannot alter or amend the record then made of it, how can the judge, in whose breast it never was, and consequently who can never know, except by the record, what they intended?

The verdicts are acts independent of the court. They constitute a *basis*, on which the court is then to begin to act. It is the absence of this of which we complain. We oppose a judgment, because the *basis* is wanting—and the judgment is given, and then the *basis* created by an *amendment*.

Until the bill is brought in "a true bill" by twelve grand jurors there is no accusation—nothing on which the court can arraign—to which the prisoner can plead—no fact alleged to which a petit jury can say "guilty—for which the court adjudge death." Until it appears on the record, no one knows that it is brought in *De nom. apparentibus et non existentibus est eadem lex.*

In this case, the Grand Jury have returned into court only one
484 bill—"The State *v.* Holton, felony." Must we presume it "murder," in preference to any other "felony"—must we presume it "a true bill," in preference to 'not a true bill'—or must we rely upon the frail memory of man after judgment of death, by which to amend the record.

Record evidence is necessary, else why amend the record? And yet a record from memory is no record. The amendment condemns itself. The bandage shows the wound, but cannot heal it. As the record shows on its face nothing of the finding a true bill, the presumption of innocence arises, that none was found. This presumption outweighs all human memory—nothing but a record can strangle it.

The signature of the foreman on the back of the indictment is only a form, making the "bill"an "indictment." It does not prove the concurrence of twelve, *or the return to court*, any more than does the Solicitor's signature to the body of the indictment. It proves only for *one*—we claim proof for twelve. To give this, it must be *presented in open court*, with the assent of twelve. No court would receive a bill and record it as a true bill, if only eleven grand jurors answered when called. Formerly the names of those who presented a bill had to be set out at length. The foreman may sign by mistake (as has been done) one bill for another—in anticipation, or after a hasty agreement, afterwards reversed by the jury, and he forget to erase, or to add the word "not"—by mistake of law, ((in which a majority of the jury may partake,) as by deeming a majority of the Grand Jury (though less than twelve) enough to find a bill, as in Low's case. 4 Greenleaf, 439.

But if the signature was evidence of the concurrence of twelve, which is impossible, it still would not show the further fact, that the *locus penitentiæ* had passed, that the act was consummated, that the bill was *presented* in open court. It may have come in by accident, or mistake, or fraud.

The signature of the foreman *is no evidence at all of anything, until the bill is presented in court*. It is the presentment in court, that makes the signature of the foreman of any importance, and then only as the *completion of a form*. It is *the record* which only makes the *signature* evidence of a perfect indictment—then *it* cannot make a record. Until the record shows the fact, that the bill has been returned "a true bill," the court does not judicially know of this signature of the foreman, or in fact that there is an indictment. And if it 485
was handed to him during the term, and he could find no record, he could not notice it. He could not ask the clerk or the bystanders, if such a bill had been brought in. He could not rely upon their memories, though they might be unanimous—not because it would not be true, but because he would not have a record. How, then, can he rely upon his own memory? And if he puts his own memory upon the record, it can be no better than that of all the rest—it cannot supply the place of that which was *indispensable*

We thus see that the record is the *substance*, (showing that twelve agree and present before the world a solemn fact, affecting often life, and liberty, and always reputation,) and the signature of the foreman is only the *form* to complete the instrument of accusation; and suppose the form was defective, and there was no signature on the back, though written a true bill and recorded a true bill, we could not amend even the *form* by the substance, which showed twelve had concurred and had presented in open court—how much worse is it, then, to amend the substance by the form? In the former case, too, the record would be conclusive, that the bill was found and presented by twelve; but in the latter case, the signature proves nothing but the completion of the form.

[Here Judge Lancaster asked if the indictment is properly endorsed—and if so, *when* it was so endorsed? Brockenbrough—"It is properly endorsed. But *when* does not appear, because we have not the record of its return into open court, and the impossibility of answering by the record when a man was indicted, sustains our argument. It proves the endorsement to be nothing, until the finding is recorded. An indictment need not show *when* it was found, because the record shows *when* it was found. So decided, 2 Virginia cases, p. 3.]

To support these views, see what is inserted in making up the record. 1 Chitty's Crim. L., 719.

See the ceremonies pursued in bringing in a bill. 1 Chitty, 324. The same are found in 3 Robinson's Practice, as pursued in Virginia. The same has been the Florida practice. No book lays down any different practice any where. These ceremonies, when considered as essential, and the record conclusive, become vitally important to life, liberty and reputation, and carry out in practice the protection afforded by our Constitution and Bills of Right; but become a mere
senseless mummery, if they may be dispensed with entirely, or the 486
results equally recorded without the presence of the Grand Jury.

On removing the cause, or copying the record, these ceremonies become an important part of the *caption*, without which the record is not admissible in evidence. 1 Chitty, 326. They are important, because they prove the *fact*, and show that there is such a record; and although the caption may be amended, it is because it is a copy, and the record we require must exist to amend it by. In 1 Chitty, 326, is the form of a caption, concluding *"it is presented,"* and formerly it was indispensable that this should be in the present tense, but now it is not thought to be absolutely necessary. This could not have been important, except to show that the *record* was made at the time it was presented, and if it even *seemed* to have been made afterwards, it was error.

But it is said this record can be amended, and has been amended 2 Hawkins Pl. C., 336—'7, sec. 96, 97. This admits the conclusiveness of the prior argument, and that it is indispensable to *the judgment*. This admission invalidates the judgment, unless the capacity to amend it is established. Of this, the burden is upon the State.

What is an amendment? t must be an improvement, by change or addition of that which *exists*, but is imperfect. You cannot amend a non-entity

We say there is no true bill presented. We examine the record, and show there is none. Can you call it amendment, to insert a true bill was presented?

You order it *nunc pro tunc*—that is, you order it *now* for *then*, because it should have been done *then*. But it is too late to do it *now* because it is after judgment. And before judgment, you must have had a record of a true bill, or you could give no valid judgment.—But you had no record—we moved in arrest, *because* there was no record—for that we moved in arrest.

You had no record of a legal accusation—you give judgment, and then make the record *now* for then. We say your judgment stands *void* by your own amendment, because it shows you have only *now*, which was indispensable *then*.

Besides, it is a thing you cannot make *now*. There was but one branch of the court which could make it at any time, and that has dispersed. You do now what *ought* to have been done then. But it is

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487 precisely the evidence of that fact which is wanting—*ought* it to have been done then? We know not, unless we had the record to prove there were twelve present assenting. We can listen to no man's memory. The only evidence we can have that it ought to have been done, is the *record* that it was done. Wherever you can amend, you must have something to *amend by*. Here there is nothing—there was nothing—there never will be any thing. It was a fact which appears no where else, in no other manner—of which no other evidence exists, or was ever meant to exist, anywhere but the record made then. A *fact* which only existed at that moment. Before that time it was inchoate, afterwards irrevocable and unalterable. It was no one's duty to note it any where else, or preserve it, or keep a record, minute, or memorandum of it. If any one did so, it was unofficial—no record—merely memory, parol.

See 1 Chitty, 721-'2. "And no court can make any alteration, when once the judgment is solemnly entered upon the record." And strange would judgment records read, if, after sentence of death is solemnly passed, and the prisoner is remanded to the place whence he came, to depart thence only to the grave—after the prisoner is gone, if then only verdicts were to be enterd for the first time upon the record. By whatever name we call it, the record still shows judgment of death without a true bill—and the insertion of a true bill afterwards, when the prisoner was gone, the Grand Jury dispersed.

It even appears that the acts of the court must be described in the *present*, not the past tense—that the record must show that the prisoner was present, *when sentence of death was passed*. 1 Chitty, 751. And this because the statutes of amendments do not apply to criminal proceedings. This matter of the *present tense*, though frivolous it may seem, shows that the record must walk *pari passu* with the actual proceedings, and must tell of things done as they are done at the time, and not by any subsequent alterations and amendments—and if these niceties are important, what shall we say of the whole foundation of the action being brought in at the end, or the cellar and its massive walls, intended to sustain, placed on the top of the building?

At page 752, [753,] 1 Chitty, we learn that "no alteration can be made in the finding of the jury of matters of substance, whether it be the decision of the grand or the petit inquest."

488 "The judge may amend his own judgment, &c."—"mere ministerial acts may be amended at any time"—"any matter not of record may be amended by *the record*," &c.

So 1 Chitty, 644, [645,] "But it seems to be the better opinion, that though a verdict cannot be amended in matter *of fact*, yet the court may amend a mere error in form even in capital cases, when there are any minutes *or notes by which it can be amended*." This must mean whilst the jury is present, even as to form. But surely it is a matter of *fact*—"a true bill," or "not a true bill." It is not only matter of *fact*, but it is all—it is the whole verdict—it is all the jury has to say. All the rest is only the recital of the clerk of what occurs in the court—not of any conclusion to which the jury come, or any thing which occurred in the jury room. The clerk says, "This day the Grand Jury came into court, and presented the following bills: State *v.* C. D., larceny, State *v.* Holton, murder."

This tells nothing of what the jury think; it merely shows they came with certain papers. If he says no more, the presumption of innocence is, that they ignored both. If he says "A true bill," then the jury speaks, and it is all *they* say. If "not a true bill," it is equally all they say. To insert either of these is to make the whole without a memorandum. If we must insert either in their absence, we must insert by legal presumption—"not a true bill"

But in this case the *amendment*, if made and *good* in all other respects, does not go far enough. It makes it *"felony, a true bill"*—but not "MURDER, a true bill," which is what is wanted and indispensable. The bill found might have been the highest felony. The amendment may be perfectly correct, and still *non constat* that a bill for *murder* was ever found by that Grand Jury. And this shows the danger of amendments. If the court could amend by adding the verdict, could it not also amend by altering the description? Might it not have erased felony, and inserted murder, from memory? And if so suppose two bills—the one felony, for stealing, a true bill—the other felony, for murder, *not* a true bill—might not the court alter and transpose these, by the same power of amendment? Where is the limit? Suppose the Judge's memory was one way, and every other person's the other, which shall prevail? But if amendment is legal, can it be made when the prisoner is in the *condemned cell*?—has he not a right to be heard by counsel, to introduce *evidence* upon the *new fact* to be introduced upon the record?—has he no right to except to the opinion of the court? Can he not claim to have the fact 489
tried regularly?—can the court alter of its own mere motion, when the solicitor does not ask it for the State—when he says in *open court* it is *sufficient as it is*, and the court *concurs* in this, and passes judgment, can it afterwards in private order the change?

II.—As to abreviations in the indictment. The statute is peremptory—it shall not be in Latin, it shall be in English, and there shall not be abreviations. It will not, therefore, answer to say, "&" is a short way of writing the latin *"et,"* because all abbreviations are a short way of writing something else. And if it is Latin, it violates the other part of the statute, which requires it to be in English. See both these rules in 1 Chit. Cr. Law, 174, 175, 176.

It is no answer to say the indictment may be read without them.—Because being in violation of the statute, it is void, and cannot be read at all. But this indictment, without the "ands" written "&," would be insensible in many places, and is not sufficient in some vital parts.

Thus it not only reads, "in the Circuit State aforesaid, "in upon his head" "did strike, beat," and the like, but says he did it with a stick which he "then there *had held*"—that this, before that time, whereas he must have held it *at* the time. Besides it does not say, if we leave out the "&," that he killed Stafford or that he murdered him, but that he "did *kill murder*," which is either nonsense, or an averment that he killed a man named "murder," and certainly no averment that he killed or murdered Stafford.

III.—As to the instruction sent the jury. This requires no argument; neither the court, nor the parties, nor any other person can send a thing to the jury, nor hold any communication except in open court. No one can speak to them out of court except the bailiff, and he only to ask them if they have agreed. Our law makes the instructions a record—they are required to be written. A copy of it is not evidence for any purpose, except made out in the regular way—a mutilated copy cannot be. The statute which requires them to be written does not authorize them to be sent to the jury, though they might be, *perhaps*, with the prisoner's consent, in open court. But to send a loose, *imperfect copy* out of court, by an order which does not appear of record, must be inadmissible. And who can tell what effect they had? It is presumed they were thought of some importance, or the law would not record them, the judge would not give them, and the jury must have thought them of some importance, or they would not have sent for them. After receiving them and pon- 490
dering upon them, they agreed upon a verdict, which they did not agree upon before, though they had heard the same short charges, impressively and deliberately read to them more than once—who shall them say it had no effect? When that charge was delivered in court, prisoner's counsel asked the addition of a word—a word which introduced a whole chapter of possible accidents to the consideration of the mind. The prisoner and his counsel must have thought it important; the court must have thought it of some import, as at least giving a chance of life—or to say the least, that is was not unreasonable or unlawful to give it. The jury wanted the charge, it was said—no doubt truly—but the application should have been made in open court, and recorded when granted, if granted—for the bailiff may have been mistaken. But if they did want the charge, they wanted it as given—the court must have ordered it as given. It was sent without one of its words—who shall say that the jury did not doubt about that very word?—and that the paper sent them without it, may not have solved the doubts?—or if it was some thing else, who knows what chain of thought that word might have awakened in the minds of the jury? The court states that the branch of the subject was much relied upon by counsel—a branch which made impression enough on their minds to enforce with zeal, might by that *word* have raised at least a *doubt* in a jury's mind, when he was there *pondering* over the charge written in fixed unvarying form before him—when the evidence was sinking into a dream, and the argument only a confused and cloudy reminiscence.

Hogue, for the State?

The first error assigned in this case is, that it was not proper to send the written charge of the court to the jury. The law requires that the charge shall be reduced to writing *and filed in the case*.—If the charge sent to the jury contains nothing more that the written charge filed in the case, it would seem that it is not such error, because there is nothing in such a proceeding which "gives reason to suspect the purity of the verdict," and nothing which "affects the impartiality of the trial." Any irregularity committed in the course of a criminal proceeding must be, in order to vitiate the verdict, of such a character as to have the effect of destroying the purity of the verdict and the impartiality of the trial, or at least of affording ground to

491 suspect one or the other. Davis Crim. Law, 467. See also 12 Pick., page 519. Though the act complained of is unusual or "contrary to the ordinary forms," it is not necessarily such an irregularity as to affect the impartiality of the jury. 12 Pick., 519, 510. See on the subject of instructions, 7 Wheeler Am. Com. Law, 122.

But it is objected, in this case, that the copy sent was not a true copy—that the words "or accident" were left out. These words were not material and in fact, were not necessary in the original. The record shows that there was no evidence which would have required the Judge to insert the omitted words in the charge which he gave to the jury before their retirement. Unless it can be supposed that the omission of these words brought the jury to a different conclusion from what they would have arrived at, had those words been in the copy, it cannot be error. The impartiality of the trial would not be affected by the omission. If the omission would not have such an effect or tendency, then the verdict will be supported upon the principles before laid down, as to irregularities.

The second error assigned is—that the indictment contains abbreviations. The only abbreviation complained of is that & is written for *and*. It would seem, upon principle and reason, that such an objection as this would not be sufficient to vitiate a verdict, upon motion for a new trial or in arrest of judgment. At most, it is a mere formal objection, which ought to have been taken advantage of before pleading.

"An indictment," as defined by Lord Hale, "is nothing else but a plain, brief and certain narrative," &c., "in which, in favor of human life, great strictness has at all times been required, to that degree, as to become the disease and reproach of the law." 2 Hal. Hist. P. C. 193. 3 Bac. Abridg., Indictment, letter G. "There is no rule that other words should be employed than such as are in ordinary use, or that a different sense should be put upon them than what they bear in ordinary acceptation."—Ibidem. Tried by this rule, it cannot be pretended that the abbreviation & can be used in any other sense than *and*. It is in such use as to be a full word of itself, and can scarcely be regarded as an abbreviation. It is as much and as often written as the other, and no meaning can be attached to it repugnant to the sense or context of the indictment. If, then, it is free from ambiguity, on what ground can it be objected to on motion for a new trial or in arrest." No case, it is believed, can be found, in which such an
492 objection was sustained. If the sense be clear, nice objections ought not to be regarded. 2 East., 259. The statute against abbreviations was only intended to prevent such as rendered the indictment obscure or ambiguous. *This* cannot be argued of the abbreviation complained of here.

The third error assigned is—that it does not appear by the record that the Grand Jury had ever found a true bill.

The indictment itself has the indorsement "a true bill," but this fact was not instantly recorded by the clerk. This is the objection. The formalities and solemnities required, so far as the books show, are simply these: the Grand Jury come into court and publicly present the indictment. If it is returned a true bill, it is so indorsed and signed by the foreman. "The indictment is then said to be *found*, and the party *stands indicted*." 4 Black. Com., 306. 4 Com. Dig. 645.

Now the Grand Jury Jury is the accusing body. Does the court try the party upon their accusation, thus formally and solemnly presented, or upon the record made of the fact by the clerk? Clearly upon the accusation of the Grand Jury. The only case in which I have seen it required that there should be a record of the fact, is the case of Cawood, 2 Va. Ca. And yet the judge who pronounced the opinion in that case, mentions no other forms or solemnities requisite to the complete accusation of the party, than those above laid down. It is true, he says the Grand Jury deliver the indictment to the lcerk, *"who records the fact."*

In the case of Cawood the record did not show that the Grand Jury had ever presented any indictment whatever against him. In this respect, it differs from the case before this court. The record here shows that the accusing body came into court and presented an indictment against Holton for felony; but the record did not show the words "a true bill," though that indorsement was on the indictment itself. In other words, the clerk failed only to record the words "a true bill."

Now, if that formality was necessary, though I can find it no where so laid down, except in Cawood's case, the next question is—could the court direct the clerk to place those words on his record book, in addition to the entry he had already made in the case? It seems to me it is, at most, an omission of the clerk which can be rectified at any time. The record of the fact of the finding "a true bill" is not

one of those solemnities deemed necessary to constitute a complete 493
accusation by the accusing body.

This question involves the whole doctrine of the power of courts over their records, during the term. This doctrine is briefly set forth in 3d Vol. Dane's Abridg., 510, to which I refer the court. I remark that, in the case before the court, it *does* appear by the record that the Jury had presented a bill in open court against the prisoner. All that the court did was to make that record say "a true bill." In Cawood's case, nothing whatever appeared on the record, yet I apprehend that in that case the court below might have ordered it to appear, so as to make the record conform to the indictment; and such appears to have been the opinion of the General Court of Virginia, in that case.

But another question still remains. The prisoner was tried for murder; both the indorsement and the record read "Felony—a true bill;" is this sufficient?

"The common law of England in relation to crimes and misdemeanors, except so far as the same relates to the modes and degrees of punishment, shall be, and the same is hereby, adopted and declared to be in full force in this State." Thomp. Digest, 489.

"Any person convicted of the crime of murder shall be punished with death." Same, 490.

"Felony comprises every species of crime which occasioned, at common law, the forfeiture of lands and goods." This most frequently happens in those crimes which are punished with death."—4 Black. Com., 94.

In this country there is no such consequence as forfeiture of property. The only attribute remaining to distinguish a statutory felony from any other offence is the punishment of death—though it is competent to the Legislature to make any offence a felony without annexing such punishment; but if that punishment is annexed, it is necessarily a felony.

"All statutory crimes to which capital punishment is annexed are, by reason of such punishment, felonies." 3d Robinson's Prac., 39. Now the common law declares that murder is a crime. The statute of this State also declares it. It is, therefore, a statutory offence.—The statute annexes the punishment of death. It is, therefore, a felony. If it be a felony, the indorsement of an indictment for murder with the words *"a felony"* would not vitiate the indictment.

In this case the prisoner was indicted for murder which, by the in- 49
dorsement on the indictment and by the record, was styled "a felony." The body of the indictment shows for what particular crime the party was indicted. He was led to the bar and arraigned for murder, and pleaded not guilty. The only record, then, to which it is at all necessary to look, shows that the prisoner, Holton, was indicted and tried for the crime of murder; and certainly, the mere indorsement of the words "felony," which is no part of the accusation, should not vitiate the indictment and the verdict of the jury.

On the contrary, upon the reason and principle, the very reverse is to my mind perfectly clear. The indorsement of the particular kind of offence or grade of crime is made by the prosecuting attorney. The Grand Jury has nothing to do with it. All that they endorse is "a true bill," signed by the foreman. The foreman does not sign the particular offence, but affixes his signature only to the words "a true bill" or "not found," as the case may be. Suppose no crime was indorsed at all, and the Grand Jury found "a true bill," would it not be sufficient? Would not the Grand Jury, in such a case, have complied with every form and every solemnity required, in the language of the authorities, to make "the accusation complete?"

But it is perfectly clear to my mind that the word "felony," embracing as it does the crime for which Holton was indicted, was a good indorsement, if, indeed, any indorsement of crime was requisite. It is a generic term, and the body of the indictment points out, declares and makes known, as the action of the Grand Jury, the species of crime of which they accuse the party in any particular case.

The action of a Grand Jury, in finding a bill of indictment and indorsing it "a felony," if, indeed, they do indorse it, merely assigns the particular crime charged to the general class to which it belongs. If this is error in law, then the Grand Jury have erred in this case, supposing they made the indorsement in question, although they have not erred in logic.

The counsel for the plaintiff in error lays down four propositions which, he says, no one will dispute: 1. That no man can be legally convicted until he is legally accused. 2. He can be legally accused of murder only by indictment. 3. He can be indicted only by a decision of twelve against him. 4. That decision can only be known by the record.

It is not necessary, nor will it be attempted, to deny these propo-

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sitions. The record in this case shows that the prisoner was legally accused. How is the decision of twelve of the Grand Jury against a party to be made known, but by the forms prescribed by law?—The indorsement of the indictment "a true bill," signed by the foreman, is the only evidence which the law requires of the assent of twelve. "The signature of the foreman of the Grand Jury to an indictment, certifying it to be a true bill, legally imports that it was found by twelve or more grand jurors." Such was the sensible decision of the Supreme Court of Massachusetts in the case of Turns *v.* Commonwealth, 6 Metcalf, 225.

But it is said there is no record of this fact. I answer that there is. The record shows that it was amended. This, the counsel contends, is an acknowledgement of the error. Suppose it is; the court has power to correct any error during the term. This power is clearly settled, and cannot be denied.

But it is said the amendment cannot be made after the discharge of the accusing body. Their assent to the amendment, it is said, is absolutely necessary. Strange doctrine, this? When the Grand Jury have come into court and presented a bill of indictment "a true bill," and have been discharged, the indictment so found no longer belongs to them. It is placed, when found, among the files of the court, and from the court's own files the amendment is made and not from any papers in possession of the Grand Jury, or from the recollection of the members of the Grand Jury, or the memory of other persons.

Every form of law—every requisite in a criminal proceeding has been complied with in this case. There has been no irregularity affecting the impartiality of the trial. Not a step has been taken that does not clearly show the correctness of the proceedings, the fairness of the trial and the justice of the verdict. There is no reason, therefore, why a new trial should be awarded.

Opinion by Chief Justice DOUGLAS:

This case was brought up by writ of error from the Circuit Court of Jefferson county.

The record commences with a caption in the following words, to wit: "Pleas at the Court House in the town of Monticello, Jefferson county, in the State of Florida, on the first day of December, in the year of our Lord one thousand eight hundred and forty-eight, before the Circuit Court of law of the county aforesaid."

And after setting out an affidavit said to have been made before a justice of the peace, the issuing of a writ by the same justice, and a mittimus to the sheriff of said county, with the following endorsement by the said sheriff, viz: By virtue of the within, I have received and committed to jail the said Thomas J. Holton"—none of which ought to have been inserted in said record, as they form no part of it—the record proceeds as follows:

"And on another day, to wit: on the twenty-ninth day of November, in the year one thousand eight hundred and forty-eight, and at the October adjourned term of the Circuit Court for Jefferson county, the following entry was made among the records of said court, to wit: "The Grand Jury came into court, and presented the following bill of indictment, to wit: The State of Florida *v.* Thomas J. Holton, felony. A true bill—together with other Criminal cases.

The following is a copy of said bill of indictment, with the endorsement thereon, to wit: "State of Florida. In the Circuit Court for the Middle Circuit of the State of Florida, for Jefferson county, at November term, in the year of our Lord one thousand eight hundred and forty-eight. Jefferson county, *ss.*" Setting out the indictment, which is in the usual form, charging Thomas J. Holton with having murdered one John F. Stafford, with the following endorsement: "State of Florida *v.* Thomas J. Holton. Indictment for a felony.—Found Nov. term, 1848. A true bill, Allen R. McCall, Foreman." On the first day of December, 1848, as appears by the record, the prisoner, Thomas J. Holton, was arraigned, and pleaded not guilty to the said indictment, and the case was submitted to a jury, who, by their verdict, found the prisoner "Guilty of Murder"—upon which verdict, judgment was pronounced, and the prisoner sentenced to execution; which sentence is succeeded by the following entry: "and thereupon the said Thomas J. Holton is remanded to jail;" after which, the following order was made by the court, to wit: "The State of Florida *v.* Thomas J. Holton, murder, a true bill. In this case, after the rendering of the verdict by the jury, the defendant by his counsel moved the court for a new trial and in arrest of judgment, which motion was overruled." Whereupon, the said defendant by his counsel prayed the court to sign and seal his bill of exceptions. "It is therefore ordered that the writ of error asked for in this cause, when issued, shall act as a *supersedeas;* and there being an omission to state that the Grand Jury presented the indictment in this case 'a true bill,' it is, therefore, ordered that the same be done *'nunc pro tunc.'"*

It further appears, by a bill of exceptions, which constitutes a part of the record in this case, that between 11 and 12 o'clock at night, the jury had sent to the judge by their bailiff for his charge, and that the clerk had, on a message from the judge, made out the following paper as a copy of the said charge, to wit: "If the jurors believe that the deceased came to his death by a blow from defendant, stricken with a stick upon the head, and that such blow was given not in self defence, nor in the belief that defendant was in imminent danger of bodily harm, and without adequate provocation, the defendant is guilty of murder." "If the jury shall be of opinion that some new injury or violence, subsequent to the blow stricken by defendant, was made by another, so as to enlarge the wound, or create a new one, and that this caused *of itself* the death, then you will find the defendant not guilty." To the close of this last charge, the words "add accident," were attached in the hand writing of the judge, but were omitted in the copy sent by the clerk to the jury—and said charge, omitting the said word accident, and not sealed or certified, and without consent of prisoner or his counsel, was sent to the jury.

It appears, by another portion of the record, which, by-the-bye, is very irregularly made out, that this word *accident* was, on motion of the prisoner's counsel, added in the last clause of the charge, immediately after the word *"another,"* so as to make it read, *"made by another, or by accident, so as to enlarge,"* &c.

It also appears that the prisoner by his counsel moved the court to add to his first instruction the words—"But if the jury believe, from the evidence, that the prisoner did not believe at the time he inflicted the blow, that it was with a weapon likely to inflict death, then that the jury might acquit the prisoner;" which was refused by the court, and to that refusal, the prisoner by his counsel excepted. The foregoing contains all of the record properly applicable to the question presented in this case.

The important and delicate trust which we are called upon to exercise, in reviewing cases of the description of the one now presented for our consideration, strongly admonishes us of the caution and prudence with which any such examination ought to be attended. Every step in the conduct of a trial of this nature imposes upon the court very great responsibility, and requires its fullest deliberation. All the light which can be derived from authority, or from argument and discussion, is deserving of the most serious attention.—With these views of the character of the duties evolved upon us in this case, we approach the errors assigned; and the *first* is, that "it was a fatal error to the proceedings to send the instructions of the court to the jury—especially to send a copy, and that *not a full and perfect copy"*

This assignment is based upon the fact stated in the record, "that between twelve and one o'clock at night, the jury had sent to the judge by their bailiff for his charge, and that the clerk had, on a message from the judge, made out a paper containing the following, which he sent to the jury, viz: "If the jury shall be of opinion that some new injury or violence, subsequent to the blow stricken by the defendant, was made by another, so as to enlarge the wound, or cause a new one, and that this caused of itself the death, then you will find the defendant not guilty."

It further appears, that when this charge was given to the jury, counsel for the prisoner moved the court to add the word *accident,* so as to make the charge read, "made by another, or *by accident,"* &c., which was done; and that the judge added the words (by an asterisk) in his own handwriting, at the foot of the written charge; but that the clerk, in the paper that he made and sent to the jury, left these words out.

The first question presented for our consideration, upon this statement of facts, is, whether this paper, admitting it to have been a full and true copy, could rightfully have been sent (as this was sent) to the jury? And after the most mature deliberation, and the most full consideration of the question, we are of opinion that it could not.—The Constitution of this State, chap. 1, sec. 2, No. 10, Thompson's Digest, page 2, amongst other things, provides, "That in all criminal prosecutions, by indictment or presentment, the accused shall have a speedy *public trial,* by an impartial jury of the county or district where the offence was committed;" and No. 15, page 3, "No person shall be put to answer any criminal charge, but by presentment, indictment, or impeachment." The charge of the court to the jury is the evidence to them of the law which they should apply to the

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facts, and is part and parcel of the trial of the cause, the whole of which should be *public*. The statute approved January 4, 1848, sec. 8, Pamph. Laws, p. 10, requires, "That charges made by judges to juries in criminal cases shall be reduced to writing, and filed in the case;" and because this is so, it has been urged by the Attorney General, that "If the charge sent to the jury contains nothing more than the written charge filed in the case, it would seem that it is not error, because there is nothing in such a proceeding which gives reason to suspect the purity of the verdict, and nothing which affects the impartiality of the trial;" and Davis' Cr. L., 467, and 12 Pick. Rep., 510, 519, were cited to sustain this proposition. In the case in 12 Pick., the constable who attended the jury furnished them some refreshments, without an order of the court, but they were such as the court deemed reasonable, and without deciding whether the facts disclosd an irregularity or not, it refused to grant a new trial for that cause. Davis says: "The present inclination of the courts appears to be, rather to relax than to increase the strictness of the law on this subject, in so far as the object to be attained, which is the guarding against the exercise of any improper influence over the jury, will allow; and, therefore, where there is nothing in the transaction which gives reason to suspect the purity of the verdict, to sustain it, notwithstanding any *trivial* irregularity, not affecting the impartiality of the trial." In the case of Guykowski *v.* The People, 1 Scamm., 479, also cited by the Attorney General, the court held the following language: "Where there is every reason to believe, from an inspection of the proceedings, that the intrinsic merits of the case have been fairly ascertained and determined, the adjudication of the inferior tribunal should not be disturbed, unless it satisfactorily appear that some settled and well established principle of criminal law, or rule of proceeding, has been clearly violated." While the justice of the rule here asserted is admitted, and an adherence to its principles conceded, it is of equal importance that the rights of the accused should be protected and preserved, and the essential forms of law prescribed for the mode of conducting the ascertainment of his guilt, should be carefully observed and followed. A departure from them could not fail to produce difficulties and doubts. A recognition of a departure in one case, might lead to the adoption of another; and finally, those barriers, which are guarantees for the regular and impartial conducting of criminal cases, might be frittered away, and possibly eventuate in gross in justice. It is much easier to require the observance of the mandates of the law, than to determine in what cases they may be safely dispensed with. It is, therefore, more proper and more consonant to reason and justice to require a substantial adherence, than to suffer innovations upon the known and positive rules prescribed by law for the regular conducting of causes. The justice of these grounds is as clear and apparent, as those which are founded on principles of humanity, by which the administration of criminal law has been marked, and which declare that the accused stands on all his rights, and waives nothing which is irregular, and more especially so, where life is in the question." Testing this case by these principles, we enquire whether a positive rule, prescribed by the Constitution, which is the paramount law of the State, would not be violated, by thus sending the charge to the jury? It would be nothing less or more than re-charging the jury at their room, in the absence of the prisoner and his counsel, as had been once publicly done in their presence, in open court. We are not prepared to say, what effect this might have upon the jury in determining their verdict; but certain it is, that if the charge, instead of being sent to the jury, had been re-read to them by the judge in open court, in presence of the prisoner and his counsel, they would have had the right (and might have exercised it) of moving for additional instructions, and if their motion was overruled, of excepting to the opinion of the court, or of excepting as to those already given, if they had not done so before; upon which exceptions, the prisoner might have based a writ of error. Of the benefit of all this a prisoner might be, and of all but the last he actually was, deprived in this case, by the course that was adopted. But if a doubt could be entertained upon this point, we think there can be none whatever that if a charge, in such a case and under such circumstances, may be sent by the judge to the jury, it should be the original one, and not a copy.

But there was another very important, settled and well established principle of criminal law violated, we think, by this proceeding; which is, that during the trial of a capital case, (the whole trial,) the prisoner has a right to be, and must be, present—no step can be taken by the court in the trial of the cause in his absence. This results from the humanity of the law, and the tender regard it has for human life; which forbids that any proceedings shall take place in the trial of such a cause, unless the prisoner charged is present in court, to make his objections to any and every step that may be taken in it, which he may deem illegal, and to do whatever else he may or can legally and properly do in his own defence. Suppose that after the testimony has been taken the prisoner escapes, or becomes sick, and is unable to be brought into court, can the jury render a verdict? Suppose he escapes or is taken sick, and is thus disabled, after the verdict has been received, can judgment be rendered? If he were to escape or become sick, and unable to remain in court while the testimony is being taken, or the charge is being given, would the cause proceed?

In the case of the State *v.* Hughes, 2 Alabama Reps., 103, 104, Collier, Ch. Justice, delivering the opinion of the court, said: "The 10th sec. of the 1st art. of the constitution declares, that "In all criminal prosecutions, the accused has a right to be heard by himself and counsel," &c.; again—"and in all prosecutions, by indictment or information, a speedy public trial by an impartial jury of the county or district in which the offence shall have been committed—he shall not be compelled to give evidence against himself, nor shall he be deprived of life, liberty or property, but by due course of law." The constitutional provision guarantees to the accused the right, not only to discuss questions of law and fact, which may arise preparatory to or pending the trial before the jury, or other proceedings in the cause. That he may avail himself of this privilege, the opportunity must be afforded him of coming into court and being heard, before he is foreclosed of any legal exception. If a different course is pursued, and a sentence pronounced ag inst him, extending to life, liberty or property, he cannot be said to have been "convicted by due course of law." Our constitution, sec. 2, No. 8, is essentially the same in principle, as that of Alabama above cited.

In Sperry's case, 7 Leigh Reps., 623, (2 supp. to the United States Digest, page 154, No. 242,) the record showed that on the 29th of September, 1837, the accused was led to the bar, in custody of the keeper of the jail, and was then arraigned and pleaded, and on motion of the prisoner, the cause was continued until the first day of the next term, and thereupon he was remanded to the jail. Afterwards, at a court held the 27th day of April, 1838, it was entered upon the record, that on that day "came, as well as the attorney for the commonwealth, as the prisoner *by his attorney*, and thereupon came a jury," &c. The jury, not agreeing upon their verdict on that day, were adjourned over until the next. Nothing being stated on the record, from which it could necessarily be inferred that the prisoner was personally present on the 27th April, the General Court decided that the verdict, which was found on the following day, should be set aside, and a *venire de novo awarded*. In the case of the Commonwealth *v.* Parker, 2 Pickering, 550, which was an indictment for murder, after the jury had been impanelled, and the circumstances of the case stated to them, the counsel for the prisoner moved that the jury should view the place where the assault was alleged to have been made. Parker, Ch. Justice, asked the counsel if they knew of an instance of a view being granted in a case like this, saying that it seemed to violate the principle, but the proceedings should be in the presence of the accused. 3d Robinson's Practice, 178. 1 Chitty's Crim. Law, 636, and 4 Black. Comm., 317, and the State *v.* Battle, 7 Alabama Reps., 259, are also authorities which tend to sustain this view of the matter. In the case last cited the court held, that, when a prisoner will not appear in court to hear the verdict which the jury announce themselves ready to render, the court may order a mistrial. This was a charge of an assault with an intent to kill, and the prisoner had fled when the jury came in—and if the court would not proceed in such a case in the absence of the prisoner, surely it should not in a capital case.

In Sergeant *v.* Roberts, et al., 1 Pick. Reps., 338, cited by the counsel for the prisoner, there was a motion for a new trial, and one of the grounds on which it rested, was a written communication from the judge to the jury, after the court was adjourned, in answer to a note from their foreman, stating the improbability of their agreeing upon a verdict. In regard to this, Parker, Ch. Justice, who delivered the opinion of the court, said: "As it is impossible, we think, to complain of the substance of the communication, the only question is, whether any communication at all is proper; and if it was not, the party against whom the verdict was, is entitled to a new trial. And we are all of opinion, after considering the question maturely, that no communication whatever ought to take place between the judge and the jury, after the cause has been committed to them by the charge of the judge, unless in open court, and where practicable, in presence of the counsel in the cause." This is a civil case, and the principle asserted in it applies with far greater force in a criminal,

and especially in a capital case. It is true, that in Shepley *a.* White, 6 New Hamp. Reps., 172, which was somewhat similar in principle, a new trial was refused. The judge who delivered the opinion in the case, after commenting upon the cases of Thayer *v.* Van Vleet, 5 John. Reps., 111, and Brown *v.* Crane, 10 Johnson, 239, concludes as follows: "The principle to be deduced from these cases seems to be a sound one. If the jury, after an adjournment, put a question respecting the facts of the case to the court, it will be irregular to state the evidence relating to it; but if they desire instruction upon a mere question of law, that may be answered. It should undoubtedly be answered in such a way that the parties may have an opportunity to have it corrected, if there is error in the answer; and in this way, all the rights of both parties are secured as effectually as if the answer was given in open court." This also was a civil case, and we doubt exceedingly whether the learned court who decided it, would have sustained such a proceeding in a capital case. The last paragraph of its opinion shows very clearly that it ought not to be applied in such a case, because if the verdict is for the prisoner, it is conclusive; and the error (if such error produced it) could not be corrected; and it is the duty of the court to hold the scales of justice even between the prisoner and the State.

The second error assigned is that "The indictment is bad, because it contains abbreviations and contractions in various parts, such as the "&" for "and." & is not a letter, but a character which represents the word *and,* and nothing else—it would be better to use the word itself. This character, however, although it may have been discarded by some classical writers and others who are very nice and particular in regard to their style of writing, has generally obtained, been long in common use, is as well understood as the word "and" itself, and is not therefore obscure, ambiguous or likely to deceive or mislead; and it is only such as are ambiguous or obscure that render an indictment bad. An indictment ought to be certain to every intent and without any intendment to the contrary. 1 Chity's Cr. L., 306. Cro. Eliz., 490. Cro. Jac., 20. But this strictness does not so far prevail as to render an indictment invalid in consequence of the omission of a letter which does not change the word into another of different signification, as *undertood* for *understood,* and *receiv'd* for *received.* 1 Leach Cr. Ca., 134, 145. And if the sense be clear, nice objections ought not to be regarded. 1 Chitty's
504 Cr. L., 172. 2 East., 259, 260. We therefore think that this objection is not sustained.

The third error assigned is that "There did not appear of record that the Grand Jury had ever found *"a true bill,"* and though the court has ordered the record to be altered, it could not be done"

The record, as we have seen, commences as follows, to wit:—"Pleas at the Court House in the town of Monticello, Jefferson County, in the State of Florida, on the first Monday of December, in the year one thousand eight hundred and forty-eight, before the Circuit Court of law for the county aforesaid," saying nothing of its being an adjourned term. And the next entry, (after setting out an affidavit, warrant and commitment, &c., which are no part of the record,) is as follows: "And at another day, to wit, on the 29th day of November, in the year one thousand eight hundred and forty-eight, at the *October adjourned term* of the Circuit Court of Jefferson County, the following entry was made among the records of the court, to wit: The Grand Jury came into court and presented the following bill of indictment, to wit: The State of Florida *v.* Thomas J. Holton, Felony, a true bill." This is all that the record contains respecting the finding of the Grand Jury in this case; and by another part of it we are informed that the words "a true bill" were not in the record until after the verdict was found and judgment rendered thereon, when the court ordered that it be inserted *"nunc pro tunc,"* and the right of the court to make this order, at that stage of the proceedings, is denied by the counsel for the prisoner, and may well be doubted. But from the view that we have taken of this case, we do not deem it necessary now to decide that question, as we have come to the conclusion, after a due examination of the record and the most mature deliberation, that there is no proper showing by the record that any bill of indictment for murder was ever found by a Grand Jury against the prisoner, and that the first error assigned is well sustained. The clerk has, after the entry of the finding above mentioned, spread *in extenso* upon the record a paper purporting to be an indictment against the prisoner for murder, which, he says, is a copy of the said bill of indictment, with the endorsements thereon; and, at the foot of it, he says "Endorsed, State of Florida, *v.* Thomas J. Holton, Felony, found at November term, 1848." Now an indictment found at November term, 1848, is not an indictment found (as stated in a former part of the record,) at the *October adjourned term,* 1848. The clerk states further that this indictment was endorsed 505
"Allen R. McCall, Foreman," but there is nothing in the record to show that Allen R. McCall was foreman of a Grand Jury at either the October adjourned term, 1848, or at the November term, 1848, if any such term was holden. There was not, however, any statute authorizing such a term to be held, and it is presumed that none such was holden; and if the bill was in fact found a true bill at the *October adjourned term,* the record should have shown when the original session commenced, but it does not. Chitty, 1 Cr. L., 331, says: "If an indictment is taken at an adjourned session, it must be shown when the original sessions commenced, as well as when the bill was preferred, in order to show that it is within the time prescribed by the statute." And see The King *v.* Fisher, 2 Strange, 865; 3 Bac. Abr., title Indictment, page 94, letter K. The caption of an indictment is a formal statement of the proceedings, describing the court before whom the indictment was found, the time and place where it was found and *the jurors by whom it was found,* and these particulars it must set forth with sufficient certainty. 1 Chitty's Cr. L. 326.—5 Bac. Abr., title Indictment, 93. This record does not show the name of the judge who held the court, unless we can infer it from finding the name of a judge signed to a bill of exceptions, after the trial was over; nor does it set forth the names of the Grand Jurors who found the alleged indictment, or even show that one was empanelled at either of the terms of the court mentioned. It is possible that these two last mentioned defects might have been amended, if the proper steps had been taken in time, but that would have availed nothing; for, if we could presume that the court was holden at the time prescribed by law, and by the proper Judge, and that a Grand Jury was duly empanelled and sworn, and that Allen R. McCall was foreman of it, when the record states that the Grand Jury found "a true bill" against Thomas J. Holton for *felony,* we think that we are not warranted in saying that they agreed upon finding and did find a "true bill for murder." The fact that a paper called an indictment for *murder* is spread out *in extenso* on the record does not cure the defect, which is, that, by the record it also appears that the Grand Jury *did not find a true bill for murder,* but only for *felony.*—It has been suggested that the word "felony" might be rejected as surplusage; but it would read that the Grand Jury came into court and presented an indictment against Thomas J. Holton "a true bill" without showing for what; which would not help the mat- 506
ter. Felony is a generic term, which includes all capital crimes.—4 Blackstone's Comm., 63. Davis' Cr. L., 62. In Cawood's case, 2 Virg. Cases, 541, the record showed that the Grand Jury were regularly empanelled and sworn, that they found many bills of indictment and made several presentments, and then, *having nothing further* to present, were discharged. In the record of the proceedings of the Grand Jury there was no entry of any bill being found against the prisoner; the paper, however, which was copied into the record as the indictment, had on the endorsement "a true bill," and this endorsement was signed by the person who was foreman of the Grand Jury at the term at which the prisoner was arraigned. It was stated in the proceedings had upon the trial, the prisoner "who stands indicted for murder, was led to the bar and thereof arraigned, and pleaded not guilty to the indictment." Held, that the prisoner did not appear by the record to have been indicted; that the failure to record the finding of the Grand Jury could not be supplied by recording the paper purporting to be an indictment,, nor the endorsement thereon, and that the subsequent plea of "not guilty," pleaded by the prisoner, did not cure the defect of the record. The Grand Jury cannot find one part of the same charge to be true and another false; they must either maintain or reject the whole, and therefore if they endorse a bill or indictment for murder *"billa vera se defendendo,"* or *"billa vera,"* for manslaughter and not for murder, the whole will be invalid and may be quashed on motion. 1 Chitty's Cr. L., 322, and authorities there cited in note (e). 2 Hale, 162.—So we think of a finding for *felony* on a bill of indictment for *murder.* Felony comprises every species of crime which occasioned, at common law, the forfeiture of lands and goods. This most frequently happens in those crimes which are punished with death. 4 Black. Comm., page 94.

The second section of the act relating to crimes and misdemeanors, (Duval's Comp., 113,) declares that any person convicted of murder, rape or arson shall be punished with death. Here, then, there are three felonies enumerated in the very section which provides for the punishment of murder. Manslaughter, too, is a felony at common law and is so regarded throughout this State. In all trials for that offence the prisoner has always been allowed his twenty peremptory challenges, under the 14th section of the act of Novem-

507 ber 19th, 1828, for the apprehension of criminals, &c., which says: "In all cases of felony the accused shall have a right of peremptory challenge of twenty." Upon an indictment for murder the jury may acquit of the malice aforethought and murder, and find guilty of manslaughter. 1 Chitty's Cr. L., 638, and authorities there cited in note. *Non constat* but the Grand Jury could not agree upon a finding for murder and so found for *felony* in this case.

The fourth and only remaining error assigned is that "The court erred in refusing instructions asked as an amendment to those granted."

The instruction asked and refused was as follows: "But if the jury believe from the evidence that the prisoner did not think the blow was likely to produce death, then that the jury should acquit the prisoner;" and we think that the court did right in refusing it.—Had it clearly appeared that he so thought, or had a right so to think from the size of the stick used, still he would not have been entitled to an acquittal—it would only have reduced the offence to manslaughter. This assignment, therefore, is overruled. But, for the reasons above stated, upon the *first* and *third* errors assigned, we are of opinion that the judgment of the Circuit Court of Jefferson County should be reversed, a *supersedeas* to the sentence of death awarded, that the indictment be quashed and that the prisoner be held to answer to a new bill of indictment to be preferred against him, and that the cause be remanded for further proceedings in accordance with this opinion.

*Per curiam.**

Note.—The Reporter understands that Justice Hawkins did not assent to all the views taken by the court in the foregoing opinion. No expression of dissent was heard from him, however, and it is believed he concurred in the judgment pronounced by the court.

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508 Michael Ferrall, Thomas M. Crowell and Lewis Hale, Plaintiffs in Error, *vs.* Richard H. Bradford and Edward Bradford, Defendants in Error.

A judgment without satisfaction, recovered against one of two or more joint debtors, is a bar to an action against the others. If the parties enter into a joint obligation, it is certainly to be understood they are to be sued jointly and not severally.

If, upon such an obligation, separate suits are brought against the joint obligors, the non-joinder of all the obligors who are in full life, and who have not been discharged by the operation of a bankrupt or insolvent law, and who are of full age, may be pleaded in abatement.

Where a suit has been brought against several joint obligors and the attorney of the plaintiff is induced, by the false and fraudulent representations of one of the defendants, to dismiss the suit as to him and another, and take his judgment against the third joint obligor, the party making such representations cannot be permitted, in a subsequent suit on the same joint obligation, to avail himself of the plea of a former recovery. Nor will the fact that such representations were made by one only of the defendants make any difference—the fraud enuring to the benefit of his co-defendant, against whom also, as well as himself, the first suit was dismissed.

A demurrer of defendants to plaintiffs' replication, averring that the proceedings in the original suit were dismissed as to them, owing to certain false and fraudulent representations made by one of them to plaintiffs' attorney, whereby he was imposed upon, circumvented, and his judgment not fairly exercised, admits the fraud so set forth in the replication.

The mode or manner in which fraud is effected is not a matter of much consequence; —it is the effect produced to which the court must look, in order to see if the result is a consequence of the fraud complained of.

Where fraud is *admitted* or proved, relief can be obtained in a court of law, as well as in a court of equity; and when the defence of fraud exists at law, the party *should* avail of it there.

Error to Leon Circuit Court..

The plaintiffs in error brought an action of debt against the defendants at the Spring term, 1846, of the Circuit Court of the county of Leon, upon a bond made by defendants, jointly, for the payment of the sum of thirteen hundred dollars. To this bond there was a condition which is recited in the opinion delivered by the court.

Richard H. Crowell, one of the defendants was not served with process. The other defendants, the Bradfords, pleaded that they were jointly, and not jointly and severally, bound, with one Richard 509
H Crowell and that, in the year 1843, the plaintiffs impleaded the said Crowell, in the Superior Court of the County of Leon, severally in an action of debt for and in respect of the very same identical cause of action, and recovered judgment against him, in said court, for the very same identical debt in the declaration mentioned.

To this plea plaintiffs replied: That J. B. Brown, Esq., the attorney for plaintiffs in the suit mentioned in defendant's plea, took judgment against Richard H. Crowell alone, in consequence of false and fraudulent representations made to him by Richard H. Bradford, one of the defendants—that the said attorney was imposed upon, circumvented, and his judgment not fairly exercised, and was induced to dismiss proceedings, as to the Bradfords, in consequence of the aforesaid representations.

The defendants demurred, alleging the insufficiency in law of this replication.

At the Spring term, 1848, the Circuit Court of the County of Leon, Hon. Thomas Baltzell presiding, the matters of law arising upon defendant's demurrer to plaintiff's replication being argued, it was adjudged that the matters therein contained are insufficient in law to maintain the action; and therefore the demurrer was sustained.

Douglas, for plaintiffs in error:

The plaintiffs' counsel contend that the judgment heretofore rendered in this case against Crowell does not bar the plaintiffs' right to recover against the defendants in error:

1. Because the whole of a joint contract is not *merged* in a judgment against one of the joint contractors. Vide Shehee *v.* Mandaville and Jamieson, 2 Cond. Rep. Sup. Ct. U. S., 362. Drake *v.* Mitchell, 3 East., 257. Brown *v.* Wooten, Croke James, 73.—Coke's Abr. Rep., 183. 1 Harr. Dig., 22. 2 Greenleaf's Rep., 191 1 Comyn's Dig. (L. 4,) title Action, 234. Bryant *v.* Withers, 2 M. & Selw., 123. 2 B. & Adolph., 892. 7 J. J. Marshal, 416. Godson *v.* Smith, 2 Moore, 157.

2. Because the joint obligation is not *extinguished* by a judgment against one of the joint obligors. See the above cited authorities.

3. The recovery of judgment against one, is no *release* to the others. The recovery of judgment negatives the idea of a release.— 510
The authorities cited prove this position.

4. Nothing short of full payment by one of several joint debtors, or a release under seal, can operate to discharge the other debtors from the contract. Walker *v.* McCulloch, 4 Greenleaf, 421. Ruggles *v.* Patten, 8 Mass., 480. 14 John. Rep., 404. Dennett *v.* Chick et al., 2 Greenleaf, 191.

5. Judgment and execution without *satisfaction* is no bar to a recovery against the co-obligors, otherwise in torts. 1 Johns. Rep., 291. 3 Mol., 87. 1 Ch. Plead. 33, and note G. 2 Hen. & Mun., 358. Blumfield's case, Coke's Abr. Rep., 169. 2 Shower, 494.—3 East., 257. Walters *v.* Smith, 2 B. & Adolph., 892. Bailey *v.* Rogers, 1 Greenleaf, 186. 2 Black., 947. Reese *v.* Abbott, Cowp., 832. 2 Bailey, 411.

Should the court differ with me on these points, still we hold the replication is good and a sufficient answer to the plea. Fraud vitiates all proceedings, and those who are parties to it may not shield themselves under the effect of their own acts. If the attorney was induced to take a sole judgment against Crowell, one of the joint obligors, by the false and fraudulent representations of his co-obligors, or either of them, or by their simple misrepresentations, then the co-obligors, who have pleaded the judgment, cannot take advantage of their own wrong. Vide Simms *v.* Slacum, 1 Cond. Rep. S. C. U. S., 539. Borden *v.* Fitch, 15 Johns. Rep., 121. Fermer's case, Coke's Ab. Rep. 60. 1 Cain's Rep., 461. Sinclair *v.* Fraser, 1 Doug. 5 and note. Dutchess of Kingston's case, 1 John. Rep., 424. 1 Stark. on Evidence, 233. Winchell *v.* Stiles, 15 Mass., 230. 19 Johns. Rep., 164. Holker *v.* Parker, 2 Cond. Rep. S. C., 560.—7 Cranch., 453.

Branch, for defendants in error:

The first question in this case is—whether the plea of a former recovery by plaintiffs against Crowell, one of the joint obligors, is a bar to this action?

The bond is *joint,* and not joint and several; and plaintiffs have heretofore, in another and separate action, recovered judgment against Crowell. This suit is against the Bradfords and *likewise against Crowell.*

511 No principle of pleading is better recognized than that, on a joint obligation or contract, all the parties must be sued jointly. This rule is so inflexible that all must be sued, even though one has become a bankrupt. Chitty on Pl., 47, 48.

So, also, if a party bring a joint action on a joint and several bond, and one of the parties dies after judgment, he will lose his remedy against the assets of the deceased. Chitty on Pl., 49, 50.

To allow a party to sue the obligors of a joint obligation separately or in separate actions, would destroy the universally admitted distinction between joint and joint and several bonds or contracts.—It would virtually make joint instruments joint and several.

In this case, plaintiffs, having sued the principal and obtained judgment against him, must be presumed to have discharged the other obligors, who were only *sureties*. Crowell, having made no objection by plea or otherwise, the plaintiffs had a right to discharge the Bradfords and sue Crowell alone, as they have done. They cannot, after having elected to treat the bond as the separate bond of Crowell and under that election obtained judgment against him, now elect to treat it as the joint obligation of all the parties, and make the Bradfords liable in a new suit against all. They must abide their election.

The right of personal action against the Bradfords having been once suspended or relinquished, is gone forever, and cannot be restored by any act on their part.

Again: By obtaining judgment against Crowell, the bond or cause of action became *merged* in the judgment. It ceased to a debt of specialty and became one of record. Having thus become a debt of a *higher nature*, the bond ceased to be the *subject of future action.*

Again: Should this action be maintainable, then *two* judgments will be in existence at once against Crowell for the same debt, which clearly cannot be. Nor can the Bradfords alone be sued to avoid this difficulty; for if they were, they could show that Crowell was *jointly* liable with them, and indeed the *variance* between the *allegata* and *probata* would be fatal.

It has, acordingly, been repeatedly decided by the highest courts in this country and England, that a *judgment against one* on a joint contract and in a separate action *is a bar to an action against the other contractor.* Chitty on Pl., 53 and note. Ward *v.* Johnson, 13 Mass. R., 148. Robertson *v.* Smith. 18 Johns. R., 459. King
512 *v.* Hoare, 13 Meeson & Welsby R., 494. Gibbs *v.* Bryant, 1 Pick. R., 118. 3 Bacon's Abr., title Extinguishment, D. Willings & Francis *v.* Consequa, 1 Pet. C. C. R., 306. Beltzhoover *v.* Commonwealth, 1 Watts R., 126. Anderson *v.* Levin., 1 Watts & S., 334. 9 Pet., 8. 10 Peters, 449.

2. The replication to the second plea of former recovery, alleging that this recovery had been obtained by the *fraud of the Bradfords,* was bad, and the demurrer thereto was properly sustained.

The plaintiffs, *being parties* to the judgment, could not aver that it *was fraudulent. A party* to a judgment cannot impeach it collaterally. Until reversed, a judgment is in force; and being a record, no averment can be made againset its validity. Chitty on Pl., 521.—2 Black. Comm., 22. Moses *v.* McFarland, 2 Burr. R., 1005. 1 Starkie on Ev., 254. 2 Phillips on Ev., 515. Homer *v.* Fish et al., 1 Pick. R., 435. Hooks *v.* Moses, 8 Iredel R., 90. 1 Saunders, 92, (b).

HAWKINS, Justice, delivered the opinion of the court:

For the better understanding of the case at bar, the second plea of the defendants, Bradford's, is set forth at length. "And for further plea, the defendants, Edward Bradford and Richard H. Bradford, by their attorneys, J. & L. Branch, crave oyer of the said writing obligatory, and it is read to them, &c.; they also crave oyer of the condition of the said writing obligatory, and it is also read to them, in these words: 'The condition of the above obligation is such, that whereas the aforesaid Lewis Hale, Michael Ferrell and Thomas M. Crowell, are bound as bail for the said R. H. Crowell, for his appearance at the next Superior Court, to be holden in the county of Halifax, in the State of North Carolina, in a certain suit, wherein the heirs of William Crowell, deceased, are plaintiffs, and the said Crowell is defendant. Now, if the said R. H. Crowell shall appear at the said court, to be held in October next, and surrender himself in discharge of his bail, or if he shall pay the amount which may be recovered against him, then this obligation shall be null and void.'

Witness our hands and seals, this 11th May, 1841.

R. H. CROWELL, [SEAL.]
EDWARD BRADFORD, [SEAL.]
RICHARD H. BRADFORD, [SEAL.]"

"Which being read and heard, the said defendants, Edward Brad- 513
ford and Richard H. Bradford, say—they became bound to the said plaintiffs by the writing obligatory in the declaration mentioned, jointly with the defendant, Richard H. Crowell, and not severally; and that the said plaintiffs, notwithstanding the said writing obligatory was the joint obligation of the said Richard H. Crowell and the said Edward Bradford, and Richard H. Bradford, heretofore, to wit: at the Spring term of the Superior Court of the Middle District of Florida, sitting for the county of Leon, in the year eighteen hundred and forty-three, impleaded the defendant, Richard H. Crowell, one of the joint obligors of said writing obligatory, severally, in a certain action of debt, for detaining and not paying the very same identical debt, and for and in respect of the very same identical causes of action in the said declaration mentioned, and that such proceedings were thereupon had in the said court in that plea; that afterwards, to wit: on the twenty-fifth day of April, Anno Domini, eighteen hundred and forty-three, the said plaintiffs, by the consideration and judgment of the said court, recovered in the said plea against the said Richard H. Crowell, the sum of thirteen hundred dollars, and one hundred and ninety-four dollars and seventy cents, and their costs about their said suit in that behalf expended; whereof the said Richard H. Crowell was convicted, as by the records and proceedings thereof still remaining in the said court more fully and at large appears; which said judgment still remains in full force and effect, not in the least reversed or made void. And this the said defendants, Edward Bradford and Richard H. Bradford, are ready to verify; wherefore they pray judgment, if the said plaintiffs ought to have or maintain their aforesaid action thereof against them, &c."

To this plea, the following amended replication was filed. "And the said plaintiffs, Lewis Hale, Michael Ferrall and Thomas M. Crowell, by their attorneys, as to the said plea of the said defendants, Richard H. Bradford and Edward Bradford, by them secondly above pleaded, say—that they, the said plaintiffs, by reason of any thing by the said defendants in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against them, the said defendants, because, they say, that, at the time of the taking of the said judgment. in said plea mentioned, against Richard H. Crowell alone, Joseph B. Brown, the attorney of record, who conducted, prosecuted and managed the suit in which said judgment
was taken for plaintiffs, was imposed upon, circumvented and his 514
judgment not fairly exercised, and said attorney was induced to dismiss the proceedings as to the said defendants, Richard H. Bradford and Edward Bradford, and to take a judgment against Richard H. Crowell alone in said plea mentioned, in consequence of the false and fraudulent representations of the defendant, Richard H. Bradford, one of the said defendants, and this they, the said plaintiffs, are ready to verify; wherefore they pray judgment and their damages, by reason of the non-payment of their debt, to be adjudged to them, &c., &c."

By the defendants a demurrer was put into this replication, and was sustained by the court.

The plaintiffs in error have assigned the following causes of error:

1. The court below erred in sustaining the plea of former recovery, pleaded in the second plea of the defendants.

2. The court erred in sustaining the demurrer to plaintiffs' replication to said plea of former recovery.

3. The court erred in not giving judgment for plaintiffs on the defendants' demurrer to plaintiffs' replication to said plea of former recovery.

4. The court erred in deciding the defendant's plea of former recovery against the said Richard H. Crowell a bar to plaintiffs' action.

Two questions raised by the pleadings and by this assignment of errors, present themselves for the consideration of the court.

First. Where there is a joint obligation given by three persons and judgment is taken only against one, whether that judgment can be pleaded in bar to a subsequent suit upon the same cause of action, by the other parties to the instrument?

Second. If this plea of judgment recovered is a good bar to the subsequent suit, the next inquiry is, how far its effect can be counteracted and avoided by the false and fraudulent representations of the party setting up this bar; and owing to which judgment in the original suit was taken against Richard H. Crowell alone, without joining the Bradfords, his co-defendants?

We will discuss them in their order; and as to the first point, we are clearly of opinion, that a judgment, *without satisfaction,* recovered against one of two or more *joint* debtors, is a bar to an action

515 against the others. We are aware that there have been conflicting decisions upon the question; but we must decide it upon what we deem *principle*, and upon the authority of decisions entitled to the greatest respect, not only for the reasoning contained in them, but for their having been made by judges of the highest character and reputation.

If parties enter into a *joint* obligation, it is certainly to be understood they are to be sued *jointly*, and not *severally*. It is part of their bargain, and they have a right to insist upon its fulfillment. In the words of C. J. Spencer, "Each debtor is bound for the whole, until the debt is paid; but as regards the remedy to coerce payment, there is a material and settled distinction. If they have undertaken *severally* to pay, *separate* suits may be brought against each; but when their undertaking is JOINT, unless they waive the advantage, by not imposing a plea in abatement, they must be sued *jointly*, if in full life, and neither has been discharged, by operation of a bankrupt or insolvent law, or is not liable on the ground of infancy."—Robertson *v.* Smith *et al.*, 18 John. R., 477.

The principle we have laid down is to be found in all the text books. In Chitty on Pl., 48, we find that, where there are several parties, if the contract be *joint*, they must all be made defendants." So in Comyn Dig., tit. action, K. 4, "a recovery against one obligor and execution, will be a bar in debt against the other." It is true, that in the same work, tit. as above, L. 9, it is said: "So a recovery and execution against one, where the thing demanded is certain, is no bar in another action, against another, upon the same foundation—as if two be bound by a bond, a recovery and execution against one, is no bar to an action upon the same bond against the other obligors." Baron Parke, in a case to be cited hereafter, remarked, in relation to this last clause in Comyn, "that it is merely a repetition of the old cases relating to joint and *several* bonds," and such seems to have been the opinion of C. J. Spencer.

We are aware, that in stating our conclusion, we may be said to have impugned a decision of the highest legal tribunal in our country, the Supreme Court of the United States, and that decision, too, pronounced by Chief Justice Marshall. Shehee *v.* Mandeville, 6 Cranch, 263. Delicate must be the task at all times of criticizing an opinion emanating from such a source—bold, perhaps, the tribunal that may differ from its conclusions; and we are free to admit,
516 that in that case the rigid technicalities of the law were made to succumb and give way to equity and justice. There certainly seems something exceedingly unjust in one partner, receiving the profits of a partnership for a long period of time, and upon the concern becoming unsuccessful, concealing his interest, and leaving a third person to bear the loss; besides, if he were a secret partner, how could the creditor learn whom to sue? But *ita lex scripta est*. The case at bar stands upon a different footing; the suit was upon a bond—in which, of course, all the names of the obligors were clearly and distinctly set forth.

The decision, however, in Shehee *v.* Mandeville, has been directly overruled in this country, and in England. In Ward *v.* Johnson, *et al.*, 13 Mass., 148, it was quoted by the plaintiffs, and its doctrine denied by the court, Justice Wilde holding: "This being a joint action, to support the declaration, a joint subsisting cause of action must be shown against both the defendants. (There had been a previous judgment against one of the defendants, upon the same cause of action.) "We know of no principle of law," he further says, "which can authorize us to give separate judgments in an action on a joint contract."

In the case before cited, 18th Johnson, it was commented upon at large by C. J. Spencer, and received his decided disapprobation, and the principle contained in it was overruled by the court. So, too, in Peters' C. C. Reports, 301, Judge Washington says: "a judgment against one partner extinguishes the simple contract debt as completely as if one had given his bond for it." This same principle is sustained in the courts of Pennsylvania. 9th Sergeant & Rawle, 142; 1 Watts & Sergeant R., 339, and in the latter case, the decision of Shehee *v.* Mandeville, is not considered as authority, though with an expression of regret by the court that it had been overruled, as "its justice might have supported it."

Chancellor Kent, in Penney *v.* Martin, 4 Johnson Ch. Rep., 567, approves of the decision in the case of Willings & Francis *v.* Consequa, 1 Peter C. C. R., 301, before cited, and refused even in equity to enforce the rights of a creditor against a dormant partner. The decisions in Peters' C. C. Reports, and that of Penney *v.* Martin, were made several years posterior to that of Shehee *v.* Mandeville.

The general principle as asserted by the court, is fully sustained also by a solemn decision of the Court of Exchequer in England,

King and another, *v.* Hoare, 13 Mee. & Welsby Repts., 495. The 517
case of Shehee *v.* Mandeville was cited before that court, but it was not deemed satisfactory, and was disregarded. In this case, there are some dicta of Baron Parke upon the subject of extinguishment, and sustaining the argument of counsel for the defendants. He remarks that "If there be a breach of contract or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because thereby it is reduced to a certainty, and the object of the suit attained, and it would be useless and vexatious to subject the defendant to another suit, for the purpose of obtaining the same result. Hence the legal maxim, *transit in rem adjudicatum*. The cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true, where there is but *one cause of action*, whether it be against a single person or many." With these remarks, we dismiss the first point in the case, and we come now to the second.

This involves a question of more difficulty, inasmuch as we can find no case precisely analagous, to assist us in coming to a conclusion. The facts succinctly are these: The plaintiffs in the court below took judgment against only one of the joint obligors, and when that fact is pleaded by the defendants in bar, they reply that they did only do so, because their attorney was *circumvented* and *induced to dismiss* the proceedings as to the other defendants, in consequence of the *fraudulent representations* of one of the defendants

It matters little as to the mode or manner in which fraud is effected. A court must look to the effect, and ask if the result is a consequence of the fraud. Here the defendants seek to avail themselves of a legal defence, arising from a state of facts which they themselves by their fraud have produced. They admit, virtually, by their demurrer, that the plaintiffs have been deprived of a legal right by their fraud, and they seek now, by their defence, to take advantage of their own wrong—a defence admitted to arise from their own fraudulent act. The question now is, will such a defence be available, tolerated, or allowed? Law, reason, justice and morality, unite in a negative response.

Lord Coke says, that "fraud and deceit by him who is trusted is most odious in law." "The common law doth so abhor fraud and covin, that all acts, as well judicial as others, and which of them- 518
selves are just and lawful, yet being mixt with fraud, are in judgment of law wrongful and unlawful." 3 Reports, Fermer's case.—Lord Mansfield, too, (Cowper, 434,) remarks: "The principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes of 13th and 27th Elizabeth."

Fraud will vitiate any, even the most solemn transactions, and an asserted title to property founded upon it is utterly null. 15 Peters' S. C. R., 594. 2 Howard, 284. No doubt a record may be affected and even vitiated by fraud. White *v.* Hall, 12 Vesey, 324. Hampson *v.* Hampson, 3 Vesey & Bea., 42. But this principle of fraud is so generally admitted, it is useless to multiply authorities.

We do not deem it imperative, as contended for by counsel, that the plaintiffs should be driven into a court of equity for redress, if a fraud has been perpetrated. We consider the defence to the plea in this case, as set forth in the replication, a good one at law. Judge Story remarks: "To remedy defects in common law proceedings, is the principal reason of interference—that a wrong is done for which there is no plain, adequate and complete remedy in the courts of common law." 1 Story's Equity, 53.

It is an admitted principle that a court of law has a concurrent jurisdiction with a court of chancery in cases of fraud. The principles as to fraud may be often more correctly applied in a court of equity than in courts of law. Chancery can compel discovery of facts which a court of law cannot. Fraud may frequently be presumed in equity by the chancellor, while at law, it is the province of the jury to find the facts and determine their character, under the instruction of the court. 8 Peters, 244. 12 Ibid, 11. 10 John R., 462. 4 Wash. C. C. R., 662.

The Supreme Court of Massachusetts, in speaking of this subject, hold this language: "But when a court of law has regularly the fact of fraud *admitted* or proved, no good reason can be assigned *why relief should not be obtained there*, although not always in the same way in which it may be obtained in a court of equity." Boynton *v.* Hubbard, 7 Mass. R., 112.

So in the case at bar, *the fraud is admitted;* then why should not the court act upon it? A chancellor, too, might feel no little diffi-

519 dence in allowing an appeal to his jurisdiction, when a good defence existed at law, of which the party had not availed himself; and we all know that negligence in this respect meets with no favor in a court of equity.

At the first blush we thought we discovered some difficulty arising from the fact that only *one* of the defendants is alleged to have been guilty of the fraud, but it soon disappeared; for we find this principle broadly laid down—that interests gained by one person by the fraud of another cannot be held by them; otherwise fraud would always place itself beyond the reach of the court. 4 Iredel Eq. Rep., 219, citing Bridgman *v.* Green, 2 Vesey, 627. Huguen *v.* Basely, 14 Vesey, 273.

Again, a plea which is bad in part is bad *in toto*. If, therefore, two defendants join in a plea which is sufficient for one but not for the other, the plea is bad as to both; for the court cannot sever it and say that the one is guilty and that the other is not, when they all put themselves upon the same terms. Chitty on Pl., 598 (7th Am. ed.) 1 Saunders' R., 28, note 2. So an entire plea cannot be good in part and bad in another part, because such entire plea is not divisible. 1 Saun., 27. Stephens on Pl., 448. 1 T. R., 40. 3 T. R., 376. 3 Mass., 310. 7 Cranch., 159. 7 Cowen, 330.

In relation to the doctrine of *transit in rem adjudicatum*, a maxim borrowed from the civil law, we are free to admit that it would have been available but for the fraud of those setting it up against the plaintiffs, inducing them to single out one of the joint obligors against whom to take judgment; and we are disposed to carry out the civil law doctrine of the *restitutio ad integrum*, so far as the defendants are concerned, by restoring the plaintiffs, as near as may be, to the same state in which they would have been but for the fraud of the defendants. Of course, we are not to be understood as intending to set aside the judgment against Crowell, in this collateral way. It would have been better, no doubt, for the plaintiffs to have had it reversed or vacated before the second suit was brought. Crowell was not served with process in the last suit, so that there cannot be two judgments against him. That a legal anomaly, two judgments on a joint cause of action, has, by the peculiar circumstances of the case been produced, must be admitted. But who occasioned it? Who is to complain? Crowell will scarcely do so, and the defendants have no right to be querulous, estopped as they are by their acts and
520 their own conduct in the premises. If the plaintiffs in this case were to be turned out of the court, an anomally far more to be regretted, involving the strongest principles of justice, would arise, viz: a deep, palpable wrong, without a corresponding remedy. We have argued this case, of course, as it stand upon the pleadings. Whether fraud *actually* was committed, or not, is a question easily solved by the creation of an issue of fact in the court below, to which the parties are remitted.

With these views we are opinion that the judgment of the court below should be reversed. It is therefore ordered that it be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Per Curiam.

DANIEL MCRAENY, TRUSTEE, &C., PLAINTIFF IN ERROR *vs.* WILLIAM JOHNSON AND WORMLEY R. MOORE, DEFENDANTS IN ERROR.

The trustee of a married woman is the proper person to bring an action at law for asserting or defending the legal title, and every action founded on such title must be brought in his name.

The fact that the property, for an injury to which the action is brought, was in the actual possession of the *feme* at the time of the injury, does not change or affect the right of the trustee to sue.

When the deed of trust allows the property to remain in possession of a married woman, her possession is consistent with the deed, and she is to be regarded as the agent of the trustee.

The right of action, in such case, cannot be in the husband and wife, the *cestui que trust*—he having neither the ownership nor possession.

Wherever the trust would be supported in equity, the right of the trustee will be supported at law.

The trustee is the owner and has all the remedies devised by law for any injury done to the property in his charge.

In cases of injury to slaves, the American courts give a more enlarged protection than prevails in cases of *mere* chattels. They are moral and sentient beings, and the right of the master to maintain trespass for any battery of his slave is clear and well settled.

This was an action of trespass, brought in the Circuit Court of 521
Leon county, by McRaeny, Trustee of Rebecca C. Williams, against William Johnson, Daniel Johnson, Wormley R. Moore and James G. Wells, claiming damages for a trespass which was alleged to have been committed by defendants, and which consisted in assaulting and beating a certain slave of plaintiff, so that he died. Defendants pleaded not guilty.

At the Fall term of the Circuit Court of said county, in the year 1847, the Hon. THOMAS DOUGLAS, Judge presiding, the case was argued and submitted to the jury, who found the following verdict:

"The jury empannelled in this cause appeared in court and upon their oaths do say that the defendants are guilty in manner and form as the plaintiff against them has complained, and they do assess the plaintiff's damages, by occasion thereof, to four hundred and thirty-five dollars, subject to the opinion of the court upon the following points reserved:—Whether, inasmuch as the jury find that the said plaintiff claims title to the negro, Sam, under and by virtue of a deed of trust from Joseph Williams, which is on file in this cause, whereby an interest in, and the possession and use of, said slave was secured to Rebecca Williams during her life, and the said Rebecca Williams was in possession of the slave under said term, so secured to her, not then expired at the time of the alleged trespass, the said plaintiff can maintain this action; and if the court shall be of opinion that the said plaintiff can maintain this action, then the verdict is to be entered for the plaintiff, as aforesaid; but if the court shall be of a contrary opinion, then a verdict is to be entered for the defendants."

Upon this special verdict the court below, being of the opinion that the law upon the point reserved was for the defendants, gave judgment accordingly."

There were other points in the case arising out of the right of challenge, but not material to be noticed in this statement.

The plaintiff, before trial, dismissed his suit as to Wells and Daniel Johnson.

Archer, for plaintiff in Error,

I.—Contended that the court erred in deciding the point reserved in favor of the defendants;

1. Because the possession of Mrs. Williams was the possession in 522
law of the plaintiff. 1 Chitty Pl., 175. 8 Taunt., 676.

2. Trespass lies by the legal owner though not entitled to immediate possession, when there is a destruction of the chattel. 2 Saunders' Pl., 862. 2 Saund. Rep., 479. 1 Chitty Pl., 198-200. 12 Wend., 98. 8 Metcalf, 235.

3. For injury to a slave by force trespass lies by the general owner, under all circumstances. Gilliam *v.* Senter, 9 Ala., 395. 2 Bailey, 95. Harper, 113. 1 McCord, 100. Dudley's Law and Equity Rep., 83.

II.—The court erred in allowing eight challenges to defendants in empannelling the jury.

III.—The court erred in giving judgment for all the costs against plaintiff, when the verdict was in his favor.

Randall & Thompson, for defendants in error:

The only question here is, whether the court below erred in its judgment on the special verdict. It will be seen that the jury submit to the court, whether the plaintiff had such an *actual* or *constructive* possession and also such a general or qualified property in the slave, as will entitle him to maintain *trespass vi et armis*. [See special verdict.]

The plaintiff must, at the time when the injury was committed, have had an *actual* or *constructive possession*, and also a *general* or *qualified property* therein. 3 Stephens' N. P., p. 2631. 1 Term R., 480. 2 Greenleaf on Ev., 504, 506. 4 Term R., 489. 7 Term, R., 9.

But if the general owner has parted with the possession, and the bailee *have a right to use the thing*, the constructive possession is rebutted, and he can no longer maintain *trespass*, though he retain the right of property, because he has not an *immediate* right, but only a *reversionary* right; and when that is the case, the owner cannot maintain trespass for an injury done to the property, even by a stranger, but is driven to *his action on the case*. 2 Tucker's Coms. 90, 91.

Whether the general owner can maintain trespass for the taking or injury of a chattel while in the hands of a bailee or person having a special property, depends on the question *whether such owner has the constructive possession*. If the bailee *has a right of posses-*

McRaeny, Trustee, vs. Johnson and Moore.—Opinion of Court.

523 *sion for any time, however considerable,* to the exclusion of the owner, such owner cannot maintain trespass.

Therefore, where furniture of a landlord, let with a house, was taken under an execution against the tenant, it was held that the landlord could not maintain trespass against the sheriff, for he had not the constructive possession. Ward *v.* Macauley, 4 Term R., 489.—Smith *v.* Plomer, 15 East., 607. Gordon *v.* Harper, 7 T. R. 9.—Ryan & Moody's Ca., 99. 9 Bac. Abr., title Trespass, 455, note A.

Thus it will be seen that a voluntary bailment, if it have secured to the bailee *the right of possession for any the least considerable time, to the exclusion of the owner,* such owner cannot maintain trespass for injury done during such bailment.

In the case at bar, McRaeny had neither actual or constructive possession. Moreover, he had not the right to the possession—that was in another, by a title and tenure as good as his own right to the reversion.

Now the exception to this rule yet more fully confirms the correctness of our position.

That "exception" is—where the owner has parted with his possession to a carrier, servant, &c., giving him only a *bare authority to carry or to keep, not coupled with an interest in the thing,* such owner may yet maintain this action. Stephens' N. P. 2636.

But *"e conira"*—when the authority of the bailee is something more than a bare authority to carry or to keep; when it is a vested interest in the *thing in possession, coupled with the use,* this action cannot be maintained by the general owner.

This is illustrated by the case of Hall *v.* Pickard, 3d Camp., 189. See opinion of Lord Ellenborough, 61, g., in the above case.

Now, for the American rule on this point, see Mr. Justice Washington's opinion in Corfield *v.* Corfield, 4 Wash. C. C. R., 387, in a case analogous to the one in 3d Campbell.

See further cases cited in 4th Wash. C. C. R., to wit: 1 Chitty's Pl., 166, 7.—193, 4.—150. 8 Johns. R., 337. 11 Johns., 385.—7 Johns. 9, 535.

Cases may be multiplied to any extent:—5 Vermont, 274, 328.—6 Ibidem, 622. 11 Pick., 382. 13 Johns., 141, 561. 21 Pick., 367. 1 New Hamp., 110. 4 J. J. Marsh., 18.

To get rid of this difficulty the counsel for plaintiff in error assert that the possession of Mrs. Williams is the possesion of McRaeny,
524 trustee, and thus seek to shelter themselves behind the principle of law that the possession of the *cestui que trust is that of trustee.*

But it must be seen that the principle cannot apply here to the *possession secured* to Mrs. Williams, individually, in the same deed that secured to McRaeny his title as trustee.

It may be true, as laid down in Tillinghast's Adams on Ejt., p. 52, that *"cestui que trust* is tenant at will to the trustee," and for the very obvious reason that, the whole estate, legal title and possession usually going to trustee, the possession of *cestui que trust* is ordinarily, in fact, but permissive by trustee, and is, in fact, his very possession.

Opinion by Justice BALTZELL:

That the owner of a slave is entitled to damages from a wrong doer for an injury occasioning his death, is not denied; but in the present case it is urged, that the trustee is not the proper person to bring the suit, nor trespass the form of action appropriate to such an injury. The slave, on whose account the action is instituted, is found by the jury in their special verdict to have been in the possession of a married woman, under a deed of trust constituting the plaintiff trustee; and whether he can maintain the action, under such circumstances, is the question.

For injuries to personal property, without a motion or carrying it away, the remedy is either trespass or case. The injury should be immediately injurious in the action of trespass, and the plaintiff should be in the actual or at least constructive possession of the chattel at the time it was injured. Arch. Pl. & Ev., p. 16, 17. Constructive possession is where the general owner, although the chattel is in the actual possession of another, has the right to reclaim it immediately; the person in possession not being entitled to retain it against his will. 8th Pickering, p. 235. Bacon Abridg., title trespass, C. 7th Connecticut R., page 235. 5th Vermont R., page 97. The plaintiff must have a constructive possession in respect of the right being actually vested in him. 1 Term. Rep., 498. 3 Day, p. 498. 8 Johnson, p. 432. A general property in a personal chattel draws to it the possession in law. Bacon Abridg., title trespass, C. 7 Connecticut, 235. 5th Vermont, 97. Not only he who has the property, but also he who has the possession of goods, shall maintain trespass for the goods. 7th Comyn's Digest, 510.

Has the trustee for a married woman such property or possession 52
by right actually vested as will enable him to maintain the action? We confess that but for the confidence with which the contrary has been maintained by learned counsel, we should have no hesitancy in giving an affirmative, as he is the proper person to bring any action at law for asserting or defending the legal title, and every action founded on such title must be brought in his name. Lewin on Trusts, p. 481, 482. The trustee cannot maintain the action in this case, it is said, because the *feme* was in the actual possession, and by the deed was entitled to it. There is nothing peculiar in this: "for," says an eminent writer, "it is a case that seldom happens, for the trustee to be in the actual possession." 1 Cruise's Digest, 489.

In the case of Haselton *v.* Gill and another, which was trover for eight cows, &c., the marriage settlement was in trust, that the trustees should permit the *feme* (about to be married) to keep and enjoy, and at her will to sell and dispose of the said cows and premises, and the increase and produce to arise and be produced from the same, for her own use, &c., and to carry on the business and trade of a cow keeper and milk-seller; and the action was by the trustees, for part of the cattle contained in the deed, and others bought with the trust money. Lord Mansfield says: "By the common law the wife can have no property during the coverture, but all her estate is in the husband. But courts of equity have for ages past thought the rules of the common law too hard, and have thought it right to protect the property of the wife from the extravagance of the husband, in cases clear of fraud. This is done by the intervention of trustees, and thus far the wife is, to all intents and purposes, a single woman. And whenever the trust can be supported in equity, this court will consider the trustee entitled at law." The title having been contested as fraudulent, on account of the possession, Ashurst and Butler, Justices, say, it was consistent with the deed—the wife was the agent of the trustees—she acted as their agent, and a recovery was had." 3 Term R., p. 622, n. To the same effect, and under like circumstances, are the cases of Jarman *v.* Woolaston and another, 3 Term R., p. 622. Caddogan *v.* Kennett, 2 Conn. R., 242, and Foley, &c., *v.* Sheriff of Middlesex, stated in a note to this latter case. These were cases of trover, yet *property* is required in *it*, as well as in trespass. "When the defendant takes goods wrongfully and by trespass, the plaintiff, if he brings trover, waives the trespass, and admits the possession to 5
have been lawfully gotten." Coolidge v. Chitty, &c. 1 Bur., 31.—"Two things are necessary in the action of trover—property in the plaintiff, and a wrongful conversion by the defendant." Ibid. In trover, there must be proof of actual possession, or that plaintiff was entitled to the immediate possession of the goods. 2 Phillips' Evidence, 221. 7 Term. R., 13. A case still more conclusive is that of Wooderman *v.* Baldock, being an action of tresspass, for the asportation of goods, brought by trustees, under a deed of assignment, with a clause for the trustees to permit the goods to remain in possession of the assignor—those remaining with him were levied upon, and suit being instituted, a recovery was had, no objection being raised as to the form of the action, or to their want of possession, although a new trial was mo d on other grounds. 8 Taunton, 677.

Referring to elementary treatises, whilst the rule is as we have stated, as to the right of the trustee to sue, there is no exception as to any particular action, or class of cases. He is owner, and there is no reason for denying him all the remedies devised by law for redress for any injury sustained by the property under his charge. Nor is there any obstacle, on account of the interest of the *cestui que trust;* the cases just quoted speak of him as the agent of the trustee; others, of his possession as the "very possession of the trustee," and not liable to be displaced by it, however long continued, the holding not being adverse. Hill on Trustees, 266. Adams on Ejectment, 52. Such right to the possession, it is said, is recognized in equity only. Lewin, 481. Again: *cestui que trust* is regarded as tenant at will and at sufferance of the trustee. Hill, 266. Lewin, 481. In Dane's Abridgement, as mere borrower of goods from the trustee. 4 Dane, 249. Courts of law do not distinguish between a suit brought by trustee against his *cestui que trust,* and that by another person. 8 Term Rep., 122, 123. Nor are trustees for married women, as has been insisted in argument, mere nominal appointments, or dry trustees; on the contrary, we find them classed amongst the trustees clothed with active duties. Hill, 545. Where, then, is the pretext for considering their interests and rights as distinct or separate? If the provision, entitling the *feme* in a trust deed to the possession, may not be noticed or asserted in a court of law, by what rule or right can it avail a stranger claiming its protection

527 not only adversely, but in a manner to annihilate and destroy, as well the possession as the interest and property itself?

It is sought to bring this suit within the authorities holding that trespass will not lie in cases where there is a bailment or right of possession derived from the owner. To this it may be answered, that if the trustee of Mrs. Williams, by his implied sanction, had hired the negro for a term, and during its continuance the injury had been committed, there might be pretext for the argument, though even in such case the destruction of the chattel, for obvious reasons, will give right of action even against the bailee. 1 Chitty Pl., 171.

In cases of injury to this peculiar species of property, the American courts, by a spirit of enligtened humanity, have extended a more enlarged protection than prevails in cases of mere chattels; it is said, "slaves are, by the operation of our law, deprived of all personal rights, yet they are moral agents, subject to the same feelings, and have a right to protection from abuse, as other human beings." Whilst different remedies have been used, "they all, either impliedly or expressly, admit the right of the master to sustain trespass for any battery of his slave. 2 Bailey, 95. Harper, 113. 1 McCord, 100. 11th Alabama, 395, n. s.

The right of action for the injury in the present case, is asserted to be in the husband, Williams, and his wife the *cestui que trust*, but he has neither the ownership nor possession—neither a right in law, nor one in fact. For him to maintain the action, is to permit him to defeat his own deed, and destroy the very interest he had vested in the trustee. We are satisfied that the trustee is the person to bring the suit, or thre is no remedy—that it was his duty to have brought the action, and that it was rightly brought.

The judgment of the court below will be reversed and set aside, and the cause remanded, that a judgment may be enterd on the special verdict for the plaintiff in that court.

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528 ALBERT G. PORTER, PLAINTIFF IN ERROR, *vs.* PAUL R. BEVILL, DEFENDANT IN ERROR.

The act of 1843, T. Dig., 340, does not authorize the admission in evidence of such records or judicial proceedings from other States as are plainly irregular, or defective, or void, but only such as are valid between the parties.

If it appears from the record of the judicial proceedings of a court in another State, that a judgment was rendered against a party not legally summoned, the judgment will be considered here as void, just as such judgment would be regarded, if rendered in this State against a person not legally summoned.

When the courts of this State are required to sanction and enforce the proceedings of the courts of other States, the regularity of such proceedings can and ought to be inquired into.

Where the rule of court in a sister State, made in pursuance of authority given by law, requires in any given case personal service of notice of any proceeding, or publication in a gazette or newspaper, and no such notice or publication appears in the record of the proceedings offered in evidence in the courts of this State, such proceedings, so far as concerns the party here, against whom they are attempted to be enforced, will be regarded as *coram non judice*, and not binding upon him.

Error to Jefferson county Circuit Court.

This cause was tried at the Spring Term of the Circuit Court, sitting in and for the county of Jefferson, in the year 1845, the Hon. GEORGE S. HAWKINS, Judge, presiding.

An action of *assumpsit* was brought on the copy of a note, which had been established by certain proceedings in the Superior Court of Effingham county, in the State of Georgia, a certified copy of which proceedings was offered in evidence on the part of the plaintiff in the court below, and held not to be admissible. A full statement of the case, and of the proceedings had in the State of Georgia, is contained in the opinion delivered by the court.

Archer, for Plaintiff in Error.

Call, for Defendant in Error.

Opinion by Justice LANCASTER:

Upon the trial of this cause in the court below, the plaintiff offered in evidence a copy from the record of the Superior Court of

Effingham county, in the State of Georgia, of certain proceeding 529
had in the said court, wherein Albert G. Porter was petitioner, and one Stephen P. Bevill and Paul R. Bevill were made defendants—the object of said proceedings being to establish a copy, in lieu of a note alleged to be lost, which said copy is certified by the clerk of said Superior Court of Effingham county, Georgia, to be a true copy of the proceedings had in said Superior Court, and his seal of office is thereto annexed. To the introduction of which in evidence, the defendant by his counsel objected—which objection was sustained by the court, and the said certified copy of the record ruled to be inadmissible. To which ruling the plaintiff excepted—which was signed, sealed and made part of the record in this case.

The question of this court to adjudicate is, whether the copy of the proceedings, certified as above, was admissible as evidence against this defendant, or not?

By the act of the year 1843, Thompson's Dig., 340, it is enacted: "The records and judicial proceedings of any court of another State, or of the United States, shall be admissible in evidence in all cases in this State, when authenticated by the attestation of the clerk, prothonotary, or other officer having charge of the records of such court, with the seal of such court annexed."

A literal construction would seem at once to exclude these proceedings from being admitted as evidence; they do not purport to be original, but only a certified copy from the original. This question is not deemed necessary to be adjudicated in this case. But if it were conceded that the provision of the act before recited, authorized the admission in evidence of certified copies, so far as the authentication is material, it seems in due form.

This court cannot understand that it was the intention of the Legislature, by the above recited enactment, to authorize the admission in evidence of such records, or judicial proceedings, from other States, as are plainly irregular and defective, or void; but only such as are sound and valid between the parties by whom, and against whom, they are sought to be used. A judgment obtained in this State could not bind a person not a party to it; nor yet a person sought to be made a party, unless he voluntarily appeared, or was duly and legally cited to make his appearance and defend. The same must be true of all manner of judgments obtained in other States. The courts have no jurisdiction over a defendant in an action who has not been legally summoned to defend, and who has not appeared, and judg- 530
ment against such an one is void.

This court is aware of the judicial courtesy due between States of the Union, under the constitution of the United States, and are disposed so to construe the before recited section of the act of 1843, as to give due faith and credit to their records and judicial proceedings. We may add that we feel every proper respect for the judiciary of our sister State, Georgia, but this should not deter or prevent us from looking at the regularity of judicial proceedings sent hither from there, when we are required to sanction and enforce them.

By the 28th section of the before recited act, Thompson's Dig., 342, all the courts of law in this State are authorized to admit the printed statutes of any of the States, when published by authority and commonly read there, as *prima facie* evidence of the law in such State.

By the judiciary act of the year 1799, the Superior Courts of Georgia were authorized to establish copies in lieu of lost papers, according to law and equity, and to make such rules for their government in the premises as they should think meet. Prince's Dig., 206. Under the authority of that act, the judges of the Superior Court established a rule that it is necessary for a person seeking to establish a lost paper, "to present to the Superior Court a petition, together with a copy in substance of the paper lost as nearly as he can recollect, which copy shall be sworn to by the party, or proved by other evidence. Whereupon a rule *nisi* may be obtained, calling upon the opposite party to show cause (if any we have) why the copy should not be established in lieu of the original so lost—which rule shall be personally served on the party, if to be found in the State—and if he cannot be found, then the said rule shall be published in some public gazette in the state, for the space of three months."—Appendix to Hotchkiss' Dig. L, of Ga., p. 949. By reference to the copy of the record offered in evidence, it appears that the petition filed in Effingham Superior Court was sworn to, but not the copy of the note sought to be established. The note sought to be established is in the following words, to wit: Scriven County, December, 1841. On the first day of January next, I promise to pay to Paul R. Bevill, or bearer, one hundred dollars, for value received.

(Signed,) STEPHEN P. BEVILL,
(Indorsed,) PAUL R. BEVILL."

531 This, then, is an effort to establish a note alleged to be lost, and an endorsement thereon upon an affidavit appended, not to the copy of the note, as required by the rule of court, but to the petition in which both the form of the note and endorsement are indistinctly set forth; it is not said by whom the endorsement was made. Upon this showing, a rule *nisi*, was obtained for the defendants, Stephen P. Bevill, the obligor, and Paul R. Bevill, the alleged endorser, to show cause. That rule was executed, in the following manner, as appears from the certified copy of the proceedings: "We acknowledge service of this petition and rule, 30th March, 1843.

STEPHEN P. BEVILL,
PAUL R. BEVILL,
per Attorney.
STEPHEN P. BEVILL."

Upon which service so executed, the defendants were afterwards called, but answered not, and judgment was rendered against thm, and the said copy established to stand in the place of the original. It nowhere appears that Stephen P. Bevill was the attorney of Paul R. Bevill, authorized to acknowledge service for him; his assumption of that authority is not sufficient evidence that he possessed it. Either a power of attorney for that purpose should have been exhibited, or satisfactory evidence of his authority been given.

There was, then, no personal service of the rule *nisi* on Paul R. Bevill, nor advertisement in a public gazette in the State of Georgia, as required by the rule. It is not shown he had notice of the proceedings, or that he made defence to them, nor is it constructively inferable. As to him, therefore, the said proceedings were plainly *coram non judice*, and are void and do not bind him. The certified copy of the proceedings offered in evidence, as against the said defendant, are, therefore, inadmissible as to him.

This renders any examination of the reasoning on which the court below proceeded unnecessary; but the opinion of that court, ruling out the testimony, was correct, and must be affirmed with costs.

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532 JOHN MCDOUGAL, ADMINISTRATOR, &C., OF JOSEPH W. LEA, *vs* ANDREW J. LEA, EXECUTOR OF JOHN WILLIAM LEA, DECEASED.

A plea that is founded upon the idea that the cause of action arose in a particular county from the fact that probate of the will was made and defendant undertook and assumed the duties and responsibilities of the office of executor in such county, only goes to the *right of action*.

The statute which requires a party to be sued in the county of his residence or in that where the cause of action accrued, relate to the cause of action and not to the right to sue.

When the plaintiff's replication alleges that the cause of action accrued in the county where the suit is brought, and the defendant demurs, the demurrer admits that the cause of action did accrue in such county, and consequently that suit is properly brought in that county.

This was an action of assumpsit brought in the Circuit Court for the County of Leon by McDougal, Administrator of Joseph W. Lea, against Andrew J. Lea, Executor of John William Lea, deceased. The cause of action, as set forth in the declaration, was an account for money paid, laid out and expended by plaitniff's intestate to and for the use and at the special instance and request of defendant's testator, in his life time

The defendant pleaded that he was not a resident of Leon county, but of the County of Madison; and that probate of the will of his testator was had in the County of Wakulla, in which his testator resided at the time of his death; and that the cause of action declared upon accrued against him in the county of Wakulla.

To this plea there was a replication to the effect that the cause of action, in the plaintiff's declaration mentioned, accrued to the plaintiff's intestate in his life time and against defendant's testator in his life time, in the county of Leon.

To this replication the defendant demurred and the court below sustained the demurrer. Judgment for defendant at the Spring term, 1848, of Leon County Circuit Court, Judge BALTZELL presiding.

Archer, for plaintiff in error.

Call, for defendant in error.

Opinion by Chief Justice DOUGLAS:

This cause was brought up by writ of error from Leon Circuit Court. The declaration contains but a single count, and that is for

"Money by the said Joseph Lea paid, laid out and expended to and 533
for the use of the said John W. Lea, and at his special instance and request. "To this declaration the defendant put in a plea alleging that he is not a resident of Leon county, but that he resides in Madison county, in the Middle Circuit of the State of Florida, and that the probate of the will of John Williams Lea was had in the county of Wakulla and State of Florida, where the said John Williams Lea resided at the time of his death, and the cause of action above declared upon accrued against this defendant, as executor, as aforesaid, in the county of Wakulla aforesaid, where the defendant undertook and assumed the duties and responsibilities of the office of executor of the last will and testament of said John Williams Lea, and not in the county of Leon. To which plea the plaintiff replied that the said several causes of action, in the said declaration mentioned, accrued to the said Joseph Lea in his life time and against the said John Wiliams Lea in his life time, in the county of Leon aforesaid. To this replication the defendant put in a demurrer, upon which issue was joined, and the court below, after argument, sustained the demurrer and held the replication to be bad.

The error assigned is this: "The court erred in sustaining the defendant's demurrer to the plaintiff's replication.

And, upon a full consideration of the question presented, we think the error well taken. The question arises upon the provisions of the 7th section of the act of November 21st, 1829 (Duval's Compl., 106, Thompson's Digest, 320, No. 4,) which says, "Summons *ad respondendum* shall be made returnable to the Court having jurisdiction over the County in which the defendant resides, or the cause of action accrued; and the cause shall not be tried in any other County"—with certain exceptions not affecting this case and therefore not necessary to be stated. The plea proceeds upon the idea that the cause of action arose from the fact that probate of the will of John W. Lea was made in Wakulla county and that the defendant there undertook and assumed the duties and responsibilities of the office of executor, &c.; but this only goes to the *right* of action. The statute relates to the *cause* of action and not merely the *right* to sue. When Andrew J. Lea made probate of the last will and testament of John Williams Lea and took upon himself the duties and responsibilities of the office of executor of said will, it gave to the plaintiff a right to sue him as such executor, provided he had a *pre-existing cause of action.* The declaration alleges such pre-existing cause of action, to 534
wit: money paid, laid out and expended by the said Joseph W. Lea, (of the goods and estate left by whom, at the time of his death, the said plaintiff is administrator,) to and for the use of the said John W. Lea, in his life time. This cause of action the plaintiff, in his replication alleges accrued in Leon Coutyn; the defendant, as his plea shows, resides in Madison county, and, so residing, might have been sued there. The demurrer admits that the cause of action declared upon (to wit: the money paid, laid out and expended, as aforesaid,) accrued in Leon county, and, consequently, we think this suit was well brought in that county. The judgment of the court below must therefore be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Per curiam.

LEWIS HALE, MICHAEL FERRAL AND THOMAS M. CROWELL, PLAINTIFFS IN ERROR, *vs.* RICHARD CROWELL'S ADMINISTRATRIX.

It is a well settled principle that a party may resort to a court of error to obtain a reversal of his own judgment, if it has been so rendered that he may sustain injury by it.

The rule that a party shall not take advantage of an error for his benefit does not apply to errors of the court, as when it pronounces a wrong judgment.

When, in a joint action upon a joint contract, a judgment is entered up against one defendant, after having discontinued as to the other who had been in court as co-defendant, it is erroneous and fatal. This principle applies with greater force when the judgment is first taken against one of several joint obligors, and the suit is *afterwards* dismissed as to the others.

When, by the negligence or unskilfulness of an attorney, a judgment has been taken which stands in the way of a recovery, or is calculated to embarrass the plaintiff in a suit upon the original contract, and such judgment thus improvidently taken is erroneous, the plaintiff will be allowed to reverse it.

Error to Leon Circuit Court.

The plaintiffs in error, who were also plaintigs in the court below, brought their action against Richard H. Crowell, Edward Bradford and Richard Bradford, in the late Superior Court of the county

535 of Leon, on a joint obligation signed and sealed by defendants.—Three separate præcipes were filed by the attorney for plaintiffs, directing the clerk to issue three separate writs of summons *ad respondendum* against the defendants, which was accordingly done.

At the Spring term of said Superior Court, 1843, the attorney for plaintiffs filed a declaration against the defendants jointly, declaring on the aforesaid writing obligatory.

At the Fall term of said court, in December, 1844, the plaintiffs by their attorney took a judgment by default against Crowell, and dismissed as to the other defendants.

This writ of error is sued out by plaintiffs to reverse their own judgment, as having been improvidently taken and to their injury, and for manifest error in the proceedings.

Douglas, for plaintiffs in error:

The plaintiffs in error, who were also the plaintiffs in the court below, assign the following error as apparent of record, viz:

That the bond sued on was the joint bond of three persons and the judgment was taken by default against one of the joint obligors, and the proceedings were dismissed as to the other joint obligors.

Upon an inspection of the record the court will find that *three* several præcipes were filed and three sumomns were issued, all of which were duly executed and returned; and that the plaintiffs declared *jointly* in one declaration against all the defendants. It also appears of record that the obligation declared on is the *joint* bond of the three defendants, and not their *joint* and *several* bond.

It is one of the canons of the law of contracts that all must be sued *jointly* who have *jointly* sealed a contract and are in life. 1 Peters S. C. Rep., 81. Rice *v.* Shute, 5 Burrows, 2611. Hermer *v.* Moore, cited in same case. In this last case the judgment was *arrested* because the facts, of the plaintiff's own showing, made out that he ought not to have judgment; and these facts were: That all had sealed the bond and all were alive at the time of suit brought.

It seems to be well established law that, in all actions on joint contracts, the plaintiff is compelled to bring his action against all the parties thereto, and must recover judgment against all the *joint* contractors or none. 1 Ch. Pleadings, 32, 33, 38 and 546. 3 Term Rep. 782. 1 Hen. and Munf., 62. 3 Munf., 187. 2 Maul. and
536 Selwyn, 23. 2 Randolph, 446, 478, 174, 313. 2 Day's Rep., 387. 1 Hen. Blackstone, 108. 1 Saund. 207, note 2.

The only exception to this general rule or canon of the law of contracts is, where one of the *joint* contractors pleads some plea which goes to his *personal discharge;* such as bankruptcy, *ne unques* executors and the like, and not to the *action of the writ.* In cases of the latter character the plaintiff may recover against the remaining joint contractors who are not by act and operation of law discharged from the action. 1 Saund. Rep., 207, note 2. It is the practice in England, even in the case of bankruptcy or infancy, to require all the *joint* contractors to be sued. Bevil *v.* Wood, 2 Maul. & Selwin, 23. Mr. Justice Johnson, in the case of Miner *v.* Bank of Alexandria, 1 Peters' S. C. Rep., 81, says "It cannot be questioned that a joint contract by several, where all remain equally bound, all in life and all within reach of the process, more especially where they have been all actually arrested, the plaintiff must recover against all or none." This is that case; all were bound, all within reach of the process, and all served. Still more; the plaintiffs show, by their own pleadings, that they are not entitled to recover, for they declare against them all *jointly,* and take a judgment against *one* by default, and subsequently dismiss as to the others. Saddler *v.* Houston, 5 Stew. & Porter, 205. Jenkins *v.* Hunt, 2 Randolph, 446, 478, 174, 313.—2 Blackf., 121. 1 Stew. & Porter, 189, 62, 130.

It may be said that the plaintiffs in error in this case, who were also plaintiffs in the court below, are not entitled to reverse a judgment which they have erroneously taken. In reply to that we say:

1. That the plaintiffs are not to suffer for the errors, mistakes and inattention of their attorney. See the case of Holker et al. *v.* Parker, 2 Cond. Rep. S. C. U. S.

2. That nothing is more frequent than a resort to an appellate court by those who are injured by improvidently taking an erroneous judgment. To this point Geecher's case, reported in 8 Coke, 58, Croke James, 211, is direct and positive. That was a suit upon a bond, and a *nolle prosequi* was entered by the plaintiff. On a second action upon the same contract it was held to be a bar, and it became necessary to remove the judgment by a writ of error for some *technical* information, before the obligee could recover on the original contract. Croke James, 211. The case at bar is that case. An unproductive and erroneous judgment stands in the way of a recovery on the original contract. The plaintiffs have been grievously in- 537
jured by the unskilfulness of their attorney. This unskilfulness is now used to defeat a just demand. The record shows manifest error, and this court is now appealed to, for the purpose of removing the impediment to a just recovery and promoting the ends of justice.

Archer, for defendant in error.

Opinion by Chief Justice DOUGLAS:

This suit was instituted in the late Superior Court of Leon County by Lewis Hale, Michael Ferrall, and Thomas M. Crowell, against Richard H. Bradford, Edward Bradford and Richard H. Crowell, upon the *joint* bond of the defendants, (in the court below, for the sum of thirteen hundred dollars, payable to the plaintiffs. Process was sued out against and duly served upon all of the said defendants, and the declaration filed in the case is in the usual form in debt, charging all the defendants *jointly.* Judgment by default for want of plea, was rendered against Richard H. Crowell only, for the said sum of thirteen hundred dollars debt, and one hundred and ninety-four dollars and seventy cents, making together the sum of fourteen hundred and ninety-four dollars and seventy cents and costs, &c.—Whether on motion of the attorney for the plaintiffs or not, the record does not state; but it shows that he was present, and he seems to have acquiesced in it, for immediately after it was entered, the suits against Richard H. Bradford and Edward Bradford were dismissed "by consent of parties, by their *attorneys.*" Since the rendition of said judgment, the defendant, Richard H. Crowell, has departed this life, and this suit is prosecuted by the plaintiffs in error, (who were also plaintiffs in the court below,) to reverse their own judgment, on the ground that it was improvidently taken by their attorney, and tends greatly to their injury. The error assigned is, that the bond sued on was the *joint* bond of three persons, and the judgment was taken by default against one only of the *joint* obligors, and the proceedings were dismissed, as to the other joint obligors. The defendant in error appears by her counsel, but makes no objction.

That a party may resort to a Court of Error, to obtain the reversal of his own judgment, if it has been so rendered that he may sustain injury by it, is a principle too well settled to be now contested. Johnson *v.* Jebb, 3d Burr Reps., 1772. 2 Eng. Comm. Law cases, 255, is a leading case upon this subject, and it was likewise so held by this Court, in the case of Ward and May *v.* Bull and Shine, 1 Florida 538
Reps., 275, where a number of authorities in point are cited, but a number more might be added; it is also laid down in 2 Tidd's Pr., 1134, and 1 Archbold Pr., 232. The only opinion is, whether this is a case proper for the application of the principle, and we think it is. In Capron *v.* Von Noorden, 2 Cranch, 126, 1 Peters' Cond. Reps., 370, Mr. Capron (who was plaintiff below) sued out a writ of error, and assigned for error that the record did not show that the Circuit Court had jurisdiction, the parties not being described so as to show they were within the provisions of the act of Congress. "The only question submitted to the court was, whether the plaintiff could assign as error his own *omissions* and *irregularities* in the pleadings. The defendant did not appear, but the citation being duly served, the judgment was reversed." The rule that a party shall not take advantage of an error for his benefit does not apply to errors of the Court, as where it pronounces a wrong judgment. Cross *v.* The United States, 1 Gallison's Reps. 26. In the case of Teal *v.* Russell, et al., 2 Scammon, 319, 321, it was held that where an action is brought against several, and a plea is filed as to one, and the default of the others is entered, it is erroneous to take final judgment against them until the plea is disposed of. The court say, "it was clearly erroneous in the Circuit Court to render a judgment against McClure and Russell, during the pendency of the plea filed by Peyton. If issue had been joined on that plea, the proper course would have been to have sworn a jury, as well to try the issue joined as to assess the damages, as to those who had suffered the default. Until the plea filed by Peyton was disposed of, no judgment could regularly be entered against the other defendants; and although the judgment against McClure and Russell was in favor of Teal, yet the law is well settled that the plaintiff may have his own judgment reversed. Judgment reversed." In Jones *et al. v.* Wright *et al.,* 4 Scammon, 338, 339, Catron, Justice, delivering the opinion of the court, said: "This suit was brought against Wright and Jackson on a promissory note, process was served on both the defendants, and Jackson appeared and pleaded the general issue. At a subsequent term, without noticing this plea, a judgment by default was taken against him, the damages assessed, and execution awarded. Afterwards Wright appeared, and filed a plea, on which issue was taken, and a jury called, when the plaintiff submitted to non suit as to him. Execu-

539 tion had been issued against Jackson, and returned *'nulla bona.'*—To reverse this judgment against Jackson, the plaintiffs have prosecuted this writ of error, that they may commence their action anew." The question was, whether the plaintiffs could obtain a reversal of their own judgment, and after citing Capron *v.* Van Noorden, 2 Cranch, 126, Teal *v.* Russell, *et al.*, 2 Scam., 321, Johnson *v.* Jebb, 3 Burr, 1772, and 2 Tidd's Practice, 1134, the court proceeded: "Without going further into the authorities, it is clear that a plaintiff may obtain a reversal of his own judgment, for irregularities which may have intervened in the court below, in order that he may commence another suit, and obtain a regular and valid judgment, as well as where errors have been committed against him."—And Beecher *v.* Shirley, reported in 8 Coke, 58, and Croke James 211, also sustains this principle.

Another question presented for our consideration is, what was the effect of rendering judgment against Richard H. Crowell *only*, and then dismissing as to the two Bradfords. It is to be recollected that Crowell could not have pleaded a non-joinder of parties, because when the judgment against him was rendered they were parties to the suit, and such a plea would have been contradicted by the record. In Sadler *et al. v.* Houston and Gillespie, 1 Stewart and Porter, 206, service of the writ was effected on both the defendants. "There does not," said Ch. J. Lipscomb, "appear to have been any appearance, unless we can infer the presence of the defendants, from the manner in which the clerk has entered the judgment." The case is first stated of Houston and Gillespie against both defendants; he then goes on to say, "the parties appeared by their attorneys, and the said plaintiff dismissed *his* suit against the said Mary Sadler, and the said defendant said nothing in bar, &c., concluding a judgment of *nihil dicit* in the usual form. The error assigned is in entering up judgment against one only, after having discontinued against the other defendant, who had been in court as co-defendant."

"That such a discontinuance is error and fatal, has been ruled (said the Chief Justice) by a series of decisions in this court, and it will be only necessary to refer to the cases. The case of Smith *v.* Hill, 1 Stewart and Porter, 62. Adkin *v.* Allen, ibid 130. Brahan *v.* Johnson, ibid, 189. Roberts *v.* Johnson, 2 Stewart, 13, and Thompson *v.* Saffold, *et al.*, 2 Stewart, 494. The principle (he says) is acknowledged in all these cases, and we are fully satisfied
540 of its soundness." And if it is thus conclusive, where the suit was dismissed as to some of the joint obligors, or contractors, before judgment against the others, "*a fortiori*," it must be so, where the judgment is first rendered against one obligor, and the suit is afterwards dismissed as to the others. In King's administrators, *v.* Anthony, 2 Blackford, 131, the court held, that "if the plaintiff in an action against two, proceed to judgment against one alone, and the record do not contain a return of the writ that the other had not been found, and a suggestion of such return, the judgment will be reversed in error." In Jenkins *v.* Hart's Commissioners, 2 Rand. 447, the Court held, that in a joint action upon a joint contract, (the very case at bar,) the plaintiff must have judgment against all the defendants, or he can have judgments against none. In the case of Newnan *v.* Graham, 3 Mum., 187, 188, the Court of Appeals of Virginia, upon the authority of the case of Leftwick *v.* Berkley, 1 Hen. & Mum., 62, held, "that in an action of debt against one obligor only, if the declaration describe the bond as joint, and do not state the other obligor to be *dead*, it is a fatal error, though not pleaded in abatement, and is not cured by verdict." That case is analogous to the case at bar in this, that the defendant did not crave oyer of the bond, but a copy of it was nevertheless annexed to the transcript of the record by the clerk, as in this case. But there is an essential difference between them in this: the bond in that case (as shown by the copy) was *joint* and several—while in this it is *joint* only: in that the defendant appeared and pleaded—in this, there was judgment by default. The court decided the case according to the showing of it, which the plaintiff had made in his declaration, and so we deem it proper to decide this.

A *nolle prosequi*, or dismission, is simply an agreement not to proceed further in the suit, as to the particular person, or cause of action. 2 Saunders' Reps. 207, note 2, and authorities there cited.

Holker *et al, v.* Parker, 7 Cranch, 436, 2 Peters' Cond. Reps., 560, is cited as an authority to show that plaintiffs should not be permitted to suffer, on account of the errors or mismanagement of their attorney. But the case of Beecher *v.* Shirley, 8 Coke, 58, and Croke James, 211, above cited, is an authority more directly in point. That was a suit upon a bond; the defendant, Shirley, pleaded payment, and it was found for him; but the court being in doubt upon a point of law which arose in the case, after divers motions, the plaintiff, Beecher was content that a discontinuance should be entered, but by the 541
negligence of his attorney, a judgment was entered, which it became necessary for him to remove by writ of error, before the obligee could recover on the original contract. He sued out a writ of error, which was sustained, and the judgment was reversed. That is precisely the case before us. Here an erroneous judgment, improvidently taken, as appears by the attorney of the plaintiffs, stands in the way of a recovery, (or is calculated at least to embarrass the plaintiffs very much in a suit) upon the original contract; the plaintiffs having been injured by the unskilfulness of their attorney, there is manifest error in the record. The judgment of the court below is, therefore, reversed, but at the cost of the plaintiffs.

Per curiam.

JOHN B. DOGGETT, PLAINTIFF IN ERROR, *vs.* MARCELLUS JORDAN, DEFENDANT IN ERROR.

It is erroneous so to instruct or charge a jury, as to leave the whole case to the *opinion* of the jury, without reference to the testimony. If a charge is so framed, the jury may suppose that they are at liberty to find their verdict upon what they know of the case, irrespective of the evidence before them.

The question whether a partnership exists between parties, is a question of fact for the jury to determine, upon the evidence adduced, under the instruction of the court, if asked, as to what, in law, constitutes a partnership. It is error to tell the jury that a partnership exists, and that a defendant is liable in consequence of such partnership. Such a charge is erroneous, because it is both as to the law and the fact, and the court is, therefore, not warranted in giving it.

The jury should be told by the court that they are the sole judges of the facts, and that it is not only their right but their duty to find according to their own views of the proofs before them, regardless of any opinion the court may entertain in reference to such proofs.

A charge to the jury upon the facts of the case is in violation of the express provisions of the act of the General Assembly of January 3, 1848, entitled "An act to amend the several acts regulating judicial proceedings."

It is error not to reduce to writing the charge given by the Court upon the law of 542
the case. The act of January 3d 1848 makes it the duty of the judge presiding upon the trial of common law causes to charge the jury *only* upon the law of the case, and points out the manner of such charge, and directs that it shall be wholly in writing.

Error to Leon County Circuit Court.

This was an action *assumpsit*, brought by Jordan against John B. Doggett and Henry Doggett, in the Circuit Court of Leon county, claiming the sum of one thousand dollars, for services as an overseer, alleged to have been rendered the defendants in the years 1843 and 1844, at a plantation in Leon county, called the Black Creek plantation. Henry Doggett was not served with process, but the plaintiff, under the provision of the judiciary act of this State, elected to proceed against John B. Doggett, who was served. The cause was tried before the Hon. THOMAS BALTZELL, at the Spring Term of the Circuit Court of the county of Leon, 1848.

The bill of exceptions shows the following state of facts, as proved at the trial. The plaintiff introduced a witness, who testified that he, plaintiff, was overseer on the Black Creek plantation, which belonged, to Henry Doggett, during the years 1843 and 1844. That John B. Doggett told witness that he had hired plaintiff to oversee said plantation—and that, since the commencement of this suit, he had told witness that he had hired plaintiff for his uncle, Henry Doggett. That John B. Doggett, so far as witness knew, had no interest other than eight hands working on the plantation, and that he informed witness that these were placed there to help his uncle to work out of debt. Witness also proved that plaintiffs' services as overseer were worth $400 or $500 per annum.

Plaintiff here rested his case, and introduced no other testimony.

Defendant then proved by Hardy Gaskins, a witness called to testify on the part of defendant, that he was present in the State of North Carolina, in 1842, when Henry Doggett employed plaintiff as an overseer for his Black Creek plantation—John B. Doggett was not present. That plaintiff continued in the employment of Henry Doggett during the years 1842, 1843, and 1844; but that in the latter part of the year 1844, he was engaged on another plantation.—That plaintiff complained to witness in the spring of 1845, that Henry Doggett had left Florida for North Carolina, without paying him for his services. Plaintiff made no allegation of any claim against

Doggett vs. Jordan.—Argument of Counsel.

543 John B. Doggett at that time, nor did witness ever hear of any such claim until the commencement of this suit. Henry Doggett had forty hands, and John eight. That the plantation belonged to Henry—that John brought his hands to this country in 1842, and owned no land, so far as witness knew. That John lived on the plantation, and acted as the agent of his uncle.

Defendant proved by another witness, that in 1846, plaintiff had given him a draft on Henry Doggett, for some six or eight hundred dollars, which he requested witness to present to him in North Carolina, and collect if possible. That plaintiff at that time said nothing to witness about any liability of John B. Doggett to him.

James J. Barnes was sworn, and testified that he was employed to oversee the Black Creek plantation in 1844—that he was employed by Henry Doggett—that John B. Doggett's slaves were there, and workd as they had when plaintiff was overseer at that plantation—that witness never looked to John B. Doggett for his pay—that the plantation belonged to Henry, and that John acted as the agent of the old man.

Defendant also exhibited a receipt, dated in January, 1845, signed by plaintiff, for the sum of two hundred dollars paid him by Henry Doggett, in part payment of plaintiffs' services as overseer on the Black Creek plantation.

After argument of counsel, the court below charged the jury, as is set forth fully in the opinion pronounced by this court. To all which charge, and to the refusal of the court to give the instruction asked by defendant's counsel, (also stated in the opinion,) the defendant by his counsel excepted.

Branch for plaintiff in error:

The liability of John B. Doggett is alleged in the declaration *to be joint with that of Henry Doggett.*

The evidence, therefore, to entitle Jordan to recover in this action must show their *joint* promise or *assumpsit*, or it must arise from the fact that they were partners. The joint liability of John B. Doggett can in no other way be established, and the expression in the charge of the Court, "liable as partner or otherwise," can mean nothing more.

It is not pretended there was a *joint* promise, nor does the evi-
544 dence in the remotest degree show there was; nor, indeed, is there evidence that John B. and Henry Dogggtt jointly mployed him, from which a joint promise or liability might be implied. Then as there was no joint promise, the only other way in which John B. Doggett can be made *jointly* liable is upon the presumption, which seems to have been adopted by the court, that *there was a partnership.*

To constitute John B. and Henry Doggett *partners,* there must have been a participation mutually *in the profits.* This is the test 3 Kent. Comm., 23, 25, 28. 2 Greenleaf's Ev., 393-'4-'5.

There is no evidence whatever that John B. Doggett ever received one cent of the profits, or anything else, or that there was any agreement that he should. The proof is, that he was merely an agent of his uncle, Henry Doggett, without any interest in the plantation *or the profits thereof.*

Nor is it pretended that either John B. or Henry Doggett ever held themselves out to the world as partners. The evidence is to the contrary, and shows that it was well known that they were not.

If, then, John B. Doggett was liable neither on a joint promise, nor as a partner, the court erred in instructing the jury that he was, and, *a fortiori, that he was liable for the whole amount of Jordans' claim.*

If the court should hold, that John B. Doggett was liable as a partner, then *the judgment should have been against both,* both being sued.

Upon either hypothesis, the judgment is erroneous—for if a partner, the judgment should have been against both, and joint; or if he was *not a partner,* the court erred in instructing the jury that he was *liable for the whole claim.*

If Jordan had a demand against John B. Doggett, for his care and diligence in overseeing his hands, he could not recover in this action but should have sued John B. Doggett *individually,* in a separate suit. This action is against John B. Doggett and Henry Doggett, *on a joint liability,* and a judgment could not be taken *against one,* on a separate and individual claim.

As to the effect of the receipt and draft given by Jordan on Henry Doggett, for the claim now sued for, the court should have instructed the jury that they were *prima facie* evidence that Jordan gave the credit to Henry Doggett alone, and that if he now sought to make John B. Doggett liable, he should explain or rebut their effect by other evidence. Instead of this, the court instructed the jury in such 545 a manner as to mislead their minds.

In relation to fourth error, see Acts of General Assembly, passed 1847-'8, page 12.

The court also erred in refusing to give the instruction asked by defendant's counsel. Possession of personal property is ordinarily evidence of title. But where the property is admitted to be in another, the only inference from the lawful possession of negroes, is that the party in whose possession they are either *hired* them from the owner, or that they were loaned to him.

In this case, the property in the eight negroes was admitted to be in John B. Doggett, and the possession of Henry Doggett to be lawful. Is it not, then, a legitimate presumption, in the absence of proof to the contrary, that John B. Doggett's negroes were hired by Henry Doggett?

One thing, however, is certain—that the possession of John B. Doggett's negroes by Henry Doggett, or the fact that they were at work on Henry's plantation, does not, *per se* or *prima facie,* make John and Henry partners. If it did, persons hiring out their negroes would run great risks by being, without their knowledge or consent, made partners of persons totally insolvent, and, as in this case, might subject themselves to heavy losses.

Long & Walker for defendant in error:

This was an action of *assumpsit* brought by plaintiff against John B. Doggett and Henry Doggett, to recover compensation for services alleged to have been rendered as overser on a plantation, called the "Black Creek plantation," in the years 1843 and 1844. Process was not served on Henry Doggett, and the sheriff having returned that he did not reside in Leon county, the cause proceeded against John B. Doggett alone. See Thompson's Digest, 327, sec. 3. 9 Mass. R., 300.

The substance of the charge of the court, as we understand it, was that if the jury believed from the evidence that the plaintiff had rendered services to John B. Doggett and Henry Doggett jointly, and had not agreed to look to Henry Doggett alone for payment, then that John B. Doggett was jointly liable for the whole amount of the plaintiff's wages. See Addison on Contracts, 214, 876, 880. 9 Mass. R., 300. If this position be correct, then the first and second 546 errors are not well assigned.

The third error assigned we think is founded in mistake of fact.—It will be seen by reference to the testimony of Gaskins that the plaintiff had charge of the Black Creek Plantation for Henry Doggett alone in 1842, before John B. Doggett brought his negroes to this country. It was in part payment of the wages of that year that the two hundred dollars mentioned in the receipt was paid. The order sent by Daffin to North Carolina was for the balance due for 1842, and also for services rendered to Henry Doggett alone on his Jefferson county plantation, in 1844. The verdict of the Jury was for services rendered to John B. Doggett and Henry Doggett jointly on the Black Creek plantation, in 1843. 5 Mass., 196.

The fourth error assigned is also founded in a misapprehension of the facts. The court did reduce to writing every thing it charged "as to the law of partnership."

It is deemed a sufficient answer as to the sixth error assigned, to say that it was the duty of the jury to draw their own presumptions from the testimony before them.

In answer to the seventh assignment we say that the refusal to grant a new trial was matter of practice which cannot be assigned for error in this court, and if it could be, no sufficient ground for a new trial was shown.

Opinion by Chief Justice DOUGLAS:

This suit was instituted in the Leon Circuit Court by Marcellus Jordan, the plaintiff in the court below, against John B. Doggett, the plaintiff in error, and Henry Doggett, against whom summons *ad respondendum* issued, which was returned by the sheriff endorsed in these words: "Executed by serving a copy hereof on John B. Doggett—Henry Doggett does not reside in this county."

The declaration contains several counts in *assumpsit;* all in the usual form, upon a claim for services charged to have been rendered by the said Marcellus Jordan to the said John B. Doggett and Henry Doggett, as overseer of a plantation. To which declaration the said John B. Doggett put in a plea of *non assumpsit* and issue was joined therepuon, and the case was submitted to a jury who returned a verdict for the plaintiff and assessed his damage at fourteen hundred

and eighteen dollars, for which sum a judgment was entered, and that judgment has been brought up to this court by writ of error.

The record contains a bill of exceptions that sets forth the evidence adduced to the jury, and goes on to state that "after argument of counsel the court instructed the jury that, if they were of opinion that the negroes proved to be owned by John B. Doggett were actually hired to Henry Doggett, and the former was agent of the latter merely, they will find for the defendant.

"If the jury shall be of opinion that there was no hiring, then that, in general, the liability of a party depends upon services rendered to him. That, in this case, if the services were rendered in the care and management of eight negroes belonging to John B. Doggett, with forty belonging to Henry Doggett, on the plantation of the latter, John B. Doggett was responsible to the plaintiff to the extent of his interest, certainly. Whether liable to the extent of the claim as partner, or otherwise, is a question of greater difficulty; but the court inclines to the opinion that he is, and so instructs the jury. This is the general rule, and its operation may be avoided by evidence that the plaintiff agreed to look to one of the parties and not to the other for payment, and that a receipt in part payment to one of the parties does not confine the liability to him nor prevent the operation of the contract as to the other."

The court, further, as to the responsibility of John B. Doggett as part owner of the negroes, informing them as to the law of partnership, instructed the jury, "if they were satisfied that defendant and Henry Doggett were partners in the business of farming, then the defendant was responsible, as a partner, to the plaintiff, jointly with Henry Doggett, for the services rendered."

The following are the errors assigned, to wit:

First. The court erred in instructing the jury that John B. Doggett was liable for any part of Jordan's claim as overseer.

Second. The court erred in instructing the jury that John B. Doggett was liable, as partner or otherwise, for the whole of Jordan's claim.

Third. The court erred in instructing the jury that Jordan has a right to look to John B. Doggett for his pay as overseer, after he, Jordan, had recognized Henry Doggett as *his sole debtor*, by receipting to said Henry Doggett for part of his pay and drawing a draft on him for the same; and in not instructing the jury that such receipt and draft were *prima facie* evidence that Jordan recognized only Henry Doggett as his debtor and looked to him alone for pay.

Fourth. The court erred in not reducing to writing and incorporating in his charge to the jury what it instructed the jury "as to the law of partnership."

Fifth. The court erred in entering judgment against John B. Doggett *alone*, if John B. Doggett was liable as a partner of Henry Doggett.

The *sixth* it is not deemed necessary to notice, and the *seventh* and last was abandoned at the argument of the cause.

The first and second may well be considered together, for although the latter is somewhat more extensive than the former, both are deemed erroneous and for similar reasons. They are both founded upon that part of the charge in which the court instructed the jury that, "if the jury shall be of opinion that there was no hiring, then that, in general, the liability of a party depends upon services rendered to him; that, in this case, if the services were rendered in the care and management of eight negroes belonging to John B. Doggett, with forty belonging to Henry Doggett, on the plantation of the latter, John B. Doggett is responsible to plaintiff to the extent of his interest certainly. Whether liable to the extent of the claim, as partner or otherwise, is a question of greater difficulty; but the court inclines to the opinion that he is, and so instructs the jury."

The first thing which presents itself to our notice in this charge is, that the whole matter appears to have been left to the opinion of the jury, without any reference to the testimony. There are few points upon which jurors are more apt to mistake, than in supposing that they may find their verdict upon their own knowledge of the case, acquired before they took their seats in the jury box. We presume this was an inadvertence of the learned judge who tried this cause, as it is one that often happens in other courts, and it may have had no material bearing in this case; but we can readily imagine cases where thus to charge might have a very injurious effect, and have therefore deemed it not amiss to mention it, *en passant*, as we think care should always be taken to instruct the jury that they must base their verdict upon the evidence adduced before them. "The jurors are triers of the facts not upon their own personal knowledge," but from the evidence thus adduced. Clark *v.* Robinson, 5 B. Monroe's Reps., 55. 2 Supp. to the U. S. Digest, 763, No. 232. The United States *vs.* Fourteen packages, &c., Gilpin's C. C. Rep., 235. 1 Starkie on Ev., 405. 3 Black. Comm., 374.

Again, the jury were charged in substance that, if there was no hiring in the case, if the services were rendered in the care and management of eight negroes belonging to John B. Doggett, with forty belonging to Henry Doggett, on the plantation of the latter, John B. Doggett was responsible to the extent of his interest certainly.—This, however, we think does not necessarily follow. The eight negroes might have been lent by John B. Doggett to Henry Doggett as an act of kindness by the former to the latter, or Henry Doggett might have held them as guardian of John B. Doggett, or, indeed as a mere wrong doer, or in some one of various other ways that may be imagined, without rendering John B. Doggett liable to the plaintiff for overseer's wages.

But the Court added "Whether liable to the extent of the claim, as partner or otherwise, is a question of greater difficulty; but the Court inclines to the opinion that he is, and so instructs the jury." This is the first time in the whole case that anything is said in the record about a partnership. The defendants were not sued or declared against as partners, and the testimony, the whole of which is set out in the bill of exceptions, no where speaks of them as partners.—Yet it was not only left to the jury to find that John B. Doggett was liable to the whole extent of the claim as such partner, but they were expressly charged that he was so liable, or otherwise.

The most objectionable feature, however, in this instruction is, that it is compounded of both law and facts. For instance, whether a partnership existed, or not, between John B. Doggett and Henry Doggett, at the time when the services sued for in this action were rendered, was a question for the Jury to determine upon the facts of the case, under the instructions of the Court, if instructions were asked as to what in law constituted a partnership: but here the fact of partnership is assumed by the Court and the jury specially instructed that the defendant, John B. Doggett, is liable, and thus to assume (where, as in this case, if there was any evidence of partnership it was very slight, wholly inferential, the fact contested and the testimony contradictory,) and to charge both upon the law and the fact was erroneous. McRea *v.* Smith, 4 Rand. Reps., 463. Plater *v.* Scott, 6 Gill & John Rep., 116. Fowler v. Lee, 4 Munf. Rep., 373. McEldery *v.* Hannagan, 1 Harr. & Gill Rep., 308. Kendall *v.* Hughes, 7 B. Monroe's Reps., 371. It is true that the court further, as to the responsibility of John B. Doggett as part owner of the negroes, informing the jury as to the law of partnership, instructed them that, if they were satisfied that defendant and Henry Doggett were partners in the business of farming, then defendant was responsible as a partner to the plaintiff, jointly with Henry Doggett, for the services rendered;" but they had been, as we have seen, expressly charged before that he was so liable; and they were not, in the further instruction, informed that they were the sole judges of the facts, and that they had not only a right, but that it was their duty to find their verdict according to their own understanding of the proofs adduced in the cause, whatever views the court might entertain in regard to them. And besides, they had also been before especially charged that, if John B. Doggett was not liable to the whole extent of the claim, as partner of Henry Doggett, he was liable otherwise to that extent; so that the jury could not have found any other than a verdict for the plaintiff for his whole claim, without disregarding the instructions of the court, as they appear in the record. Perhaps, if the portion of them which was verbally given had been reduced to writing and filed, we might have found it a proper explanation of the whole matter; but unfortunately that was not done and we are compelled to decide the case upon the record as it is presented to us, and that shows a charge to the jury upon the facts of the case, which is against the express provisions of the act of the General Assembly of January 3, 1848, "To amend the several acts regulating judicial proceedings," Pamph. Laws of 1848, page 12, by which it is made the duty of the judge to charge the jury *only* upon the law of the case. In Reel *v.* Reel, 2 Hawk's N. Ca. Reps., 85, there was a motion for a *new trial* on the ground that the court intimated its opinion to the jury on the matter in issue. Taylor, Chief Justice, delivering the opinion of the court, said: "The act of Assembly relative to the duty of a judge charging forbids him to give an opinion whether a fact is fully or sufficiently proved, such matter being the true office and province of a jury. It is not for this court to discuss the wisdom or expediency of the law, or to pervert its true construction under a belief that no mischief can be produced thereby, or even that justice can be more substantially administered." A new trial was therefore awarded. The 9th section of the 6th article of the constitution of Tennessee provides: "That judges shall not charge the jury with

551 respect to matters of fact, but may state the testimony;" and under this provision the Supreme Court of that State, in the case of Ivey *v. Hodges,* 4 Humph. Reps., 154, held "That the judge had *no* right to declare what is proved, but simply to state what is sworn to; that the truth of the statements of witnesses and the deductions to be drawn therefrom must be left to the jury." Cited in 1 Supp. to the U. S. Dig., page 170, No. 294.

The facts should be left to the jury whose peculiar province it is to say what effect they shall have. 10 Peters' S. C. Reps., 98. It is the province of the jury to weigh and decide on the sufficiency of the evidence. Greenleaf *v.* Birth, 9 Peters' S. C. Reps., 299.

As to the *third* error assigned we think that the receipt and draft therein mentioned should have been left to the jury with the other evidence in the cause, as testimony conducing to prove that Jordan recognized only Henry Doggett as his debtor and looked to him only for pay.

The *fourth* error is undoubtedly well assigned. It is, that "The court erred in not reducing to writing and incorporating in its charge to the jury, what it instructed the jury 'as to the law of partnership.'"

The act above cited, sec. 1, provides: "That hereafter, upon the trial of all common law causes in the several courts of this State, it shall be the duty of the judge presiding on such trial, to charge the jury *only* upon the law of the case and in the manner following, that is to say, the said judge shall only charge the jury upon some points of law or exceptions to evidence arising on the trial of said causes; and said charge shall be *wholly* in writing." The second and third sections contain provisions on the subject not deemed material to the decision of this cause. But the *fourth* provides: "That *all such instructions,* as well those given as those denied, and also as well those prayed for by the parties as those declined by the said judge, shall be signed and sealed by the said judge and form a part of the record in the cause." In this case exceptions were taken to the whole of the charge, and that important portion of it does not appear. Yet the clerk of the court from which this record comes, has certified that it is a true transcript of the record and proceedings, &c. The provisions of the statute last mentioned are restrictive and mandatory, not merely directory; and whatever views we may entertain as to their wisdom or expediency, it is our duty to obey them, and a failure so to do is error.

The *fifth* error alleged seems to have been assigned under a mis-
552 apprehension of the provisions of our judiciary act, the 12th section of which (Duval's Compilation, page 92, Thompson's Digest, p. 327, No. 2,) declares: "That when any original writ or summons has been sent out against two or more defendants, and returned by the sheriff or other officer served upon one or more of the defendants, and that the other defendants do not reside in said district or county, as the case may be, it shall be lawful for the plaintiff, at his option to proceed to judgment against those upon whom process has been served, or to obtain from the court time to perfect service, &c." We have seen that the summons in this case was issued against John B. Doggett and Henry Doggett, and that it was returned "served on John B. Doggett, and that Henry Doggett did not reside in this [Leon] county." This brings the case within the provisions of that statute; the plaintiff elected to proceed to judgment against John B. Doggett, the defendant upon whom process had been served, and we see no reasons to doubt his right to do so. The fifth error, therefore, is not sustained.

That errors should occasionally be committed by the most astute and able judges, in the hurry of the trial of cases at *nisi prius,* is a matter that need not excite surprise in the mind of any one. The only wonder is that they do not more frequently occur, and especially in the charge of the court to the jury, which must often be given immediately after the close of a long and tedious examination of testimony, complicated and perplexing, out of which important, difficult and not very familiar questions of law frequently arise. But when they do take place it is not therefore the less our duty to correct them. And here it may not be improper to remark that there are no two matters in the exercise of judicial authority, about which a judge should be more careful than in not permitting the jury to usurp the power of the court, to decide questions of law, and in not himself invading the province of the jury to respond to the facts of the case.

Believing that the facts of this case were not properly left to the jury, and that, if they had been so, the verdict might and probably would have been different, and the Judge having failed to reduce the whole of his charge to the jury in writing and file it, according to the requirements of the statute upon the subject, to which we have above referred, the judgment of the court below is reversed, the verdict to be set aside, a *venire de novo* awarded, and the cause remanded for further proceedings in accordance with this opinion.

Per curiam.

SAMUEL S. SIBLEY, APPELLANT, *vs.* MARIA, A WOMAN OF COLOR, 553
APPELLEE.

W. O., of South Carolina, devised the greater part of his real and personal estate to W. H. upon the condition that a certain slave and her four children, as his property and under his protection shall be allowed all the privileges of free persons in the State of South Carolina consistently with good order and a proper subordination, and shall be allowed out of the property devised to W. H., two hundred and fifty dollars each, to be paid them at such times and in such quantities as, in his judgment, will be most proper;—otherwise, they are to be taken to the State of Ohio, and the balance of the money, over and above what will be expended in their passage, to be paid to them there; and in case the said W. H. should refuse or neglect to comply with the conditions herein expressed, or should die without an heir, then, in either of these cases, all the interests, rights and emoluments left by the will to W. H., to go to J. H.

Held, first That W. H. takes the estate devised to him, subject to certain conditions subsequent, which, unless he performed, a limitation over to J. H. is created, and is termed a conditional limitation.

Second.—The testator by such a will, manifests unequivocally his intention that the slaves shall be free, and this is shown by the declaration that they shall enjoy all the privileges of free persons, &c., if they remain in the State—as well as by the wish expressed, that if they do not remain, they be taken to the State of Ohio.

Third.—A solemn trusts is clearly created by the terms of the will involving the freedom of slaves, and the greater part of the testator's estate is devised, subject to and conditioned upon this trust.

Fourth.—That portion of the will which provides that the slaves shall have the privileges of free persons is void, because it is a condition inconsistent with the gift, and incompatible with the relation of master and slave.

Fifth.—Such privileges would also be inconsistent with the laws and policy of South Carolina, where the will was made. This portion of the will could not, therefore, have been carried out.

Sixth.—The intention of the testator being to give the slaves their freedom could have been carried out by taking them beyond the limits of the State—there being at the time of the probate of the will no law to prevent it in South Carolina.

Seventh.—The taking of the slaves to Ohio, was regarded by the testator as a *dernier* means of giving them freedom. No rational intendment other than that of freedom can be made or inferred from the direction to remove them to Ohio, and to pay them money when there.

Eighth.—In the absence of any proof to the contrary, the presumption is, that the 554
devisee, executed and performed the trust reposed in him, the general rule being, that when a person is required to do a certain act, the omission of which would make him guilty of a culpable neglect of duty, it ought to be intended that he has duly performed it, unless the contrary be shown.

Ninth.—The will not having pointed out within what time the condition was to be performed, the law presumes that it must be done within a reasonable time.

Tenth.—If not performed within a reasonable time, then the ulterior legatee might claim the estate for condition broken—subject, however, in his hands, to the same condition.

The establishment of the right of the mother to freedom by the courts of Florida, does not infringe upon the policy of this State, owing to our statute in relation to the manumission of slaves, the presumption being that she was free when she came here.

This was an action of trespass, instituted by the appellee in the Circuit Court of Leon county, at the Spring term, 1847, for the purpose of establishing her right to freedom, under the will of William Oliphant, made in South Carolina in 1837, and admitted to probate in that State in 1838.

The defendant pleaded not guilty, and that plaintiff was a slave.

The case was tried at the Spring Term, 1848, before the Hon. THOMAS BALTZELL, Judge, presiding in said court.

After the proofs were submitted to the jury, and after argument of counsel, the court charged the jury as follows, viz:

That it was the duty of the executor under the will, to give freedom to the slave, according to its provisions, and that, in the absence of all testimony on the part of both plaintiff and defendant, as to the mode in which she has been held, or is now held, and after the lapse of time, the jury may infer that that duty was performed.

That the bequest of the will imposes a duty and trust, and the presumption of law is, that it has been performed.

That a fraudulent disposition, in opposition to and in defiance of the will, would not confer a right on defendant.

That the law of South Carolina having received a judicial construction by the courts of the State, their decision is conclusive in reference thereto, and according to that construction, the bequest gave clear and indisputable right of freedom to plaintiff.

Defendant by his counsel prayed the court to instruct the jury (among other charges asked,) that if they believed that emancipa-

555 tion was prohibited by the *laws* of South Carolina, (except by the Legislature,) at the time the will under which the plaintiff claims freedom was made, then plaintiff is not entitled to her freedom, and they should find for defendant." But the court refused to give the instruction asked, as well as others prayed by defendant. To which refusal, and to the instructions given, the defendant by his counsel excepted.

Papy, for appellant:

The right claimed by the appellee in this case is based upon the will of William Oliphant, executed in South Carolina in the year 1828.

It will be observed, by reference to the copy of this will to be found in the record, that there is no provision which expressly directs the appellee to be emancipated. She can, then, only claim by construction.

She is given to the legatee, W. H. Hollingsworth, as his property, but directs that she be permitted to enjoy the privileges of a free person. This direction is manifestly void, because it is a condition inconsistent with the gift. No person can be a slave, the property of another, and yet enjoy the privileges of a free person. Such a privilege is incompatible with the relation of master and slave, and with the rights, duties and reciprocal obligations resulting therefrom. If this provision, however, be considered as an indirect gift of freedom, it is void, because the laws of South Carolina of force when this will was executed, and when admitted to probate, prohibited emancipation of slaves, except by act of the Legislature. Courts of justice will not give effect to the provisions of a will, or deed, having for their object the evasion of the settled law and policy of a State.

It may, however, be insisted that the alternative part of the clause, "or otherwise to take them to the State of Ohio, and the balance of the money bequeathed (to the slaves) to be paid them there," is sufficiently explicit to obviate the difficulty presented by the statutes of South Carolina. But this is left at the option of the legatee. He could adopt either the first or the latter part of the clause.

But the will does not direct what shall be done with them, after they reach Ohio. In order, therefore, for this court to establish the claim set up by the appellee, they must (there being no evidence of
556 the fact) take judicial notice that the laws of the State of Ohio prohibited domestic slavery when this will was executed, and by construction, determine that the design of Oliphant was to have the appellee emancipated when she arrived there.

But conceding that the effect of the will is an express direction to take the appellee to Ohio, and there *set her free*, how is it to be enforced?—at whose instance? It is very clear that as long as the appellee remained in South Carolina, where the provisions of no will emancipating a slave could operate, or in any of the slave-holding States, (so far as her rights under this will are concerned,) she could not be free, because, if she obtained her freedom at all, it could only have been by operation of law prohibiting slavery in the State to which she might have been taken, as there is no express direction to manumit her. If this be true, and it seems to be a proposition too plain to require illustration, she must still be a slave, and must continue to be, until she is taken to a free State, with a view to free her, or until she is emancipated in the manner prescribed by law. And if she is now a slave, she has no *status* in court. In contemplation of law, slaves are mere chattels, things. They have no civil rights—they can hold no property, *nor can they bring a suit*—they can acquire no right which does not, in the instant it is acquired, pass to the master. The courts cannot interfere to compel Wm. H. Hollingsworth to perform the trust in this case, at the instance of this party, because to do so, they would be recognizing a person unknown to the law.

In the case of Frazier *v.* Frazier, 2 Hill's Ch. Reps., 316, which, it seems, governed, in a great degree, the decision of this case in the court below, the principle just contended for is admitted, but the court in that case decide in effect that as the bill was filed by the heirs to partition the slaves, the court would, if on looking into the will they find that the executors could execute it, by sending the slaves out of the State, order them to discharge the trust. In that case too, there was an express direction to the executors to take the slaves to San Domingo and emancipate them, and the executors had seized the slaves for the purpose of carrying out the will. But it will be perceived that even there the slaves were not emancipated, but were directed to be taken out of the State, as expressed in the will.

It will be seen, however, by a further examination of the will, that, in the event of the failure of the first legatee to perform the conditions annexed to the bequest to him, the testator bequeathes the es- 557
tate given to him to John H. Hollingsworth, without any condition or limitation expressed. The effect of this whole clause taken together, conceding that the conditions attached to the bequest to Wm. H. Hollingsworth were valid and binding to vest in John H. Hollingsworth the title to the property bequeathed, as if given to him originally, upon the neglect or refusal of Wm. H. Hollingsworth to comply with the conditions adverted to.

John H. Hollingsworth, then, had the right in such event to claim the property, and in that case no provision is made in reference to the appellee. It is conceived that in such case the appellee would either fall into the residuum of the estate of the testator, or would be included in the property going over to John H. Hollingsworth. Whether, therefore, the conditions annexed to the bequest to Wm. H. Hollingsworth are void, or whether, upon the neglect or refusal to comply therewith, if valid, the property vested in John H. Hollingsworth, in neither event is the appellee entitled to recover.

If this case is to be decided as if it were now pending in the Courts of South Carolina, even, if there was a direct and express injunction to carry the appellee out of the State into a free State, and there emancipate her, it could not be done, because by an act of the Legislature of that State, passed in 1841, it is expressly forbidden for executors to carry out such direction in a will, and the courts there have decided that the law adverted to operates as well upon wills executed and not carried into effect before the passage of the act as after. 1 Richardson's Eq. Rep., 65. 2 Richardson's Eq. Rep., 43.

But if it be insisted that this case must be decided by the laws of this State as they now exist, it will be seen, by reference to Thompson's Digest, page 533, that certain pre-requisites are necessary, in order to manumit a slave here. No slave can acquire her freedom in any other wise. In this case, there is no one to perform the requirements of the law. Let it be recollected that, under the will, the appellee could not be emancipated, except by operation of law in the State to which she might be taken, and if not until then, she must still be a slave. Now, then, can the court listen to her claim, against the consent of the party holding her as a slave, and grant her freedom before the right of emancipation is vested.

It would only be necessary for a person desiring to emancipate a slave in this State to go into an adjoining State, whose laws permit 558
it, and there, by deed or otherwise, manumit her, deliver her into the possession of another, have her brought here and sue for freedom, in order to evade the law which requires all persons desiring to manumit a slave to give bond to send such slave out of the State within thirty days.

These laws in relation to emancipation are founded in high public policy, and are enacted to preserve the institutions peculiar to the Southern States. Courts of justice are careful not to countenance any attempt to evade them, and will not give their sanction to any efforts to render them nugatory by schemes, however artfully concontrived, to set them at defiance.

It is better even that cases of transient injustice should be endured, than that the general law and policy of the country should be disturbed.

The court below charged the jury, that there being no evidence of the manner in which the appellee was held, the presumption arises, that Wm. H. Hollingsworth discharged the trust in the will to set her free, and that, therefore, she was entitled to her freedom. But with all deference to that court, how could such presumption arise, in the face of the fact that she was held as a slave, admitted by the very suit itself, and that the laws of this State and of South Carolina forbid emancipation, except under certain forms?

The only way in which the appellee could have been freed under this will, was to have been taken to Ohio with that view—and if she had been so taken, she would not now be in Florida, or if she were here, she could only be so as a slave. Thompson's Digest, 533. The presumption, then, of her present freedom, cannot arise in any view of the case; nor can the principle that the presumption of law is always in favor of liberty be invoked here. That principle had its origin in a country where slavery was and is unknown. The institution of slavery in the Southern States is unlike the systems of feudalism and villainage in England. It is more like the slavery of the Greeks and Romans, where the slaves, as our slaves, had no legal rights or privileges whatever, with the exception that here they are protected by our laws from the cruelty to which the Roman slaves were exposed.

In the States of this Union where slavery exists, the black complexion affords a presumption of slavery, and a black person will so

559 be regarded until the contrary is shown. 2 Halsted, 253. 2 Bibb, 238. The presumption of law, *in favorem libertatis,* instead of having any application in this case, is entirely reversed. The presumption being against the appellee, arising from her complexion, it devolves upon her to *prove* her right to freedom, by proper and legal testimony. This, I apprehend, cannot be done, unless she can show that she was taken to the State of Ohio, or any other free State, with the view of emancipating her, and that her right to freedom vested accordingly.

If, however, under the most favorable view, the appellee is entitled to have the trust in the will carried out, the utmost she can claim is to have her sent to Ohio; and in that case, it being a trust, a court of law cannot afford relief, but she must resort to a Court of Chancery.

Woodward, for appellee:

This is a suit for freedom, under the will of William Oliphant, of South Carolina, made October 13, 1827, admitted to probate, January 20, 1828.

The clause containing the bequest of freedom is in the alternative, to wit: "The privileges of free persons of color, consistently with good order and subordination—or otherwise, to take them to the State of Ohio."

The object of the will is the freedom of the slave.

The instructions of the court are sustained by law.

1. As to the *duty* of the *executor.*
2. The *presumption* of its *performance.*
3. The *fraud* of *dereliction.*
4. The *judicial decisions* of a State being the *best exposition of its laws.*

The counsel cited and commented on the authorities adduced by him in reference to the instructions given by the court below, and then proceeded to establish the following propositions:

I.—A will takes effect from the *death of the testator*—rights under it accrue from that time. How, then, can a bequest revert to the testator, *'eo instanti"*—it is passing away from him forever.

II.—It is only *our own* slaves that are bound to conform to our emancipation laws. Those of other States to theirs.

560 III.—The right to freedom being vested by the will, at the death of the testator, a law declaring emancipation illegal can have only a prospective operation.

IV.—Emancipation not being inhibited by the laws of South Carolina—*ergo,* a provision thereof by will is NOT VOID.

V.—An *act* of the Legislature was not essential to emancipation, if the slave were to be removed beyond the borders of the State, and only in that event, claiming to be free.

VI.—The executor was bound to adopt the alternative which should *effectuate* the testator's will—his will was *the freedom of this slave*—removal to Ohio the only certain mode of accomplishing the purpose, if the other were *impracticable,* or having been attempted, had *failed.* This being the duty of the executor, it is equally incumbent upon the legatee, because expressly enjoined.

VII.—The omission, neglect, or refusal to remove the slave to Ohio, constitutes the *fraud,* against which the courts will relieve—it is the very *gravamen* of the wrong, for which this suit is seeking redress.

The appellee had a right to resort to a Court of *Equity* in South Carolina, for the enforcement of her claim. She is equally entitled to assert it in this form of action here. That court would have compelled performance by the executor, or legatee—this court can adjudge her rights in the only mode in which they can be practically exhibited in the tribunals of this State.

The assertion of a purely personal right can be restricted only by want of jurisdiction over the person against whom, or the subject matter in reference to which, it is urged. In this case, jurisdiction over the subject-matter and the person is not only unquestionable and conceded, but it is such as our courts are bound to entertain.

To sustain these propositions, the counsel cited the following authorities, viz: 1 Leigh, 465. 4 J. J. Mar., 370. 2 J. J. Mar., 475. 3 Leigh, 8, 9, 11. 2 Leigh, 189, 192, 193. 2 Hill's Ch., 303, 313. 1 Peters, 680. 2 Peters, 220, 37, 38. 2 Phillips, 296, 297, 298, 301, 302, 307, 368. 6 Con. Rep., 445. 19 Johns., 345. 2 Cowan, 285.

Duval, also for appellee, supported the views taken by Mr. Woodward, and urged her right to freedom.

Opinion by Justice HAWKINS:

This was an action of trespass brought by the appellee, Maria, a 561 woman of color, against Sibley, who claims her as a slave.

To sustain the action, the will of William Oliphant,, of Edgefield District, South Carolina, was introduced, the plaintiff claiming her freedom by virtue of a clause contained in it in the following words, to wit:

"Item 16th, and lastly, I give and bequeath to my nephew, William C. Hollingsworth, all the remaining part of my estate, both real and personal, including my interest in a house and lot in the city of Augusta, in the State of Georgia, after my lawful debts are paid out of it. I give and bequeath to him a life estate in my tract of land known by the name of my Turkey Creek place, and at his death that it shall descend to his legal heirs in fee simple; all the rest of my real estate I give and bequeath to him and his heirs forever, together with all my personal estate not otherwise disposed of, and *under the following conditions, to wit*: that my negro woman Maria, and her four children as his property and under his protection shall be allowed all the privileges of free persons, consistently with good order and a proper subordination, and shall be allowed out of the property demised to the said William H. Hollingsworth, two hundred and fifty dollars each, to be paid to them at such times and in such quantities as in his judgment will be most proper, otherwise to take them to the State of Ohio, and the balance of the money over and above what will be expended in their passage to be paid to them there; and in case the said William H. Hollingsworth should refuse or neglect to comply with the conditions herein expressed or should die without a legal heir, in either of these cases it is my will and desire that *all the interests, rights and emoluments which the said William H. Hollingsworth has, by virtue of this will,* shall go to John H. Hollingsworth, and shall be his to all intents and purposes as though they had been originally demised to him, &c."

Giving the will what we deem a proper construction, it appears clearly to have been the intention of Oliphant, the testator, that Wm. H. Hollingsworth should take the Turkey Creek place free from all conditions, but that he was to take all the rest of his real and personal estate, not otherwise disposed of, subject to the conditions above set forth. In other words, William H. Hollingsworth, the devisee, was to take the estate devised to him *subject to certain conditions subsequent,* which unless he performed there was a limitation over to John H. Hollingsworth, creating what is termed a conditional lim- 562 itation.

By the terms of the will Maria acquired certain rights and, upon their acquisition, the law would have lent its aid to enforce them, if not against law, policy or morality. She was a beneficiary under the will, and was entitled to the benefits of its provisions, unless they contravened some statute of the State in which the will was made, or were void for some other cause. The testator manifested unequivocally his intention as to the partial or total freedom of Maria, *firstly,* by the wish that she shall enjoy all the privileges of free persons, consistently with good order and proper subordination, and a devise to her of two hundred and fifty dollars; and *secondly,* to be taken to Ohio and, after her expenses of transportation thither were paid out of this money, the remainder of the same to be paid to her there.—Here, certainly, is created a solemn trust—a trust involving the freedom of a slave who, it is fair to suppose, had most favorably commended herself to the greatest kindness of her owner, and he, for the purpose of more effectually carrying out his benign and munificent intentions, devises the greater part of his estate, (which the witnesses tell us was a large one,) *subject to and conditioned upon this trust.*—There is no evidence to show that William H. Hollingsworth actually took the estate so devised to him. Although a devisee is not bound, *nolens volens,* to accept of a devise, yet the law will presume an acceptance, if the devise or gift is of a beneficiary character; its presumption being based upon that strong, impulsive principle of self-interest which so generally directs and governs the actions of men.—If, therefore, Hollingsworth took the estate, he took it upon the condition of the will and subject to the trust. That portion of it in which it is proided that Maria shall have the privileges of free persons, we believe, in the language of the counsel for the appellant, is void, "because it is a condition inconsistent with the gift. Such a privilege is incompatible with the relation of master and slave, and with the rights, duties and reciprocal obligations resulting therefrom." There are decisions going the other way, but in deciding this case we are governed by what we deem the laws and policy of Carolina. In that State, the slave was not permitted to go as free and exercise all the rights and privileges of free persons of color, and if he did so he became liable to be seized as a derelict and sold. This being the case, the intention of the testator as to this clause could not be

Sibley vs. Maria, a woman of color.—Opinion of Court.

563 carried out, and the law of Carolina not permitting direct manumission, of course it could not be effected indirectly—the evasion of a statute being an infraction of it.

There is some diversity in the decisions how far a devise of property to a slave will entitle such slave to his freedom by necessary implication. The case of Hale *v.* Mullin, 5 Harr. & J., 590, and confirmed by the Supreme Court of the United States, 2 Peters, 670, goes to this extent, while the cases found in 2 Call, 319, 4 Dess., 266 and 1 Stewart, 320, assume the negative of this proposition. A decision of this question is not necessary, however, in this case, further than this—that if the manumission of Maria could have been *legally* effected by the laws of Carolina, the legacy to her of the money would at least have been good, so far as furnishing the means to carry the intent of the testator into execution. We have spoken of it rather as a fact indicating this intention, and as a fund to enable the party taking under it to effectuate it.

At the time of the probate of the will there seems to have been no law of South Carolina to prevent the carrying off slaves beyond the limits of the State and then to be liberated. The case of Fraser *v.* Fraser, 2 Hill Ch., 303, 35, sustains us in this view. The policy of the law against manumission was to prevent an increase of free blacks in the State, and to guard against its deleterious effects.

It is contended that there is no direct gift of freedom after the arrival of Maria in Ohio. There was certainly a trust, no precise form or set of words being necessary to create one; and taking the whole clause of the will together in relation to Maria, we think there can be but one construction of it, and that is, that the taking her to Ohio was regarded by the testator as a *dernier* means of giving her freedom. It is very true that no evidence as to the laws of Ohio was adduced in the court below; but what rational intendment, other than that of freedom can be made or adduced as to this required removal and the payment of money upon her arrival in that State?—Beside, the ordinance of 1787 embraced the territory now comprising the State of Ohio, and the decisions of the legal tribunals of that State show that its provisions were embraced in its Constitution.

Having shown that there was a clear intention of giving freedom to Maria and a trust resulting from the nature and very terms of the devise, the next question is whether that trust has been executed.

The will was admitted to probate January 7th, 1828, upwards of
564 eighteen years having elapsed between that time and the period of the commencement of this suit. The defendant in the court below introduced no evidence to rebut any of the presumptions raised by or under the will, and we know nothing of the time of Maria's arrival in our State, or the circumstances in which she came. All that we know is, she was held in bondage as a slave at the time of action brought. In the absence of all evidence, therefore, to the contrary, we have a legal right to presume that the trust was executed, and perfectly coincide with the Judge who tried the case in the court below, as to the principles laid down by him. We think, however, that inasmuch as William H. Hollingsworth was to take the estate by condition *subsequent*—in other words, the estate was obliged to vest in him ere he could perform the conditions—*he*, instead of the executor, was the person called upon to execute the trust. But inasmuch as the verdict was in accordance with the justice of the case, and the defendant had the full benefit of all the exceptions raised by him to the plaintiff's action in the shape of instructions asked of the court, we are not disposed to disturb the finding of the jury, who evidently acted upon the principles as declared by the court. The presumption we have spoken of is one of law, arising from the facts of the case. It is an inference drawn as to one fact from the existence of another fact, owing to a connection between them. 2 Starkie on Ev., 680.

In this case the presumption of law that the trust was executed is, however, but a *prima facie* inference or intendment, liable to be rebutted by proof to the contrary. In this case, as we have before remarked, no evidence was adduced by the defendant, showing any title whatever to Maria; and we think, owing to the presumptions arising in the case, he was called upon to defend his claim by some affirmative evidence, instead of relying entirely upon what he deemed the wakness of the cause of his adversary.

In support of the views we have taken on this subject we will cite a few authorities. "The general rule is, that when a person is required to do a certain act, the omission of which would make him guilty of a culpable neglect of duty, it ought to be inferred that he has duly performed it, unless the contrary be shown." 3 East., 192. 10 East., 216. Phil. Ev., 151. Woodward, Justice. Hartwell *v.* Root, 19 John. R., 347. So in the case of the Bank of the United States *v.* Dandridge, 12 Wheat., 64, Judge Story remarks: "By the general rules of evidence presumptions are continually made in cases of private persons, of acts even of the most solemn nature, when 56
those acts are the result of necessary accompaniment or other circumstances. In aid of this salutary principle, the law itself, for the purpose of strengthening the infirmity of evidence and upholding transactions intimately connected with the public peace and the security of private property, indulges its own presumptions. It presumes that every man, in his private and official character does his duty until the contrary is proved; it will presume that all thing are rightly done unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumuntur rite, et solemnitur essee acta, donec probetur in contrarium.*"

"Fictions of law," says Mr. Justice Blackstone, "although they may startle at first, will be found on consideration to be highly beneficial and useful." They are invited, say the civilians, *"ad conciliandum equitatem, cum ratione et stabilitate juris,"* and it is a well known maxim of the common law, that in *"fictione juris, semper subsistit equitas."* Best on Pre., 24. It is a general rule that, whenever trustees ought to convey to the beneficial owner, it should be left to the jury to presume that they have so conveyed, whenever such presumption can reasonably be made. 3 Sugden, V. & P., 25, 42, 43, tenth ed. Hill on Trustees, 255. See also Greenleaf, 18, 53. 2 Starkie on Evidence, 680, 681, 2—75. While the law will presume in certain cases that all things are *rite acta*, it never presumes illegality. 12 Eng. Com. Law R., 371.

As to the time within which the condition annexed to the estate devised was to be performed, there being no specific time pointed out for so doing, in such a case the law says that the condition must be performed within a reasonable time. Ross *v.* Tremain, 2 Metcalf, 495. 1 Jarman on Wills, 804. If, therefore, the condition in relation to Maria had not been performed within this reasonable period, the ulterior legatee might have claimed the estate for condition broken, subject, however, to the same condition; for the will uses this language: that if William H. Hollingsworth should refuse to comply with its conditions, then it was the will and desire of the testator *"that all the interests, rights and emoluments which the said William H. Hollingsworth was to have by virtue of the will,* should go to John H. Hollingsworth, and should be his to all intents and purposes, as though *they had been originally devised to him."* In other words, merely substituting John H. in lieu of William H. Hollingsworth as the devisee of the estate bequeathed, with the condi- 56
tions annexed to it.

The sustaining of this suit would not have the effect, as contended for by counsel for appellant, of infringing upon the policy of our own State, owing to our statute in relation to the manumission of slaves. If Maria had been proven to have been a slave ever since the death of Oliphant, the testator, and this suit had been primarily brought for the purpose of *establishing* her freedom, then the question involving the policy and statutes of our State would have arisen; but it cannot arise here, because the presumption is that she was free when she came here; and if she came after the passage of the law of 1829, she only rendered herself amenable to that act and that of 1832, prohibiting the coming of free persons of color to our State.

The judgment of the court below is affirmed.

Per curiam.

LUKE LOTT, PLAINTIFF IN ERROR, *vs.* BANKS MEACHAM, EXECUTOR OF JONATHAN THOMAS, DEFENDANT IN ERROR.

Writ of error to Gadsden Circuit Court.

This was an action of replevin, brought by Meacham, as executor of Thomas, in the Circuit Court of Gadsden county, against Lott, for divers slaves.

Jonathan Thomas, by his last will and testament, devised and bequeathed to Mary Thomas, during her widowhood, the slaves in controversy in this case—and in the event of her subsequent marriage, the property was given to his executors in trust, to and for her sole and separate use, and for her support during her life. Upon her death, the testator directed the property to be sold, and to be divided among his six children named in the will.

Meacham, the executor, made his final settlement of the estate in July, 1836, having before that time assented to the bequest to Mrs. Thomas, and delivered the property to her. By the final order, bearing date 16th July, 1836, he was discharged from the executor-

567 ship, but not from the trusts committed to him by the will. Mrs. Thomas did not marry again. She continued in possession of the property until her death, which happened in November, 1846. The persons entitled under the will, upon the death of Mrs. Thomas, took possession of the slaves, and divided them by an amicable arrangement among themselves. Lott, who had intermarried with Ann Maria Thomas, one of the daughters of the testator, was in possession of the slaves in dispute in this action, under and by virtue of the aforesaid agreement, and with the consent of all the parties entitled under the will.

The court instructed the jury, that the plaintiff, as executor of Thomas, on the death of the widow, is entitled to the possession of the property devised to her, to administer the same according to law and the directions of the will—stating, at the same time, that unless there were debts of the estate to pay, or some cause of interference by the executor, it was not disposed to allow the amicable division made by the heirs to be disturbed.

The defendant asked the following instructions: 1. That the devise and bequest in the will of the property in dispute created an estate in remainder in the persons appointed to take, after the death of Mrs. Thomas, the tenant for life, and that this estate in remainder was created at the same time with the creation of the particular or life estate.

2. That the assent of the executor to the bequest, by the delivery of the property in dispute to Mary Thomas, the tenant of the particular estate, is an assent to the remainder given to the persons named to take in remainder; and having so assented, he cannot now retract that assent.

3. That the property in dispute being in the possession of the defendant, as one of the persons entitled to take in remainder, in virtue of his marital rights, he is entitled to that possession, as against the plaintiff in this action.

4. That the plaintiff having, by his own showing, been fully discharged by the County Court of Gadsden County from all the duties of executor, on the 16th July, 1836, cannot now maintain this action.

The court refused to give the instructions prayed, and to that refusal, and to the instructions given by the judge, the defendant by his counsel excepted.

568 The jury found for plaintiff.

This cause was tried before the Hon. THOMAS BALTZELL, Judge of the Middle Circuit, at the Spring Term, 1848, of Gadsden Circuit Court.

Dupont and Thompson, for plaintiff in error.

Carmack, Stephens & Baker, for defendant in error.

This case not being deemed in a condition to be determined, with a just regard to the rights and interests of the parties concerned, no opinion affecting their rights and interests was delivered.

The following is the judgment of the Court, delivered by HAWKINS, Justice:

The court, after having had this case under due consideration, is of opinion that, inasmuch as its decision must depend very much upon the construction of the will of Jonathan Thomas, and as only detached portions of it are before the court, it cannot proceed and pronounce a definite opinion and decision upon it. The court is, therefore, obliged to require, that it be remanded to the Circuit Court, for the purpose of having sent hither a more perfect and complete record. Whilst making this order, without intending to indicate to parties any opinion as to the course already pursued, it cannot refrain from the expression of a regret, that the case was not, in the first instance, brought on the equity side of the court, where all the rights of the litigants could have been so fairly, and certainly far more satisfactorily adjudicated, than they can be at law.

The cause is, therefore, remanded to the court below for such proceedings as may be necessary to carry out the foregoing views and objects.

Per curiam.

HENRY D. DARDEN & WIFE *vs.* SARAH A. LINES, ET AL. 569

The Supreme Court of this State has no jurisdiction in a cause in Chancery, brought up by appeal from a decree, *pro forma*, entered in the court below by counsel of parties.

At a Circuit Court, held in and for the county of Gadsden, on the 16th day of November, 1848, the following decree was entered in this case: "And now, on this sixteenth day of November, came the said complainants and defendants, by their respective solicitors and counsel; and thereupon it was agreed by Counsel, that a decree *pro forma* shall be entered, sustaining the demurrer filed herein—so as not to exclude the Judge of this court from sitting in this cause in the Supreme Court on the hearing thereof.

"It is, therefore, ordered, adjudged and decreed, that the demurrer of the said Sarah A. Lines and others, defendants, to the complainants' said bill of complaint, be sustained, and the bill be dismissed, at the costs of the said complainants.

"And the said parties respectfully agreeing thereto, it is ordered that said complainants be allowed their appeal to the Supreme Court, without bond and security."

This case, and others, in which *pro forma* decrees had been entered, were submitted to the court, upon the question of jurisdiction, upon which the court were divided, and gave the following opinions:

Opinion by Chief Justice Douglas:

This and other cases have been brought up to this court, on decrees made in the court below, by consent of parties, "pro forma." The professed object of the proceeding is, to *avoid* the provision of the Constitution of this State, which disqualifies the judge who decides a case in the court below from sitting on the trial or hearing of it in this court; and in other cases to prevent the delay which would occur from the inability of some of the justices to sit in this court in consequence of their having been of counsel, or otherwise concerned in the case in the Circuit Court; and thereby to secure a trial in this court by all the justices of the Supreme Court, including, of course, the judge who, by consent of the parties, rendered the decree *"pro conforma"* in the court below. In order that this matter may be more readily and clearly understood, it is deemed proper here to refer to that clause of the Constitution which creates this dis- 570
qualification; it is as follows, to wit: "No Justice of the Supreme Court shall sit or take part in the Appellate Court, on the trial or hearing of any cause which shall have been decided by him in the Court below.' See Thompson's Digest, page 50, sec. 2, No. 4.

Another object professedly is, to avoid also the delay that would otherwise have occurred in the Circuit Court, from the disqualification of the judge to *try* a cause in which he had been employed as counsel, or attorney. The statute which creates the disability, declares that "It shall not be lawful for any judge of this State to try any cause in which he may have been employed as counsel or attorney, but shall continue the same until some judge shall hold court in the circuit in which said causes may be pending, that was not employed in such cause at the time of his election." Ibidem, 55, No. 11.

It seems to be supposed that the judge who had been thus employed may, by consent of parties, make such decree *"pro forma,"* and send the case up to this court, and that this court can take jurisdiction of it. If this can be done it is very clear that it is upon the principle that the case is *not tried* in the court below, and that this court can take jurisdiction of a case that has *not* been *thus tried;* and it has been strongly insisted that the judge who made such decree may sit and take part in the trial and hearing of the case in this court. From this statement two questions naturally arise: *First.* Can this court entertain jurisdiction of a case upon a decree thus rendered, by consent *pro forma*? and

Second. If it can, may the judge who pronounced such decree rightfully sit as judge, and take part in the trial or hearing of such case in this court?

The *first* is by far the most important question, and, indeed, seems decisive of the other; for I am free to confess that, if I entertained no doubt but that this court might rightfully take jurisdiction of a cause thus brought up, I should not hesitate were I the judge who made the decree *pro forma*, to sit and take part here in the trial and hearing of the case, upon the principle that it was not in fact tried or decided by me in the court below. But entertaining as I do a very serious doubt upon that subject, and having expressed that doubt, it is proper that I should state the reasons on which it is founded, and the views which I entertain in relation thereto.

571 The Constitution, art. 5, sec. 2, Ibidem, 50, No. 1, declares that "the Supreme Court, except in cases otherwise directed in this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the State, under such restrictions and regulations, not repugnant to this Constitution, as may, from time to time, be prescribed by law." This is not one of the excepted cases, nor is the provision in regard to it repugnant to the Constitution. The same section, Ibidem, No. 5, says: "The Supreme Court shall have and exercise appellate jurisdiction in all causes brought up by appeal or writ of error from the several Circuit Courts, where the matter in controversy exceeds in amount or value fifty dollars." "An appeal is the act by which a party submits to the *decision* of a superior court a cause which has been *tried* in an inferior tribunal." 1 Bouvier's L. Dict., 82.

From the record of this case, it does not appear that there has been any trial of this cause in the court below—and if not, then it is not a proper case for an appeal.

But it is said that it has been *decided* in the court below, and, therefore, may be properly reviewed here. Has it, however, been decided. To *decide* is to *determine, to form a definite opinion; decided* means *determined, ended, concluded;* the word *decided* implies *decision,* clear, unequivocal, that puts an end to doubt. Webster's Dict., Fol. Ed., 1848, page 306. It implies in this case the exercise of judgment upon the law and the facts of the case. Judgment is the decision or sentence of the law given by a court of justice, or other competent tribunal, as the result of proceedings instituted therein, for the redress of an injury. The language of judgments, therefore, is not that it is decreed or resolved by the court, but it is *considered "consideration est per curiam,"* his debts, damages, or possessions, or the like. Ibidem, 548.

The Supreme Court of the United States, in the case *ex parte* Tobias Watkins, 3 Peters, 202, says: "A judgment of a court of competent jurisdiction in its nature concludes the subject on which it is rendered, and pronounces the law of the case; it puts an end to all enquiry respecting the fact by deciding it.'

A decree is the judgment or sentence of a Court of Equity; it is either interlocutory or *final.* The former is given on some plea or issue in the cause, which does *not decide* the main question; the latter settles the matter in dispute, and a final decree has the same ef-
572 fect as a judgment at law. Bouvier's Law Dict., 295, and authorities there cited.

It will hardly be seriously contended, we think, that there is any such final decree in this case, or that there has been any such *decision,* any such action of the mind of the court upon it. The proceeding on its face does not import any such thing; on the contrary, it appears very clearly intended as a device to avoid what seems to me a clear, plain and unequivocal provision of the Constitution. It is true there is a decree which, if taken by itself, apart from its context, would import finality, but then the record tells us that it was entered by consent of parties, *"pro forma,"* which means *"a mere matter of form."* Branch's Principia, page 114. Now is mere matter of form to be held conclusive? Is that the result of proceedings instituted in a court of justice, for the redress of an injury?

The decree is either final, or it is not final; if it is *not* final, then it is not properly here, for no appeal lies except on a final decree. Putnam *v.* Lewis and wife, 1 Florida Reps., 455, 464, 474, and authorities there cited; to which may be added, Gray *v.* Grundy, 2 J. J. Marshall, 134. Horsey *v.* Hopkins, Ibid., 54. Read *v.* Robb, 4 Yerger, 66. Hoyt *v.* Brooks, 10 Conn., 188. Kierk *v.* Shriver, 11 Gill & John., 405. The State *v.* Pepper, 7 Miss., 248.

If it shall be said that it is a final decree, then I answer that no appeal lies from a final decision entered by consent, *"consensus tollit errorem."* Co. Lit., 126. Webb *v.* Webb, 3 Swanst., 658. Morrell *v.* Lawrence, et al., 12 John., 521. Waller *v.* Harris, 20 Wendell, 563. Ringold's case, 1 Bland., 5, 12. Harrison *v.* Roussey, 3 Vez., 483. Toder *v.* Sansome, 7 Brown, P. C., 244. Bradish *v.* Gee, Ambler, 229. Jones and others *v.* Talliafer. Car. Law Rep., 376. 2 Smith's Chy. Pr., 50. 1 Barbour Chy. Pr., 712.

The case of Marbury *v.* Madison, 1 Cranch, 137, 1 Peters' Cond. Reps., 282, has been cited to sustain the jurisdiction in this case.—In that case, Chief Justice Marshall held that the essential criterion of appellate jurisdiction is, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause.

If this be the essential criterion, (and I do not doubt it,) then the principle is conclusive upon this case; for the court below created no cause for this court to act upon, unless it committed an error in rendering the *pro forma* decree. As it did nothing else, it is very clear that there is nothing else, no other proceeding of that court for this

Court to correct; at least nothing which may not be just as well 57
corrected in that court. It was not the action or the original causes of action to which the Chief Justice referred—no court creates them—it is the errors committed in the subordinate tribunal, upon which the appellate jurisdiction is to be exercised. If the final decree of the inferior court is, in all respects, right, there is nothing for the appellate court to correct, no case made for the action of the appellate court. It is true the appellate court may look into the record of a case which is within its jurisdiction, and has been brought according to the regulations prescribed, to ascertain whether there is any thing in it that requires correction, and if there is not, may affirm the judgment or decree of the subordinate tribunal. To warrant this, however, there must have been a *trial,* in the court below. Trial "is the *examination* before a competent tribunal, according to the laws of the land, of the facts put in issue in the cause, for the purpose of determining such issue." 2 Bouvier's Law Dict., 457.—"The *examination* of a cause in controversy between the parties, before a proper tribunal." Webster's Dict., Fol. Ed., 1848, page 1173, and it must have been properly brought up. But if it is not within its jurisdiction, or brought up according to the regulations prescribed, it cannot act upon it at all, further than to dismiss and remand it for such action to the court below as to right and justice shall appertain.

The case of Ponder *v.* Moseley, *et al.,* administrators, &c., 2 Florida Reps., 267, has been cited to show that no evil consequences can flow from the exercise of jurisdiction in these cases, because the court there held in accordance with the principles laid down in Elliot et al., *v.* Piersal et al., 1 Peters' Reps., 340, and re-asserted in 2 Peters, 369, that where a court has *jrisdiction,* it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding on every other court; and according to Vourhees *v.* The Bank of the United States, 10 Peters, 474, 475, where the court says: "The line which separates *error in judgment* from the usurpation of power is very definite, and is precisely that which denotes the cases where a judgment or decree is reversable only by an appellate court, or may be declared a nullity collaterally when offered as evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case, it is a record importing absolute verity—in the other, mere waste paper."

But this court has *never decided* that where there was an *usurpation of power* the judgment was conclusive and could not be enquired into and declared a nullity collaterally; or, where the court had *no jurisdiction* the record of its judgment would import verity, or any thing more than *mere waste paper.* In the case of the United States *v* Stone, 14 Peters' Rep., 524, 525, a verdict was rendered in the District Court; it was then, by consent of counsel, transferred to the Circuit Court, precisely in the state in which it then was, and a division of opinion there entered, *pro forma,* to send the case to the Supreme Court of the United States, which the latter court deemed exceedingly irregular. "We are aware," said the court, "that in some cases, where the point arising is one of importance and difficulty, and it is desirable, for the purposes of justice, to obtain the opinion of this court, the judges of the Circuit Court have sometimes, by consent, certified the point to this court as upon a division of opinion, when, in truth, they both rather seriously doubted than differed about it. We do not object to a practice of this description when applied to the proper cases and on proper occasions; but this must be sanctioned by the judgment of one of the judges of this court in his circuit. A *loose practice* in this respect might render the court substantially a court for the original decision of all causes of importance, when the constitution and the laws intended to make it altogether appellate in its character; except in the few cases of original jurisdiction enumerated in the constitution."

This case has been invoked to sustain the jurisdiction of this court in the case at bar; but, when rightfully considered in reference to the Constitution of the United States and the acts of Congress conferring jurisdiction upon that court, it seems an authority against it. The case of Grant et al., *v.* Raymond, 6 Peters, 220, 221, cited for the same purpose, came before the Supreme Court of the United States in the first place, on a certificate of a division of opinion in the Circuit Court of the United States for the Southern District of New York. On inspecting the record it appeared that, at the trial of the cause in the Circuit Court, the counsel for the defendants had excepted to the decisions of the court on various matters which had been presented for its consideration, and that a bill of exceptions had been sealed by the court. A motion was made for a new trial, when the opinions of the two judges of the Circuit Court were opposed upon questions presented for the decision of the court, excepted

575 to on the trial, as stated in the bill of exceptions. The Cir. Court certified a division of opinion on the motion for a new trial. The question was whether the court would entertain the case as it came up from the Cir. Court on a division in that court on a motion for *a new trial*. C J. Marshall suggested that the case might be brought on if the parties would agree that it should stand as if a judgment had been given by the Circuit Court on the bill of exceptions; which was done, and an agreement in writing filed. But the court said "it would reserve its opinion and judgment in the cause till the defendants in the court below shall have sued out a writ of error in this cause to the said Circuit Court and filed a return thereto, with a bill of exceptions in the usual form, signed by the court below, in this court." So very careful was that learned court to have the cause *rectus in curia*, before it would give its opinion or pronounce its judgment upon it.

In the case of the United States *v.* Tillotson, 12 Wheat., 180, 6 Peters' Condensed Reps., 507, the court held that "Where the burthen of proof, in certain specific defences set up by the defendant, is on him, and the evidence presents contested facts, an absolute direction from the court that the matters produced and read in evidence on the part of defendant were sufficient in law to maintain the issue on his part and the jury ought to render their verdict in his favor, is erroneous, and a judgment purporting to have been given under such a charge will be reversed, although the record was made up as upon a bill of exceptions, taken at a trial before the jury upon the matter in issue, no such trial having taken place and the case having assumed that shape by the agreement of parties in order to take the opinion of the court upon certain questions of law."—All this case proves is that the Supreme Court of the United States will sometimes give its opinion upon a point of law for the satisfaction of counsel or parties upon an *assumed case*, in which, of course, no question of jurisdiction could possibly arise.

Prigg *v.* the Commonwealth of Pennsylvania, 16 Peters, 609, is the strongest case to which we have been referred in support of the jurisdiction that we are called upon in these cases to exercise; but in that case there had been a jury trial, a verdict taken and judgment rendered upon a criminal charge in a subordinate tribunal of that State. The question to be decided arose under the 25th section of the judiciary act of 1789, which confers upon the Supreme Court of the United States jurisdiction of questions such as arose in that
576 case. The Supreme Court of Pennsylvania affirmed *pro forma* the judgment of the court below and the case was carried up to the Supreme Court of the United States upon the single question of law presented in it, and which would have been precisely the same in any shape in which the case might have been carried up; was one which no other court was competent finally to decide, and it was appellate and not original jurisdiction which that high tribunal was called upon to exercise—it was that the errors in the proceedings of the courts of Pennsylvania might be corrected that the case was carried up. Had it been taken up before it had been investigated in a subordinate tribunal, no doubt the Supreme Court of the United States would have at once dismissed it for want of jurisdiction. And it is believed that no case can be found where the parties have been permitted to so mould and shape the proceedings in it as to bring the original matter or cause of action, and the testimony offered to sustain and rebut it, before that court for adjudication, until it had first undergone the ordeal of a subordinate tribunal, whose proceedings they were called upon to revise and correct, unless it was a case in which the original jurisdiction had been expressly conferred. Cases so moulded and shaped may have gone there, and been acted upon, but if they have, I will venture to say it was upon some point of law only, and that they passed without observation as to the manner in which they had been brought up.

It has been suggested that we have no statute or rule providing specifically the mode of taking appeals in chancery cases, and that we must, therefore, refer to the English practice. I fear, however, that their mode of proceeding in such cases is not sufficiently analagous to our own, to be a safe guide. In the case of Putnam *v.* Lewis and wife, 1 Florida, 475, where it was contended that the test of a decree's being final is that an appeal will lie upon it, this court [the Judge of the Middle Circuit delivering the opinion] said: "We have been referred to various cases of partition in the English Courts, showing appeals from decisions of the Master of the Rolls to the Lord Chancellor, in cases like the one under consideration. If their mode of proceeding was like our's, such an authority would be entitled to great respect; *but we find no such similitude or resemblance*. By our statute, which, in this respect, is the same as that prevailing in the Circuit and District Courts of the United States, a decree must be *final* before an appeal can be had. Not so in the English

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courts of chancery, for there an appeal may be taken from every or- 577
der or petition, motion or interlocutory decree, in the progress of the suit; and this seems to be the course in New York." Citing 3 John. Ch., 66, 68, 163, 319. 9 Vesey, 319. 14 Vesey, 184 15 Vesey, 184, 585. 16 Vesey, 213, 218. 18 Vesey, 453.

In the case of Armstrong et al. *v.* the Treasurer of Athens County, 16 Peters, 235, 236, Mr. Justice Catron delivering the opinion of the court said: "This is a writ of error from a State Court, and it becomes the duty of this court, before proceeding to examine the merits of the controversy, to determine whether jurisdiction over it is conferred by the 25th section of the judiciary act of 1789. It is true no question upon that subject was raised at the argument presented for the appellants, (the respondent having no counsel,) but it has been the uniform practice of this court, in every case of this description, to ascertain in the first instance whether the record presented a case in which we are authorized by law to reverse the judgmnt or decree of a State court."

The same principle is asserted in Stamps, *v.* Newton, 3 Howard's Miss. Reps., 34, by the Supreme Court of Mississippi, who say, "Although the attention of this court has not been directed to the present defect by the counsel in the cause, yet we are bound to enquire in every case, whether the facts presented by the record give this tribunal jurisdiction."

In the case of Read and others *v.* Robb and others, 4 Yerger's Rep., 66, the precise question now presented to us came before the Supreme Court of Tennessee (of which Mr. Justic Catron was then Chief Justice,) by whom it was held that they had no jurisdiction of an appeal taken from a decree of a chancery court made *pro forma*: that it had jurisdiction of appeals *only* in cases where there had been a *judicial* action in the court below.

The attention of the Supreme Court of Alabama was called to this subject in 1845, in the case of Elmes *v.* Sutherland, 7 Ala. Rep., New Series, 269, in which a motion had been made to dismiss the bill for want of equity. The Chancellor refused this motion, and it was then agreed by the parties that a decree *pro forma* should be rendered for all that is alleged or prayed for in the bill, in order that the case might be taken to the Supreme Court for revision. No specific decree was rendered in the case by the Court of Chancery; it seems to have been carried up on the idea that this agreement was to be considered as a decree. The court said: "It in point of fact 578
a decree had been rendered by the Chancellor for the relief prayed by the bill in accordance with the agreement of the parties, it would present a question worthy of grave consideration how far this court could take cognizance of the cause under such circumstances, as it only has appellate, not original jurisdiction. It is quite possible that we might feel constrained to repudiate a case where the parties had consented to a '*pro forma* decree.

At the next term of that court, the question was directly presented in the case of Stone *et al. v.* Lewin. 8 Ala. Reps., New Series, 395 to 399. In that case the Chancellor had been of counsel in the cause, and for that reason an agreement had been made that he might enter a decree *pro forma*, either for or against the complainant, as she might elect, and the following entry appears: "This case is submitted for a decree on bill, answers and exhibits, by consent, with an agreement that a decree *pro forma* be rendered by this court in favor of the complainant, perpetuating the injunction heretofore in this case granted. It is therefore ordered, adjudged and decreed that the said injunction be, and the same is hereby rendered perpetual; and that the defendant pay the costs herein." Peck and L. Clark for the plaintiff in error; no counsel appeared for the defendant in error. Goldthwaite, Justice, delivering the opinion of the court, said: "We suggested in the recent case of Elms *v.* Sutherland, that it was questionable if this court was invested with any jurisdiction when a decree is not made by the Chancellor, but is entered *pro forma*, by consent of the parties, in oredr to have a decision here *more speedily*, or from any other cause. This case presents the matter of such a decree so fully that we must now decide the question or consider it at rest. At the formation of our State Government it was provided that "the Supreme Court, except in cases otherwise directed by the Constitution, shall have *appellate* jurisdiction *only*. This is to be co-extensive with the State under such restrictions and regulations not repugnant to this constitution, as may from time to time be prescribed by law." Const., Art. 5, sec. 2. We remark here that this provision of the constitution of Alabama is identical with that of our State, which we have above cited. "It is quite unnecessary," says that court, "to speculate upon the reasons which induced the prohibition contained in this section, as there can be no doubt it was the intention to exclude the exercise of any original ju-

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579 risdiction by the court. As a court, our duty certainly is to give it the effect which its authors intended it should have, and this can only be done by refusing to entertain jurisdiction of cases which have not, in point of fact, been decided by the inferior courts. It is quite evident, if the consent of parties can confer what is really original jurisdiction upon this court, many cases will find their way here which otherwise might have come, and it might become common to use the inferior courts as mere offices for the preparation of causes." And this is in pr ise accordance with the reasoning of Chief Justice Taney, who delivered the opinion of the court in The United States *v.* Stone, 14 Peters, 525, and does appear to me to contain a plain natural and common sense view of the matter. That court, after further arguing the question, concludes its opinion by the following pertinent remarks, which appear to me to contain great force: "We have endeavored to show that this practice is in conflict with the letter and spirit of the constitution, and earnestly hope that it may be entirely eradicated, as it is frequently important to a deliberate and correct examination of the cause in this court, that it should have a careful examination in the subordinate courts. It is only when a cause is thus examined in a court of original jurisdiction, that the many mistakes of the parties can be corrected, deficiencies supplied and new views presented. If this examination is deferred until the case comes into the appellate court, there can in most cases be neither amendment nor revision of the evidence or frame of proceedings, and great injustice may result to suitors. The cause now before us (say the court) is an illustration of the evil of this practice; as no evidence was taken to sustain the bill, and the reversal of the Chancellor's decree would conclude the complainant, when, if the same deficiency had been disclosed to him, he might have exercised his discretion in permitting the party to take testimony."

Lord Eldon, who adorned the woolsack longer than any other man who ever sat in the English Chancery, was so sensible of this, that he considered it to be contrary to the duty of a court of justice, under any circumstances, to make a decree *pro forma*, in order to suffer the cause to go up. "The suitors," he said, "have a right to the deliberate attention and the deliberate judgment of the court in every stage in which, according to the constitution, the cause may proceed; and there can be no circumstances under which I would ever permit myself to say, as the cause is to go elsewhere, I give
580 *no judgment.*" Lord Eldon did not consider a decree *pro forma* as a judgment of the court, but as *no judgment*. It is said, however, that the case of Le Baron and Colquitt *v.* Fauntleroy and others, decided by this court, at the last term, came up on a decree *pro forma*—that we acted upon it, and that settles the question. It is true that case did come up on a decree *pro forma*, and we acted upon it; but it is equally true, that it passed *sub silentio*, so far as the question now under consideration is concerned. No question was made in that case, as to the jurisdiction. The same identical argument was presented to the Supreme Court of the United States, in the case of The United States *v.* Moore, 3 Cranch, 172, which was a criminal case. In the course of the argument, Chief Justice Marshall suggested a doubt whether the appellate jurisdiction of that court extended to criminal cases, page 188. Mason, in support of the jurisdiction, said: "This court has exercised jurisdiction in a criminal case," and cited The United States *v.* Simms, 1 Cranch, 252, when that great expounder of the Constitution, to whom the country is more indebted than to all other men beside, for the luminous and able expositions given of that great charter, which binds the thirty States of this confederacy (and it is hoped indissolubly) together, replied: "*No question* was made in that case as to the *jurisdiction;* it passed *sub silentio*, and the court does not consider itself bound by that case." This breathes the true spirit of morality and of constitutional liberty; one wrong is not to justify another; one encroachment is not to justify a subsequent breach of that sacred instrument.

It has been attempted here to weaken the force of the decision of the Supreme Court of Alabama by saying, that at one time it was construed as our's is now—that then *pro forma* decrees were common, and more approved; but that since a separate Supreme Court has been established, it is disposed to restrain the practice. But there is nothing in that case to justify the remark; it is unworthy of the reputable court of whom it was made. The language of the constitution means the same thing, whatever plan may be adopted for the organization of courts, and so I have no doubt that learned court would hold.

The reason alleged for bringing the case up in this form is, that the judge who made the *pro forma* decree shall not be disqualified from sitting or taking part on the trial or hearing of the case in this Court, so as to secure here a full bench and prevent delay; and it 581 has been urged upon us with great zeal and eloquence, by the learned counsel who argued this question on behalf of the appellants, that if this practice shall not be sustained, great inconvenience will result; and I feel the full force of the argument, can see the apparent evil, and should most sincerely regret that such a consequence should ensue; but if I was fully satisfied that there was no constitutional objection in the way of the exercise of this jurisdiction, I should have no doubt that the judge who made the decree could not rightfully sit on the trial or hearing of it in this court. That a case must either be decided, or not decided, appears to me as clear and strikes my mind with as much force as any problem in Euclid. If the case is decided, then it must have been decided by the judge who pronounced the decree in the court below, and the Constitution says, he "shall not sit as judge or take part in this court on the trial or hearing of it." This is a plain, clear, *constitutional prohibition*. It is said that this is for the benefit of the party, and he may waive it; but can a judge waive a constitutional prohibition? It is not for me to discuss the reasons which may have caused the insertion of this prohibition in the Constitution. I can imagine several, and one much more forcible and much more deeply seated in the very nature of man, than the mere fact that the judge, because he had decided the cause in the court below, might feel an interest in having his judgment affirmed. It is not to be presumed that the members of the Convention thought that the General Assembly would elect men to fill the high and responsible offices of judges, who possessed so little of that high disinterestedness, that noble magnanimity, which ought to characterize him who is clothed with "the judicial ermine," as to entertain a feeling so wholly inconsistent with his high position . Whatever reasons may have induced its insertion, it is sufficient for me that the people have spoken in their primary assembly; as judge, it is my duty to obey.

"The judges (said the learned judge who pronounced the dissenting opinion in the case of Gadsden *v.* Jones, administrator, 1 Florida Reps., 348,) are not to *presume* the intentions of the Legislature, but to *collect* them from the words of the law, and *they have nothing to do with the policy of* the law," citing Dwarris on Statutes, 703. Again: "Recently all the judges, and particularly the late present Lord Chief Justice, have manifested the strongest inclination to adhere more closely in the construction of statutes to the *words* of the act of Par- 582
liament." "I have often lamented (says Lord Tenterden) that, in so many instances, the courts have departed from the plain and literal construction of statutes relative to the settlement of the poor. Where the authorities are silent, I shall hold myself forced to construe the acts of Parliament according to the plain and popular meaning of the words." 2 B. & A. Dwarris; and again, in another case, the same distinguished judge says: "The words may probably go beyond the intention; but if they do, it rests with the *Legislature to make the alteration;* the duty of the court is only to give effect to the provision." "It is safer," said Mr. Justice Ashurst, "to adopt what the Legislature has actually said, than to suppose what they mean."—Again, citing Dwarris on Statutes, 707-'8, and T. R., 52: "Without saying how far I would, in all cases and under all or any circumstances, apply these principles to the construction of acts of the Legislature, as applicable to the construction of the Constitution, that great charter of our liberties, the fundamental law of the land they have my most decided and cordial approbation, and I am not disposed to depart one jot or tittle from the rule which they prescribe in construing that important instrument, and more *especially in favor of a power to be exercised by myself.*"

The *argumentum ab inconvenienti* is never to be applied, where the sense is clear, where there is no equivocal expression, where the words used admit of only one meaning. Attorey General *v.* Duke of Marlborough, 3 Madd., 540. Deane v. Clayton, 7 Taunt, 496. Fletcher *v.* Lord Sandes, 3 Bing, 590. 13 Eng. Com. L. Reps. Broome's Legal Maxims, 85.

"In construing an act of Parliament, if the words used by the Legislature in framing any particular clause have a *necessary* meaning, it will, according to the English authorities, be the duty of the court to construe the clause accordingly, *whatever may be the inconvenience* of such a course." Turner *v.* Sheffield Railway Company, 10 M. and W., 434. Doe ex dem., Governor of Bristol Hospital *v.* Norton, 11 M. and W., 928.

"No justice of the Supreme Court shall sit as judge or take part in the appellate court on the trial or hearing of any case which shall have been decided by him in the court below." There is no equivocal expression in this clause; the words used admit of only one meaning, and most clearly exclude the judge who decided the cause

583 from sitting or taking part in it in this court. So that the object in view, if the case was *decided*, could not be thus attained; if it has not been decided, if there has not in fact been a final decision, a *final decree* in the case, then, as we have before shown, no appeal lies.

The case of Charles *v.* The State, 1 Florida Reports, 298, 300, was a capital case; there was a verdict of guilty, but no final judgment had been entered. The learned judge who tried the cause, entertaining a doubt as to the sufficiency of the indictment, had certified that matter to this court, pursuant to an act of the Legislature Council of the late Territorial Government; the question was, whether this court possessed jurisdiction of the case? A strong and able appeal was made on behalf of the prisoner, but, after due examination and the most mature consideration, this court held that it had not jurisdiction, and concluded its opinion in the following words: "The most prudent and safe course for a court of dernier resort, when a doubt about the power exists, is deemed to be to decline to act. The exercise of doubtful powers by a court of the last resort is always extremely dangerous, and tends to excite alarm and distrust." Such was the opinion of this court at that time, and surely, if it was right and proper then, and in a case where human life was at stake, "*a fortiori*" it is so now, when we are called upon to extend, by construction of a plain, clear and unambiguous clause of the constitution, our own powers.

In the case of Willis v. Shepherd, 2 Florida Reps., 399, this court (the same learned judge of the Middle Circuit again delivering the opinion) said "We consider it by far safer and more prudent, more in the spirit of the Constitution, and in harmony with the character of our institutions, to keep within the range and limits of a rightful jurisdiction, than to subject ourselves to the reproach of travelling beyond it, and exercising a doubtful and questionable power."

For the reasons above set forth, with the decisions of two most respectable courts of dernier resort directly upon the point, against the exercise of such jurisdiction, with no like case in favor of it, the question, it does seem to me, cannot rightly be said to be clear of doubt, and the power, I think, should not be exercised.

But if the right to exercise this jurisdiction were perfectly clear, the policy of doing it would, as this court is constituted, be exceed-
584 ingly questionable. It being composed of four judges, the court might be equally divided in opinion, and the result would be, that such decree, which in fact is, (and was intended by the court below and the parties to be,) but "*a mere matter of form,*" would, of course, stand, and the rights of the party against whom it was rendered be forever concluded by it, to his great and irreparable injury, and to the total subversion of every principle of justice and equity

Without, therefore, imputing aught of blame to any one for the manner in which these cases were brought up to this court, I am decidedly of opinion that they should be remanded to the courts below, from which they respectively came, for such proceedings to be had therein as to law, right and justice may appertain—not doubting but that all concerned in them, animated by those high sentiments of honor, morality and good faith, which should mark the conduct of all who are called to aid in the administration of those sublime principles, will be disposed at once, by consent and without delay, to place them in the same position which they would now have occupied, had not these *pro forma*, consent decrees been made.

Judge LANCASTER concurred fully in the foregoing opinion, and Mr. Justice HAWKINS gave his assent to the views and sentiments expressed in the last clause, as to the disposition of this and other causes brought up to this court by appeal from *pro forma* decrees.

Opinion by Justice BALTZELLS

This and other cases have been brought to this court on decrees made in the court below, by consent and *pro forma*, to avoid the constitutional objection which disqualifies the Judge who made the decision in the Circuit, from sitting on the Supreme bench, thereby securing in the case a trial by all the justices, and in other cases to prevent the delay which would arise for the want of justices to try the case in this court, owing to the inability of some of the other justices to preside, from having been counsel or otherwise concerned.

There being an equal division of the justices as to the right to entertain cases so situated, I proceed to announce the views by which I have been governed in arriving at the conclusion that the cases can rightfully and should be tried and disposed of. The objection is that the jurisdiction of this court is appellate only; that this matter not

having been decided by the Judge below, this court would be exer- 585
cising original jurisdiction to give a decision of itself. It is not perceived how the conclusion is arrived at that there was no decision; there is a decree final and conclusive between the parties, and so long as it remains, no farther action can be had on the subject. It is obviously, we think, *res adjudicata*, and whether made by consent, or *pro forma*, it is yet a decree. Can it be pretended that the case is now at issue and that the parties can proceed as if it had not been made? Whether the Judge making such a decision or pronouncing such decree is competent to preside in the Supreme Court, under the clause of our Constitution declaring that "no justice of the Supreme Court shall sit as judge, take part in the appellate court, on the trial or hearing of any case which shall have been decided by him in the court below," is another question and the one more appropriately resulting from the position of the case than the question presented. (For my part, I am free to declare that I feel no difficulty or embarrassment on either question. Even in the case of the Judge having decided the case below, I see no difficulty in his presiding, with the assent of the parties, in the Supreme Court. The provision is for the benefit of parties, and such an one as, in my opinion, they may very properly waive. It is a matter, so far as private rights or interests are concerned, in which the State has no interest, and the object was to give to the party a privilege of excepting to a judge on account of the bias proceeding from a prior decision, which he did not possess; but if the party chooses to forego the privilege I see no reason why he should not be allowed to do so. A man may waive his objections to a juror, or select as arbitrators persons totally disqualified, and yet it is his own concern.) The very difficulty entertained by the counsel and court as to the mode of opening the decree, so as to leave the parties in their former position, shows that there has been a decision and that the case is not before the Circuit Court for trial. If so, where is it?

Passing, however, this view of the subject, the enquiry arises, whether it is in violation of the Constitution to try a case so situate? It is said to be so, because the jurisdiction of the court is appellate and to decide these cases is to try them originally, as if in a court of original jurisdiction. The clause in our Constitution is almost identical with that in the Constitution of the United States, and if the objection be tenable, we shall be able, by reference to the decisions of that tribunal, always distinguished for the ability, the intimate ac- 586
quaintance with and attachment of its members to the Constitution, to ascertain and solve it. No court has had the intricate subject of jurisdiction so frequently before it; being limited in its sphere of action its care has been from necessity always to keep within the range of its powers. Every foot of ground from the commencement has been contested, so that none understands the subject so well or has defined it with such precision. An appeal, then, can most safely be made to that court, as embodying the sentiment and opinions of American jurists upon this interesting question.

At an early period the court through their Chief Justice, Marshall, in the case of Marbury *v.* Madison, declared as "the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." 1 Cond. Rep. S. C., 283.

It can hardly be contended that any of these cases have been created in this court by their institution here, or that, in case of their affirmance or reversal, the decree or sentence of the court would be carried into execution here. There has not been, nor was there, any thing to be done originally here—no testimony to be taken—no amendment of the pleadings. The cases, if tried, are to be tried upon the decree and action of the court below. This being the general, rule and principle, let us see how far in practice the court has conformed to their doctrine by assuming or refusing to consider cases situate like the present.

The case of the United States *v.* Tillotson came up as upon a bill of exceptions taken to the opinion of the court, upon a trial before a jury upon the matters in issue, when, in reality, no trial was had, but the case assumed this shape by the agreement of the parties, in order to have the opinion of the court upon certain questions of law. "We must," say the court, "consider the case exclusively upon principles applicable to it as upon a bill of exceptions taken at a real trial."—The court took jurisdiction and reversed the case. 12 Wheat., 180

In Grant and others *v.* Raymond, a question was, whether the court would entertain the case as it came up from the circuit. Mr. Chief Justice Marshall suggested that the case might be brought on if the parties would agree that it should stand as if a judgment had been given by the Circuit Court on the exceptions. The case, he said, could not be heard on a difference in opinion of the judges of the

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587 court on a motion for a new trial. The counsel having agreed that the case should stand as suggested, the court made the following order: "It is now here by the court considered and ordered that this cause shall now be heard and decided as on a writ of error brought after verdict and judgment in the Circuit Court, on the exceptions taken in that court; that the cause shall now proceed as if judgment had been actually entered in the Circuit Court for the plaintiffs there, and the certificate in the case shall be taken, regarded and treated as a writ of error sued out by defendants below, and that the question shall be whether said judgment ought to be affirmed or reversed; but that the court will reserve its opinion till the defendants shall have sued a writ of error and a return, with a bill of exceptions," &c. 6 Peters, 221.

Another case more directly in point is that of Prigg *v.* the State of Pennsylvania. It was a writ of error to the Supreme Court of the State of Pennsylvania, to revise a judgment of that court, as a case involving the construction of the constitution and laws of the United States. Prigg was indicted in the court of Oyer and Terminer, of York county, for forcibly taking away a negro woman, and a verdict was rendered against him. The case was removed to the Supreme Court of the State and the judgment affirmed *pro forma*, and the case was carried to the Supreme Court under the 25th section of the judiciary act of 1789. The judgment of the Supreme Court of Pennsylvania was reversed. 16 Peters, 609.

To appreciate the full force of this decision and its application to the present case it will be proper to refer to the action of the same court on cases arising under the 25th section, showing the requisites to the vesting of jurisdiction as to them. In Armstrong and others v. the Treasurer of Athens county, the court held "that to give the Supreme Court jurisdiction under that section, it must appear that a question involving the Constitution and laws of the United States was necessarily involved in the decision, and that the State court could not have given the judgment or decree which they passed, without deciding it.' 16 Peters, 282.

At the same term the court refused jurisdiction of a case under this section, although all objection was waived, saying "consent will not give jurisdiction, and we have on several occasions said that, when the act of Congress has so carefully and cautiously restricted the jurisdiction conferred upon this court over the judgments and de-
588 crees of the State tribunals, it would ill become the court to exercise it in a different spirit, and it certanly could not be justified in expressing an opinion favorable or unfavorable as to the correctness of this decree, when it has not the power to *affirm or reverse it.*" Mills and others *v.* Brown, ibid., 526—7.

In the case of the United States *v.* Stone, the court it will be seen say: "We are aware that in some cases, where the point arising is one of importance and difficulty and it is desirable, for the purposes of justice to obtain the opinion of this court, the judges of the circuit have sometimes, by consent, certified the point to this court as upon a division of opinion, when, in truth, they both rather seriously doubted than differed about it. We do not object to a practice of this description when applied to proper cases and on proper occasions.—But they must be cases sanctioned by the judgment of one of the judges of this court in his circuit. A loose practice might render this court substantially a court for the original decision of all cases of importance when the constitution and laws intended to make it altogether appellate,' &c. 14 Peters, 525.

These cases very conclusively show, we think, that in the opinion of the Supreme Court at least there is no objection to the exercise of jurisdiction in a case situate like the present, and certainly under circumstances less ugent and imperious. We might well be content to rely upon this authority.

Let us examine how the matter stood under the English law, which is more immediately an authority with us, than that of the Supreme Court itself. The mode of taking appeals under our law is provided for by the rules of pratice in the courts of equity of the United States and, in case they are not applicable, by the practice of the High Court of Chancery in England. Duval, 137. In the rules adopted by the Supreme Court of the United States there is no provision for the taking of appeals, so that they and our statute also being silent, we must refer to the English practice. And here, I think, we shall find even less difficulty. According to the English practice a party had three modes of redress when aggrieved by a decree:—re-hearing before the same or another judge, appeal to the House of Lords,, and bill of review. A re hearing by the Chancellor of an order or decree made by the Master of the Rolls, or of the Vice Chancellor, is in part an appeal and governed in general by the same rules. 3 Daniel's Prac., 1602. A case may be re-heard before the judge who heard it, or the Lord Chancellor, in which case 58
it is generally termed an appeal although, in fact, it is only a re-hearing. 3 Daniel, 1617. A re-hearing before the Chancellor or the same judge, making the decree, opens the pleadings, and the cause is proceeded with exactly as if it were an original hearing. Ibid., 1627, 28, 29.

It is clearly not to this jurisdiction our laws can have an application as, very clearly, by the practice and general understanding, no new pleadings or proof can be adduced in the Supreme Court.

We have been referred to the case of Elmes *v.* Sutherland in the Supreme Court of Alabama, as decisive. The circumstances under which that decision was given are entitled to consideration; the Supreme Court of that State is a separate tribunal and independent of the Circuit Courts, and there may be, and undoubtedly is, a propriety in each discharging its duty as designed by the Constitution and Laws of the State; nor is it now the wish, or design to encourage on the part of the Circuit Judges of this State an evasion of duty, but to provide for the exigency in which the loss of one Judge, by having made the decision below, will incapacitate the Supreme Court for action in the case. The Judge, too, who makes the *pro forma* decision below, does not avoid responsibility, but actually assumes it, and a more responsible position in the court above. We learn that it was the practice in that State, whilst a system like our own prealled, to admit *pro forma* decrees. The same state of things also prevailed in North Carolina previous to the establishment of a separate Supreme Court. The decision in Alabama refers to the case of Brown *v.* Higgs, 8th Vessey 566, as authority on the subject, yet we find Lord Eldon to say: "Upon conversation with persons who are practiced in courts of equity, it has been thought that in cases of this sort the court might formally affirm the judgment and suffer the cause to go to the House of Lords," &c. But he considered it contrary to the duty of a court so to act, as suitors had a right to the deliberate attention and judgment of every court in every stage in which, according to the Constitution, the cause may proceed, &c. Brown *v.* Higgs. Now the objection here is not as to the power or right of the court to make a *pro forma* decree, but to its impropriety, an objection by no means applying to the cases before us, as the parties themselves ask us to adopt this course as the better means of attaining their rights. The learned Judge spoke of the practice as being different to his ideas of right; but suppose the necessity of the case 59
and the certain failure and denial of justice, had been presented to him, can it be supposed that he would have hesitated, or even that the Alabama Court would have refused, under like circumstances?

But there is another view of this case in our judgment no less conclusive. Appeals from decrees in chancery are regulated by the practice of the Court of the Chancery in England, there being nothing in our laws, nor in the rules of the Supreme Court of the United States, adopted by our laws (with the single exception that the appeal shall be taken within two years,) to prescribe the mode of taking the same. From an opinion delievered by the late Judge Baldwin, exhibiting a masterly analysis of this subject, we find the appellate power (that of courts of chancery,) is an assumed one, from the necessity of the case, being neither conferred nor regulated by statute. It may and has been exercised according to the exigency of the case and time as either may call for the adoption of new rules or orders which partake more of the character of legislation than the mere regulation of the forms and modes of proceeding in the practice of the courts. 4 Bridg. Eq. Dig. 50 pl. 49. Not restrained by any act of Parliament they permit or prohibit the action of courts of equity in cases appealed from according to their discretion. Appendix 777. 9 Peters 777.

It has been supposed that the general law regulating the mode of suing out writs of error and prosecuting appeals was applicable to cases in chancery, but we do not think so; it is true the term decree is used, but this of itself would not embrace them any more than the use of the word judgment in an act regulating chancery proceedings would include cases at law; the fact is that the terms judgment and decrees are in some respects treated as synonymous by the Legislature. Independent of this, there is such a contradiction between this law and the law as to proceedings in chancery, as to forbid the construction contended for. Besides, the law allowing two years for appeals evidently showed the consideration of the Legislature that they stood on a different footing. And, indeed, under that view, if a party in chancery failed to appeal within ten days he would have been remediless.

The court has already exercised the power of making rules for the practice in the Chancery cases.

It is said, however, that the judgment to be pronounced by this

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591 Court in these cases would not be conclusive, nor of binding efficacy. If such a result were to follow, undoubtedly the court should not hesitate to refuse the jurisdiction. But we have not apprehended any such consequence.

This court itself, in Ponder *v.* Moseley, quoting the authority of the Supreme Court of the United States in Voorhees *v.* Bank of the United States, 10 Peters, 74 says: "The line which separates error in judgment from the usurpation of power is very definite and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court or may be declared a nullity collaterally, where it is offered in evidence in an action concerning the matter adjudicated or purporting to have been so." 1st Florida Reports, 267.

In the case of Parkhill's administrators *v.* the Union Bank, the jurisdiction of the Superior Court of the Territory was considered by the Supreme Court, at the January term, 1846, under the following circumstances: The Union Bank obtained a judgment against persons who had been, by the same court, at a time prior to its date, removed from the office of administrators. In reference to this removal the Sup. Court say: *"eo instanti* the letters of administration were taken from her and annulled she became as to the suit *civiliter mortuus."* Sentiments to the same effect, declared by the Sup. Court of the United States, were quoted with approbation in the following language: "By his [Savage's] removal from the office of executor, he was a completely separated from the business of the executor as if he had been dead, and had no right to appear in or be a party in this or any other court, to a suit which the law confided to the representative of the deceased." Again: "Could an execution have correctly issued on the judgment against the defendant? It could not have been issued against the estate in the hands of M. A. Parkhill, because there was no such character in existence." &c. The Supreme Court of the United States, in the case of Savage, also had said "the execution on the decree was unauthorized and void, and no right of property will pass by a sale under it, if one be made by the Marshal." Florida Reps., 127—130. Howard, 282. 17 Peters, 224.— At the last term of the court, in a very elaborate opinion delivered by the Chief Justice,it was asserted as an "essential principle of natural justice that every man have an opportunity to be heard in a court of law, upon every question involving his rights or interests, before he
592 is affected by any judicial decision of the question." Again: "No court is authorized to render a judgment or decree against any one of his estate, until after due notice by service of process to appear and defend." Although this was a case of attachment against a steamboat, and such vessels and ships, by the maratime law, every day are held to pass by constructive notice all over the world, still the doctrine of strict notice at the common law was held applicable to them, and an act of the Legislature of the State was held unconstitutional allowing judgment and other proceedings in the first instance against the boat. Flint River S. B. C. *v.* Roberts and others, Reports 1848, p. 113.

The judgment rendered in the case of the Union Bank *v.* Parkhill's administrators came again for consideration before the court at the last term, in a suit between Ponder and Moseley, and it was then held that the Superior Court had jurisdiction to give judgment so as to bind the estate of Parkhill—that the judgment was a valid one, and that a sale under execution by the Marshal passed the right of property to the purchaser: Ponder v. Moseley and other, adm's Reports 1848, p. 267.

But this court on two occasions, at their sessions of 1847 and 1848, has given an express and direct sanction to the consideration of decrees taken *pro forma.* In Bluett *v.* Nicholson, decided in 1847, the question of jurisdiction was presented in another aspect on an application to the court to decide a question not presented by the pleadings, which was refused. 1 Florida, 384. The case of Le Baron, & Co. *v.* Fauntleroy, was a case of importance, as well for the amount involved, as the delicate and interesting questions presented; it was argued with great ability; even new proof was adduced, yet no one suggested the want of jurisdiction. Florida Rep., 1848, 293.

At the present term, in the case of Edwards *v.* Moseley, the case as presented in the court below was varied, by the introduction of new facts, yet the point of jurisdiction was not raised, although unquestionably presenting an exercise of direct original action by the appellate court.

It is said that the question of jurisdiction is a delicate one, and the old maxim is quoted that consent cannot give jurisdiction. The force of both expressions, it is conceived, is misunderstood. By the first, I understand that a court will hesitate to embrace within their jurisdicition cases, or questions, or persons not rightfully the subjects of it—for instance, a State Court would be careful not to take cognizance 593
of cases exclusively pertaining to the United States Courts, or other courts, or of persons subject to their jurisdiction alone. It is in this sense, the remark was used by the Supreme Court at their first term, in the first opinion ever pronounced by this court. Stewart *v.* Preston, 1 Florida Rep., 1. But the fact is, that as well this expression as the maxim itself, is more appropriate to the courts of the United States than to the State Courts; for as to the latter, the jurisdiction is always implied, being courts of general jurisdiction, and in them consent will give jurisdiction. Beatty v. Ross. Without insisting on this, the language of all courts without exception is to *amplify remedies,* and without usurping jurisdiction, to apply their rules to the advancement of substantial justice.

The principle, then, upon which our courts of law act is, to enforce the performance of contracts not injuries to society, and to administer justice to a party who can make that justice appear, by enlarging the legal remedy, if necessary, in order to attain the justice of the case. Broom's Legal Maxims, 36.

The construction of the judiciary of the State gives facilities for the promotion of justice, by having the same judges to preside in the Circuit and Supreme Court, not possessed where these are separate tribunals. Does it not, then, become a duty so to exert the judicial power, arising from this source, as that public justice will be most effectually promoted.

For my own part, having undertaken to discharge the high public trust of administering justice, as provided by the Constitution, without sale, denial, or delay, I am not for regarding exceptions to its performance, existing rather in the letter than the spirit. I have no fear that a judgment of our's will be reversed by another tribunal, or that it will be set aside as nullity by another court. Surely with the precedents from the Supreme Court of the United States—those in this court expressly to the point—the implied jurisdiction asserted in Moseley *v.* Ponder, where judgment was given in a case where there was no defendant before the court—certainly there can be no question as to the jurisdicition. A motion has been made to withdraw the case, and send it back to the Circuit Court. To this, I cannot give my consent. In my opinion, it is rightfully here, and can only be rightfully disposed of by a decision of the case. I would as soon consent to have any other case taken from the docket, and sent 594
back without trial.

Justice HAWKINS concurred in the foregoing opinion delivered by Judge BALTZELL—not assenting to the view expressed in the last clause.

ROBERT MITCHELL, PLAINTIFF IN ERROR, *vs.* JOHN J. MAXWELL, DEFENDANT IN ERROR.

Whenever a power is given by a statute, every thing necessary to the effectual execution of the power is given by implication.

Writ of Error to Leon Circuit Court.

This case, and the question involved in it, are fully stated in the opinion of the court.

Randall and Thompson, for plaintiff in error.

Archer, for defendant in error.

Opinion by Chief Justice DOUGLAS.

This is a proceeding, instituted by the plaintiff against the defendant, in the Circuit Court of Leon county, to procure a decree of that court to enable the plaintiff to cause the equity or legal right of redemption in certain property of the defendant to be sold by virtue of an execution at law, pursuant to the proivsions of an act of the General Assembly of 1845, Chap. 44, Sections 1 and 2, Thompson's Digest, page 355, 356, Nos. 3 and 4. Section 1 declares that, "from and after the passage of this act, equities of redemption, or the legal right of redemption in real and perosonal property, shall be subject to levy and sale under executions upon judgments, at common law or upon decrees in equity. Sec. 2, " that, upon application made by the party causing the levy or levies contemplated by the foregoing section to be made, the courts respectively rendering such judgment or granting such decree, shall cause the mortgageor or mortgagors, mortgagee or mortgagees, and all other persons who said mortgagor

595 or mortgagors, mortgagee or mortgagees, or any or either of them, shall state upon oath to be interested in said mortgage property so levied upon, to come into court and answer upon oath, what amount remains due and owing upon said mortgage—what amount has been paid, and to whom and when paid, that the value of said equity or legal right of redemption may be ascertained before the same shall be sold." By the record it appears that judgment was rendered in the late Superior Court of Leon County, in favor of the plaintiff, against the said defendant, on the 15th day of November, A. D., 1842, for the sum of $2,495 99-100; and that by virtue of a *pluries* execution, issued on the 20th of July, A. D., 1847, from the said Circuit Court, the said plaintiff caused a levy to be made upon the equity of redemption, being the legal right of redemption of the said defendant, John J. Maxwell, in and to certain real and personal estate, described and mentioned in a certain deed of mortgage, bearing date on the 13th day of November, A. D., 1839, made, executed, and delivered by the said John J. Maxwell to the Union Bank of Florida, to satisfy said writ of execution.

It also appears by the record, that a citation was duly issued, pursuant to an order of the court, made on application of the plaintiff for that purpose, and was served upon the Union Bank of Florida, and that said bank, by the president, John G. Gamble, appeared and answered. After which, the plaintiff obtained an order of the court under which a citation issued, and was served upon the said defendant, John J. Maxwell, requiring him to appear and answer, according to the provisions of the statute, upon oath, but that he wholly failed to obey the said citation, and did not come into court and answer upon oath, nor, indeed, did he answer at all, so far as the record shows. In this state of the case, and without and further proceedings in regard to the said defendant, John J. Maxwell, the plaintiff moved for a decree to authorize him to cause the said equity or legal right of redemption, so levied upon as above stated, to be sold, according to the provisions and directions of the statute; which motion, after argument and due consideration, the court overruled, and required the plaintiff to pay the costs of this proceeding. Whereupon the plaintiff sued out a writ of error, and assigns the following causes, viz: "The court erred in the construction of the statute relied on by the plaintiff, and in refusing to grant the order for the sale of the equity of redemption."

596 The record does not show what construction the court put upon the statute to which reference is made, and we are not able, therefore, to determine whether the first error is well assigned or not.—The second, we think, in the present position of the case, cannot be sustained.

The case, as stated upon the record, seems to be a proper one for the action of the court, under the second section of the act before cited; but all the steps, necessary to lay a foundation for the motion made, and for the overruling of which this writ of error is prosecuted, do not appear to have been taken. The direction in the statute is, not that the parties shall be cited to appear, but that the court shall cause them to come into court, and answer *under oath*. The citation is, doubtless, proper in the first instance, as the first process; but if such party fails to obey the citation, when it has been duly served upon him, some other step should be taken to cause him to come into court and answer upon oath to the matters, in relation to which the statute requires that he be called to answer. The object of the statute is plainly and clearly expressed. It is that the value of said equity or legal right of redemption may be ascertained before the same shall be sold. The reason for requiring this ascertainment of the value of the equity before the sale, does not so clearly appear upon the face of the statute itself; it doubtless was, however, that persons, disposed to purchase at the sale, might know the extent of the incumbrances upon the property, and, consequently, be enabled to bid understandingly. No one else can so well tell the nature and extent of the incumbrances as the mortgagor himself, and he is by the statute made a witness for that purpose. Although it may reasonably be supposed that he would generally be the best witness, yet *all other persons*, who the said *mortgagor* or mortgagors, mortgagee or mortgagees, or either of them, shall state upon oath to be interested in said mortgaged property so levied upon, are made witnesses also. There may be and often are, in such cases, other persons, besides the mortgagee, to whom the mortgagor has given liens and perhaps secret trusts, upon the property mortgaged, which may very seriously affect the value of the equity. Indeed, the very fact that such liens and incumbrances may exist, will necessarily render cautious men unwilling to bid, and thus affect the sales. Mortgages may appear of record which have been paid—fictitious mortgages, or other apparent liens, may so appear of record in favor of persons who never had existence, and there may be no one by whom 59
these facts can be proven but the mortgagor himself; and he, unless required by the court to disclose the information, may choose rather to withhold it, that he may, through the medium of friends, have the property bought in for a trifle for himself, to the great detriment of his creditors. It was to prevent such things as these, we think, that the provision of the statute was enacted. He should, therefore, be required, or to use the language of the statute, the court should, upon the application of the party causing the levy or levies, &c., cause the *mortgagor* to come into court and disclose these matters *under oath*, and when he shall show that other persons are interested, they too, should be caused to come into court and answer *upon oath, as* to the nature and extent of their respective interests. Unless this shall be done, he is a bold man who would bid for such property, at such a sale. The defendants, of course, would know the value and extent of the incumbrances, and might, by the aid of others, avail themselves of that knowledge, to defraud those whom it is the duty of the court, so far as power is given it for that purpose, to protect. We are not to be understood as intimating that any such fraudulent acts in intent exists in this particular case. None such has been charged, and we are neither authorized nor inclined to presume it; but it is our duty to expound this statute, according to our view of the purpose for which it was adopted.

It has been suggested, that, the statute has not declared the mode of proceeding by which the parties, upon whom it was intended to act, be caused to come into court, it cannot be enforced; but this is too narrow a view of the question. The law is well settled that, whenever a power is given by the statute, everything necessary to the making it effectual is given by application; for the maxim is *"Quando lex aliquid concedit, concedere videtur et id, per quod devenitur ad illud."* 9 Bac. Abr. Ed., 1846, page 220—citing 12 Reports, 130, 131. 1 & 2 Inst., 206. Witherspoon *v.* Dunlap, 1 McCord, 546. 3 U. States Dig., 483, No. 32. 1 Kent's Comm., page 465, note a, and Field v. The people, 8 Scamm. Reps., 79, 83.

If a *subpoena* had been issued according to law in a case pending in court, in which the testimony of a witness was required, commanding him to attend in such court on a given day to testify in the cause, and had been duly served, the court, if he failed to attend and had no good reason to offer for not doing so, would, we apprehend, be at no loss what to do, even if the statute had made no provisions on 597
the subject. Whether, were the defendants to stand out in contempt, refuse to answer and put the court at defiance, a decree for the sale might be made without his answer, or what insuch a case ought to be done as regards the execution, it is not necessary for us to say. We will not anticipate such a state of things.

This case is not properly before us; but if it were so, we should deem it unnecessary to examine the several interesting questions arising upon the charter of the Union Bank, which were presented at the argument of this case, as they have all been presented, very fully discussed, and the opinion of the court pronounced upon them, upon the cross writs of error in the case of the Union Bank and the administrators of Samuel Parkhill, deceased, at the present term of this court.

There having been no final judgment or decree in this cause, it must be dismissed and remanded to the court below, for such proceedings to be had therein as right and justice shall appertain.

Per Curiam.

DANIEL LOVE, APPELLANT, *vs.* JAMES GIBSON, APPELLEE.

Where money sought to be recovered under a count for money paid, has been paid under a judgment against the plaintiff, the record of the judgment is always admissible to prove the *fact* of the judgment and the amount so recovered. For such purpose it cannot be considered as *res inter alios acta*.

Where, in a suit against one of the sureties, judgment is fairly obtained against him and no collusion existed between him and the party recovering judgment or the principal obligor of the bond, if notice of the pendency of such suit has been given his co-surety, the latter stands virtually in privity with him against whom judgment has been obtained. The co-surety in such case is bound to avail himself of any defence he may have, and will not be permitted afterwards, in a suit for contribution brought against him by his co-surety who has paid and satisfied the judgment, to set up any defence which he ought to have pleaded in the original suit upon the bond, by becoming a party for that purpose. It was his duty to join in the defence to the action. Having failed to do so, though he

599 had full notice of the pendency of the action, he waives all defences he might have had; and in a suit against him for contribution by the co-surety the judgment is to be deemed *res adjudicata.*

The payment of a debt by the surety, on the fault of the principal is not deemed a voluntary, but a compulsory payment, and the action for contribution may be maintained, though no demand has been made or action brought on the original liability.

Appeal from Gadsden Circuit Court.

An action of *assumpsit* was commenced by Gibson against Love in April 1846. The plaintiff's declaration contained a special count setting forth that he and defendant were joint and several sureties for one John C. Love, on his bond as executor of John Colson, deceased, which bond was given in 1839, for $18,000, conditioned for the faithful discharge of the duties of executor by the said John C. Love. That in 1845 a suit was instituted on the bond against plaintiff for the use of the heirs of John Colson, and a judgment obtained in said suit for the penalty of the bond to be discharged by the payment of $1,792.88; all which appeared by the record of proceedings in said suit. That in April, 1846, the plaintiff paid off and fully satisfied the judgment so obtained, with the interest thereon; by reason whereof the defendant became liable to pay plaintiff the sum of $1,396.40, being the aliquot part of the principal of said judgment.

The declaration also contained a count for money paid, laid out and expended.

To the first count of this declaration the defendant demurred, and to the other pleaded *non assumpsit.* The court overruled the demurrer to the first count and gave leave to answer over.

The defendant then pleaded to said first count.

1. *Non assumpsit.*

2. That plaintiff was not compelled to pay any part of the said bond.

3. That although suit was instituted upon said bond, as alleged in plaintiff's declaration, yet the same was not regular nor legal; nor had the plaintiff in the suit on the land bond any legal right of action against Gibson, the plaintiff in this suit, as surety for John C. Love upon his bond as executor, at the time of the institution of said suit; nor did the declaration therein contain any good and valid cause of action against Gibson; but the same might have been resisted and defeated. Yet that said Gibson did not resist said action, but per-
600 mitted it to proceed against him, and allowed judgment to be taken without availing himself of the want of a proper cause of action, and of the absence of all legal claim and demand against him at that time as surety, as aforesaid. That therefore the plaintiff has waived, abandoned and lost all right of contribution and recourse against defendant as co-surety.

4. That though there was a suit against Gibson as surety on the bond, as alleged, yet it was wholly irregular and illegal, and might have been resisted and defeated, because the said suit was brought against Gibson, the surety before recovery had against Love, the principal. Yet said Gibson, the plaintiff in this suit, did not resist said action but failed to make defence. Wherefore he has wholly lost all right to contribution and recourse against said defendant for any part of said bond not due nor payable by said sureties by law.

5. That by the 31st section of act of the Territory, approved Nov. 20, 1828, in relation to wills, letters testamentary, &c., it was and is provided that, "whenever it shall appear satisfactory to the county court or judge, on the petition of any legatee, heir or security, that any executor who has taken out letters testamentary on the estate of any testator, is either mismanaging or wasting the estate of the deceased, it shall be lawful for the said court or judge to revoke the said letters testamentary and appoint one or more appraisers of the said estate, or to require good and sufficient security, by bond to be filed by the said executors, *for the further due administration* of said estate." That prior to the date of said bond the said Love had taken out letters testamentary on the said estate of Colson and, on petition of the heirs was required to give bond according to law, and the bond on plaintiff's declaration mentioned was given under this requirement and was intended and declared to be in pursuance of said statute, whereas said bond is not, as required by law to be, conditioned "for the further due administration" of said estate, but was attempted to be made to cover waste before the date and delivery thereof done and committed by said Love, and to make good defaults already incurred. That the bond is void for the excess beyond the security, "for the further due administration" of said estate, and plaintiff has not been compelled to pay any money as surety on account of any waste committed after the delivery of said bond, nor to make good any default since incurred.

6. That though the bond was executed and delivered and suit situated thereon as alleged, yet that no valid breach of the condition 601 of said bond was assigned in the declaration in said writ, and no legal cause of action therein set forth; and that plaintiff was then and there so advised by the defendant in this suit; and before the rendition of the judgment in said suit, the plaintiff was called upon and required by defendant to defend and resist the action by all legal ways, but that plaintiff neglected so to do, and permitted the judgment to be rendered therein, and hath since paid the amount thereof, though not legally compelled so to do. And that therefore plaintiff has lost all legal right and remedy of contribution against defendant.

7. To the second count of plaintiff declaration defendant further pleaded that plaintiff did not pay, lay out and expend $3000 as alleged.

Issue was joined on the first plea. To the second there was a demurrer assigning for cause that the matter thereof, as set forth, amounts to the "general issue" and that the plea itself is uncertain, informal and insufficient.

Replication to the third and fourth and issue tendered—that plaintiff did resist and defend an action on the bond.

Demurrer to the fifth and causes assigned: 1. That defendant by said plea seeks to raise an issue upon the legality of the bond on which judgment was had against plaintiff as surety, and in consequence of which ,having paid the same ,plaintiff here sues for contribution. 2. That by said plea defendant seeks to make an issue on the legality and propriety of the verdict of the jury in the suit on the bond. 3. That the plea is double and otherwise informal and insufficient.

To the sixth plea plaintiff replied, tendering issue, that he did not fail and neglect to make legal defences to the action, nor permit judgment therein, but did defend said suit as advised by his counsel.

Issue was joined on the seventh plea of defendant.

The defendant demurred to plaintiffs replication to the third plea, because:—1. It does not aver that in the suit on the bond there was a good and valid cause of action against said plaintiff set forth in the declaration. 2. It does not contain a full and sufficient answer to said third plea. Defendant also demurred to the replication to the fourth plea:—1. Because it does not aver that in the suit on the bond there had been a recovery against Love, the principal, before suit brought against plaintiff, the surety. 2. Because of its not being a full and sufficient answer to the fourth plea.

Demurrer to replication to the sixth plea:—1. Because it does 602 not aver that in the suit on the bond a valid breach of the condition thereof was assigned in the declaration in said suit. 2. Because it does not traverse that he was advised and required by defendant, before judgment in said suit, to resist the same day by all legal ways. 3. Because it is not a full and sufficient answer.

The court sustained the plaintiff's demurrer to the second and fifth pleas—overruling those of defendant to plaintiff's replication to the fourth and sixth pleas, and sustaining defendant's demurrer to the replication of plaintiff to the third plea.

The plaintiff thereupon amended his replication to the third plea by inserting therein that there was a good and valid cause of action set forth in the declaration in the suit against him on the bond.

And afterwards at the Spring Term of the Circuit Court in and for the County of Gadsden, A. D., 1848, the Hon. Thomas Baltzell presiding, the cause came on to be tried, and a verdict and judgment were given for plaintiff.

From the bill of exceptions, it appears that, on the trial of this cause in the court below, the plaintiff offered in evidence the bond of John C. Love, executor, dated 13th April, 1839, on which plaintiff and defendant were sureties. Defendant objected, on the ground that, being a statutory bond,the palintiff must show that it was required in manner and forms as enjoined by the statute, but the court admitted the bond in evidence. Plaintiff then offered the record of the suit on the bond against him, showing a judgment for $2,792 80, and a receipt showing payment and satisfaction there of by him. A record from the Probate Court, showing the amount adjudged against John C. Love, executor, by auditors appointed to settle his accounts, which was simply the report of said auditors of the 2d of Sept., 1844, and the decree of the Judge of Probate thereon, given 21st April, 1845, was next offered in evidence by plaintiff. To this defendant objected, because the record contained no evidence of liability in favor of the plaintiff in the suit on the bond sufficient to charge the sureties—because, also, the decree of the Judge did not specify the parties, entitled, and, further, because it did not appear that the executor was before the court when the accounts were settled and the decree made. The court admitted the record, after testimony of D. L. White, (to which testimony defendant likewise objected,) showing that the proceedings were had at the instance of the

Gibson vs. Love.—Statement of Case.

603 executor, through a petition which cannot now be found, and that he selected the auditors. D. L. White was at that time Judge of the County Court, acting as a Court of Probate.

Here the plaintiff rested his case.

Defendant then proved that neither the heirs nor legatees of Colson applied to remove the executor, or to lay him under security. He read to the jury the record of a suit against the executor as principal on the bond, and offered in evidence a mortgage given by the executor, Love, to Gibson, the plaintiff in this suit, to secure him against loss on account of suretyship, but, on objection from plaintiff, this was ruled out.

Defendant then offered the record of proceedings in the Probate Court, showing that the executor was removed in 1839, upon the application of his co-executor, Wm. Forbes, but soon afterwards was reinstated, upon giving the bond with palintiff and defendant as sureties. The record of these proceedings were offered by defendant, to prove that the bond was unlawfully executed and under coercion, against the consent of John C. Love, and to avoid being removed from the duties of his office of executor. Objection being made by plaintiff, the court refused to admit the record.

The counsel for the defendant then moved the court to instruct the jury as follows, viz:

1. That, to enable the plaintiff to recover for contribution in this form of action against a co-surety on an executor's bond, and for the default or *devastavit* of the executor, it is incumbent on him to prove that he was compelled by suit at law or in equity, on a valid cause of action, and after all legal defences, to pay the amount on which he seeks contribution; and in such action it is competent for the defendant to allege and prove in his defence any fact tending to establish the absence of any just cause of action, or any right to recovery in the legatees, heirs, or distributees, for whose use such suit was originally instituted against his co-security.

2. That a bond taken under the law of the State, regulating the duties of executors, &c., being a statutory bond, must, to be valid, pursue the terms of the law, and if varient therefrom, forms no ground or cause of action against the sureties thereon.

3. That such a bond, so far as it enlarges the responsibility of the executor, is void for excess, as regards the responsibility of a surety, and to the extent of such excess: and that it is the duty of the plain-
604 tiff, seeking to recover on such a bond against a surety thereon, to prove that the breach of the condition sued on occurred within the limits of the statutory liability, or after the date of the bond.

4. That, before the jury can find for the plaintiff, on the evidence of the settlement made before the County Court on the 2d day of September, 1844, they must be satisfied from the evidence as to what amount of the liability there stated against the executor occurred after the execution of the bond, and can find for nothing more.

5. That there being no judgment recovered or decree obtained by the legatees of John Colson, upon the settlement of accounts made by the auditors, and approved by the Judge of the County Court, there is no breach of the condition of the bond of John C. Love, as executor, upon which the securities can be charged, and that by reason thereof, the plaintiff is not entitled to recover.

6. That the order of the Judge of the County Court confirming the report of the auditors, and ordering distribution of the surplus, not specifying the parties entitled, or the sums to be paid to each, does not amount to a decree for distribution and is no evidence of a liability on the part of John C. Love, as executor, to the relatives, at whose instance and for whose use the recovery was had against said James Gibson.

7. That the liability of securities on executor's bond in this case does not accrue until a judgment or decree has been recovered against him as executor, and an action on such judgment to establish a *devastavit* has been successfully prosecuted.

8. That, to fix the liability of a security on an executor's bond, for the default or *devastavit* of the executor, it is not sufficient for the plaintiff to produce evidence of a settlement by order of the Court of Probate, without the further evidence of a judgment of a court of equity or of law establishing such liability, and that it is not competent for the Court of Probate to order or decree the distribution of the surplus remaining in the hands of the executor.

9. That the order or decree of the Court of Probate, of the date of 21st April, 1845, given in evidence of this cause, not determining the names or respective interests of the heirs or distributees of said estate, did not impose such a duty or obligation on the executor as that his failure to comply therewith fixed the liability of the securities for the amount decreed to be paid by the executor in such order or decree.

10. That no order or decree can be made valid or binding by the 605
Court of Probate for the distribution of the surplus of an estate, except it appear on the face of the proceedings that the executor had been cited to appear, at the instance of the parties interested, or had voluntarily appeared thereat.

11. That the securities on the bond are not responsible for the balances appearing in the account against John C. Love prior to the giving of the bond, if the jury believe from the evidence those balances had been previously appropriated to his use, and that the taking of the bond is evidence of a previous waste.

All which eleven instructions, or any of them, the court refused to give.

And the defendant also moved the court to give to the jury the following instructions, viz:

That the bond in this said suit, being taken for the due administration of the estate generally, while the statute of the Territory only prescribed a bond for the "further" due administration of the estate, it is the duty of the party seeking to fix the liability of a surety on such bond, to exhibit a breach of the same after the period of its execution.

That such securities are not responsible for any *devastavit* or default of the executor anterior to such date. Which last instruction the court did give, but added thereto as follows, to-wit: "That, *prima facie*, the decree of the Judge of Probate fixes the extent of liability of the executor and his securities; that it is for the defendant to show that any of the sums embraced in it, or the account alluded to by it, should not attach as a liability to the securities, as having occurred previous to the execution of the bond.

And further the court instructed the jury as follows, to-wit:

That a suit in favor of a legatee will not lie against an executor or administrator at law on the administration bond, the remedy being in equity.

That, *prima facie*, the order of the Judge of Probate, ascertaining the amount due to the legatees and ordering its payment, created an obligation on the part of the executor to pay; that, on failure to do this, his security on the administration bond might pay and claim contribution from a co-security, without requiring all the pre-requisites of a decree, a suit on the bond or *devastavit*, or other legal proceedings against the executor.

To all which rulings of the court, in admitting evidence and tes- 606
timony against the objections of defendant to go to the jury, in rejecting the evidence offered by the defendant, in refusing the instructions to the jury prayed for by the defendant, and giving other instructions by the court to the jury not moved or asked for by the defendant, be by his counsel excepted.

Randall, for appellant, argued:

I. That when, as in this case, there is no express promise to pay, the liability of a co-surety for contribution depends upon the fact, whether when the money was paid there existed a *legal obligation* on the parties-surety jointly to pay. We expect to prove in this case, that neither party to this bond has yet been placed in a position to become *legally liable to pay*, at suit of these relators at law. Skillin *v.* Merrill, 16 Mass., 40—cited 2d Stark. on Ev., 101, 102.

II. No cause of action did or does exist against Daniel Love, by reason of his pretended suretyship on the alleged executor's bond; that Gibson might have resisited the bond, and that his payment of a pretended and not a real demand against Love, could not involve the latter in any new liability.

We hold the bond void—

1. Because exacted by Judge of County Court, on petition of *a co-executor*, or on his (the judge's) *mere motion*, and not on petition of "legatees, heirs, &c," against the terms of Florida statute. Act of Nov. 20th, 1828, Sec. 31, Thomp. D., 210. 1 Williams on Exctuors, 130, 131.

2. If court did exercise a lawful jurisdiction and power in exacting bond in this case, then we say, the bond taken was variant in terms and effect from the one prescribed by statute, and for that reason void. United States *vs.* Linn, 15 Peters, 290, 314. United States *v.* Bradley ,10 Peters, 364.

3. That if not void *"in toto"* for these reasons, that, as it extends the condition beyond the terms prescribed in statute, it is void for *the excess*.

But we contend on the above authorities, and on reason that it is void *"in toto"*—

1. It is not valid as a statutory bond.

2. Not valid as a *voluntary bond*, and good as a *common law bond*.

607 If to be sustained as a common law bond, then it is only suable on by the individual obligee, R. K. Call, and not *by his sucessors.*—Governor, &c., *v.* Twitty, 1 Dev. 153—cited 1 U. S. Digest, p. 442, sec. 207.

In any aspect, not a ground of action against *sureties*—because it contains no proper *condition*, the breath of which would justify recovery against them. Archbishop of Canterbury *v.* Tappen, 8 Barn. & Cr., 151. 15th E. C. L. R., p. 177-'8.

III. If bond be valid, no such breach of it has occurred, as rendered sureties liable to action brought at suit of these relators. That Gibson paid *too soon*, and under no "legal *compulsion.*"

Previous remedy should have been had against principal and exhausted, before resort to sureties. 8. Barn. & Cress., 151. Spottswood *v.* Danbridge, 4 Mum., 293, 296. 1 Williams' Executors, 363-'4, note. 1 Mum., 1, 12, 20. 2 Blackford, 52. 2 Mum., 24. 1 Wash. Va., 32. 1 Hen. & Mum., 11.

Thompson, for Appellee:

The parties to this controversy, James Gibson and Daniel Love, were sureties for one John C. Love, as executor of John Colson, deceased, for the due administration of said estate.

John C. Love made voluntary application to the Judge of the County Court of Gadsden, to have his accounts audited and settled. Auditors were appointed, who stated the account, showing a balance against the executor, and their report was confirmed by the court, who ordered the said John C. Love to pay over the balance so found due by him to the heirs or legatees of said estate. Upon his failure to comply with the order, separate suits were instituted against him and James Gibson, his surety—a recovery was had against Gibson, before the suit against John C. Lowe was brought to issue, and the latter was dismissed. Gibson, having paid the judgment rendered against him, brought suit in the court below against Daniel Love, his co-surety, for contribution, and having obtained judgment for one moiety of the sum so paid, Love now appeals from said judgment.

To maintain this action, the plaintiff in the court below was bound to show: 1. That defendant was co-surety with him for the principal on the bond, John C. Love.

2. That he was compelled to pay the money, and did actually pay it under such compulsion.

608 I.—The point first was fully proved by the production of the original bond, which on its face shows the characters in which it was executed by the respective obligors.

The introduction of this bond in evidence was objected to on various grounds: 1. It is said the bond is void because not required on the petition of a legatee, heir or security, as provided for in the 31st section of the act of 1828. Thompson's Digest, 210. That this is the only case in which a bond can be required of an executor—the spiritual court in England possessed no such power, and our County Courts do not possess it. That the requisition of the bond was evidently *ex mero motu* of the judge.

To this it may be answered, that the Probate Courts in this country possess a very general jurisdiction in regard to estates, and over executors, administrators, and guardians. A reference to the acts of our Legislature will show the express grant of powers never possessed by the Ecclesiastical Courts in England. It is by no means clear, that it is not the duty of the Probate Judge to require security of executors in every instance on the grant of letters testamentary, and such is the practice, it is said, in some parts of the State. Indeed, the section of the act referred to seems to consider it may or ought to be required. The language of the act is "whenever it shall appear satisfactorily to the said court or judges, on petition of any legatee, heir or *security*, that any executor who has taken out letters," &c. Now, if executors cannot be compelled to give security, unless they conduct themselves so as to be obnoxious to this section, how does it happen that a *security* is provided for in the enumeration of the persons or parties who have the right to complain?

It seems from other evidence, offered by the appellant from the records of Gadsden County Court, and rejected in the court below, that there were two executors of the will of Colson—that a petition was presented by Forbes, who was one of them, against Love, making sundry charges—that citation issued thereon, the parties appeared, and such proceedings had, that by an order the judge dismissed the complaint, and ordered both to give security for the due administration of the estate, by a day certain, or their letters would be revoked. On the day named an order was passed, noting the default and revoking the letters; and on the same day John C. Love applied for leave and further time to execute the bond, which was granted him. From all this it appears that the judge, from the proceedings before him, presumed from the conduct and ill feeling be- 609
tween the executors, that the rights of all interested in the estate were in jeopardy and required the bond for their protection. A general superintendence and jurisdiction over all matters relating to estates, testate and intestate, being given by the acts organizing the County Court, and the acts relating to wills and administration, and such an exercise of jurisdiction not being prohibited, it is not, I think, claiming too much to say, the judge was acting within the scope of his legitimate powers. This order was not appealed from, but submitted to, and the bond in question given.

If, however, there were any objection to the validity of this bond the appellant here, on being sued for contribution, cannot set it up unless he had given the appellee notice of it. Cave, use of Wallace *v.* Burns, 6 Ala. R., 781, 782. Ford *v.* Keith, 1 Mass. R., 139.

2. Another objection is, that the bond was exacted and required by duress, by threats of revocation of letters, &c., and is, therefore, void. It is not believed this can be seriously entertained, when it so clearly appears there was no duress—if the requisition of the bond was erroneous the party could have had full remedy against it by appeal, which would have suspended the execution of the order, until its adjudication in the Superior Court.

3. Another objection is that the bond is retrospective, and covers acts and defaults of the executor committed anterior to its execution. There is nothing in the bond, as the court will perceive, which indicates the intention of its framer that it should cover past defaults and such effect will not be given to its language. It is not susceptible of such construction. It is prospective in its terms, as well as effect. That it may and does cover property and moneys in his hand, unadministered at the date of the execution of the bond, is not denied; such, we contend, is its legitimate intention and effect. No *devastavit* is committed until the property or money is misapplied and wasted; and if such misconduct takes place after the bond is executed, the estate is protected by the bond from its consequences. The refusal by the executor to pay a just debt or a legacy, when there ought to be assets in his hands for that purpose, or to distribute the surplus, &c., &c., is evidence at the time of a *devastavit.* Ordinarily, it cannot well be otherwise proved. This throws upon the sureties of the executor to prove, by affirmative testimony, that an actual waste or loss occurred at some period anterior to the date of the 610
bond.

The Supreme Court of the United States say, in reference to a receiver's bond: "It matters not at what time the moneys had been received, if, after the appointment, they were held by the officer in trust for the United States, and so continued to be held at and after the date of the bond." 15 Peters' R., 208. From all that appeared in this case, the funds were in the hands of Love, as executor at and after the date of the bond; the first evidence of a *devastavit* is his omission to comply with the order of the judge to distribute the residuum in his hands.

The court below was evidently right in overruling this objection.

II.—As to the second point: that Gibson was compelled to pay the debt of which he now seeks contribution.

The fact of payment is not contested, but it is denied that he paid it under compulsion.

We hold it to be the law that the compulsion under which a surety acts, who pays the debt and seeks contribution from his co-surety, is not necessarily that of legal proceedings, such as a suit at law or in equity against him, perfected by judgment or decree, but may be upon a legal liability. Addison on Con., 228, 229. Lucas *v.* Curry, 2 Bailey, 403. 1 Smith's Leading Cases, 139, at top. Hamilton *v.* Cutts, 4 Mass., R., 351. Pitt *v.* Pursford, 2 M. & Welsby, 538, and American cases in note. Linn *v.* McLelland, 4 Dev. & Bat. L. R., 458. Goodall *v.* Wentworth, 20 Maine R., 324. Story on Contracts, sec. 885, 886.

If he pays without the compulsion of a suit at law or in equity, but on his mere legal liability, then, when he seeks contribution in an action against his co-surity, the *onous* would seem to rest on him of shewing such liability; and to this extent alone would the authority of Skillin *v.* Merrill, in 16 Mass. Reports, 40, cited by the other side, seem to go.

But if the surety who pays awaits a suit and defends it, and his co-surety has knowledge of such suit, or is notified of its institution and pendency, and did participate in its defence or might have done so, the co-surity is deemed and held a privy at law and is concluded by the judgment, unless he can prove it was suffered by the party by fraud and collusion with the plaintiff in the action. See 23 Smith's Leading Cases, 139, at top, citing Smith *v.* Compton, Eng. Common

611 Law Reps., 106. Duffield *v.* Scott, 3 T. R., 374, per Buller, Judge. See also Buford *v.* Buford, 4 Munf. R., 241. Blasdale *v.* Babcock, 1 Johns. R., 517. Kip *v.* Brigham, 6 Johns. R., 158. Cartwright *v.* Carpenter, 7 How. Miss. R., 328. Bond *v.* Ward, 1 Nott & McCords' R., 201. Burrill *v.* West, 2 N. Hampshire R., 190. Train *v.* Gold, 5 Pick. R., 386. State *v.* Colerick, 1 Ohio Cond. R., 638. 1 Greenl. E. V., sec. 116.

It appears from the sixth plea filed by appellant, that he had knowledge of the institution and pendency of the suit, and required the appellee to defend it. It appears also from the record, that the appellee did defend the suit, and paid the debt under compulsion of the judgment rendered against him.

This judgment we hold to be conclusive upon the appellant, unless he can impeach it for fraud and collusion—that it is not only evidence of recovery against Gibson, but also evidence of Gibson's liability and, consequently, of the appellant's legal liability to Gibson, for a moiety of the amount paid under it.

III.—The counsel for appellant insist, however, although no fraud or collusion is imputed by any of the pleadings, nor any question of it raised by the evidence, that the payment by Gibson, notwithstanding the judgment rendered against him ,was voluntary, inasmuch as he might have resisted and successfully defended the action brought against him, on the executor's bond of John C. Love.

1. It is alleged the County Court exceeded its jurisdiction in the order for distribution of the residuum, made on the settlement of the accounts of the executor,

For the jurisdiction of the County Courts of the late Territory of Florida, in relation to the estate of deceased persons, see Thompson's Digest, 195, sec. 1, ar. 1, and note (*e*).

2. It is alleged that the order is erroneous, in not ascertaining with precision the names of the persons entitled to the residuum, and the several proportions of each.

To this it is answered, it does not in any wise appear that the failure to pay over the surplus arose from any doubt or difficulty in this particular; if he was at any loss he should have applied to the court for its direction; but it is to be presumed, from the absence of any complaint, that the will was sufficiently explicit as to the parties and their respective interests. A similar order was held sufficient in the case of Lucas *v.* Curry, cited from 2 Bailey R., 403.

612 Neither does it appear that the failure to pay arose from the refusal to give a refunding bond—if one had been demanded and refused, the court would have protected the executor in his requisition. He has undoubtedly a right to have the bond before he pays over, but must refuse on the ground of its non-delivery. Chairman *v.* Mayo, 2 Hawk's R., 329.

3. It is also argued that in this case the County Court ought not to have taken jurisdiction, as there was an infant and a *feme covert* among the distributees, and the court had not power to protect their interests; they can only be protected in a court of equity.

It also appears that one was represented by guardian and the other by her husband, and no objection seems to have been made by the executor of any want of proper authority in either to receive, or any impropriety in their receiving the amounts.

The jurisdiction of our County Courts is stated in terms very similar to those employed in the constitution and laws of Mississippi, in the grant of powers to their probate courts, and there it has been held that the powers of their courts, in matters of distribution, are co-extensive with a court of equity. Carmichael *v.* Browder, 3 How. Miss. R., 252.

4. It is also contended that the order is not sufficient—that the executor should have been sued at law or in equity, and a *devastavit* fixed upon him by a regular suit, before the sureties can be called upon; and various authorities are cited, but they will be found, on examination, to refer to suits at the relation of a creditor.

Until judgment against the executor or administrator for the amount of the debt, and that he has assets to pay it, the demand of the creditor is against the estate. After a judgment of assets, &c., the executor or administrator becomes a trustee for the creditor for the application of the assets to the debt. It is then only that he assumes the character which he always bears to the legatees and next of kin, that of a fiduciary.

A recovery against an administrator is not a necessary preliminary to a suit by distributees against the sureties on the bond of such administrator. Owings *v.* Collinson, 3 Gill & Johns. R., 25. Williams *v.* Hicks, 1 Murphy's R., 437. Chairman *v.* Moore, 2 ibid., 22. Lucas *v.* Curry, 2 Bailey's R., 403.

5. It is also urged that the account taken at the instance of Love, the executor, is not binding upon his sureties.

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It is certainly *prima facie* evidence of his indebtedness as against 613
his sureties, though they were not present at the time it was taken and the amount ascertained. See Treasurer *v.* Bates, 2 Bailey's R., 362. Lucas *v.* Curry, 2 Bailey's R., 403. Heard *v.* Lodge, 20 Pick. R., 53.

But we admit the sureties might impeach it by direct proof of errors, omissions, &c.; and in this case the appellant availed himself of the opportunity—went into an examination of the accounts, called witnesses, and in this bill of exceptions admits that he failed to show any errors therein, or to establish a *devastavit* prior to the date of the bond.

IV.—As to the exception to the introduction of the Hon. D. L. White to prove the contests of the petition of Love, executor, for a settlement of his accounts, (the loss of which was proved by the testimony of Gilchrist, the present Judge of Probate,) on the ground that a record cannot be proved by parol evidence.

It is laid down that, if a record is lost, after proof of its loss, its contents may be proved, like any other document, by any secondary evidence, when the case does not, from its nature, disclose the existence of other and better evidence. 1 Greenleaf's Ev., sec. 509.—1 Phillip's Ev., 386-7, and Cowen & Hill's notes, 1067. 2 Hayw. R., 243. Arg't of Haywood. 2 Murphy's R., 255.

V.—Appellant offered to give in evidence, in the court below, a mortgage executed by John C. Love to the appellee, on real and personal estate, to indemnify him against loss by reason of his suretyship; which, on the objection of appellee was rejected; and this is also assigned for error

The appellant did not offer any proof with it that anything had been realized by the appellee from this security, or that he might have done so without reasonable diligence. It is not indemnity to defeat this action until it has been effectual as such. The case cited at bar of Knight *v.* Hughes, from 3 Carr & Payne, 467, was one where the surety, who brought his action for contribution, had received money from the common principal to be applied to the debt.

If the appellant has any claim to share the fruits of this security, he should prefer it in a court of equity; and if a proper case was made before the court, it might, by injunction, restrain the appellee from proceeding on his judgment against appellant till the security was exhausted. But alone, it cannot defeat the appellee's action, or reduce the amount of his damages.

But there is another objection to its receipt as evidence. It is, if 614
it is to have any effect, matter in confession and avoidance, and, as such, by Reg. Gen. of January term, 1846, of the Supreme Court, should have been specially pleaded.

I have not noticed the error assigned in overruling and sustaining the demurrers to the pleadings particularly, nor have I entered into a critical examination of the various prayers for instruction refused, or of the charges given to the jury, because I feel satisfied, if I have maintained my position here assumed, they will be found to cover the whole case, and authorize an affirmance of the judgment of the court below.

VI.—Some exception was taken to the first or special count in the declaration, which, it was contended, was opened to the appellant by the demurrer to one of his special pleas.

The special count, is, I think, substantially good; but if found by the court to be defective, yet the count for money paid, laid out and expended by the plaintiff for the defendant, is sufficient without the general count. Upon this point, see Cowell, *v.* Edwards, 2 B. & P., 268. Pitt *v.* Pursford, 8 Meeson & Welsby's R., 538. Calton *v* Simpson, 8 Ad. & Ellis' R., 136.

VII.—It was also alleged that the appellee should have shown the insolvency of John C. Love, the principal in the bond, before he could resort to the co-surety for contribution. Held not necessary in Cowell *v.* Edwards, 2 Bros. & Pul., 268. Judah *v.* Micure, 5 Blackf. R., 171. Roberts *v.* Adams, 6 Porter's R., 361. Goodall *v.* Wentworth, 20 Maine R., 324. Olin v. Greenleaf, 3 N. Hamp. R., 270.

Upon the whole case the appellant seems to have had the benefit of every defence which he was entitled to, and that substantial justice has been done between the parties by the judgment of the court below.

Archer, in reply, contended:

1. That the bond upon which Gibson was sued was not a valid bond, and no recovery ought to have been had against him. It was taken contrary to the statute. The condition of it was so framed as to act retrospectively, and not prospectively, as required by statute.

2. There was no breach of the condition. The liability of sureties upon a bond of this character is to pay upon failure of the principal, unless there be something to the contrary expressed in the con-

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615 dition. A refusal by the principal to pay is not a breach, because *non constat* he might be compelled to pay by suit. Before the surety can be made liable, the debt must be reduced to a *personal liability* on the part of the executor, or administrator, by showing waste—by establishing a *devastavit*—by proceedings at law, in chancery, or in the courts of ordinary, if the latter have equity powers. The County Courts, or Courts of Probate in this State do not possess such powers. They, therefore, cannot, by any proceedings authorized by law, ascertain whether there has been a failure of the principal or not. This failure must be ascertained before the surety can be made liable, and this was not done in this case.

3. The relators are not shown to be the proper persons to whom payment should have been made. The suit is by legatees, and yet neither does the pretended order of the County Court show the persons entitled, nor does the will any where show that the relators are residuary legatees—and if so, what were their respective interests.

HAWKINS, Justice, delivered the opinion of the court:

This was an action of *assumpsit*, brought by Gibson against Love, for contribution of this portion of the amount paid by him (Gibson) upon a judgment recovered in favor of Colson and others, upon an executor's bond. The fact of payment is shown upon the record, and is not contradicted.

It is not the intention of the court to take up *seriatim* all the errors assigned by appellant, but it will, in a general discussion, express its views and opinions to such extent as may be requisite to a decision of the case.

That the form of the action brought (count for money paid) is proper, there can be no doubt, and it is needless to cite authorities, but we refer to 1 Stephens, N. P., 324. 2 Greenleaf Ev., 93. 6 Meeson & Welsby, 168.

It is contended that the judgment against Gibson, introduced as evidence in the court below, was not at all conclusive upon Love, and that he had a right to make the same defences as if he had been primarily and originally sued.

It certainly is a rule that a verdict or judgment does not bind any person, unless he be a party to the suit, or be in privity with the party, or possess the power of making himself a party. The question here arises, is the judgment against Gibson to be deemed *res adju-*
616 *dicata* and conclusive against Love, owing to the facts and circumstances of the case, as shown by evidence, or exhibited by the pleadings.

Where the money sought to be recovered under the count for money paid, has been paid under a judgment against the plaintiff, the record of the judgment is always admissible to prove the *fact* of the judgment and the *amount* so recovered. 1 Phillips & A. on Ev., 507. 4 T. R., 589; and where the record only seeks to show as *fact* that the *judgment was rendered*, or the *verdict given*, it can never be considered as *res inter alios acta*. 1 Greenleaf Ev., sec. 538, p. 576.

It is not, however, to be considered as evidence of *ulterior* facts embraced in it, or of those facts on which the judgment is founded, unless the party against whom the action is brought had due *notice* of its pendency, and might have defended it; in which case the record is said to be conclusive as to all the material facts contained in it. 2 Greenleaf, sec. 116. The rule in relation to notice was laid down by Butler, J., in the case of Duffield *v.* Scott, et al., 3 T. R., 374, and has been adopted by able legal writers as a cardinal principle, settling the doctrine upon this matter, vide 1 Smith's Leading Cases, 139, 2 Greenleaf, sec. 116, and has also received the sanction of decisions of courts of the highest respectability. Justice Buller remarks: "The purpose of giving notice is not in order to give a ground of action; but if a demand be made, which the person indemnifying is bound to pay; and *notice be given to him*, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action is not bound to pay the money."

This principle is reiterated *verbatim* in the case of Smith *v.* Compton, 3 B. & Ad., 407, and is quoted as decisive authority in Kip *v.* Bingham, 6 Johnson R., 158. Swarthout *v.* Payne, 19 John., 296. 1 Wendell, 20.

The same principle is found in 4 Mass. R., 358, and in the case of Clark's executors *v.* Covington, 7 Cranch, 308, coupled with the proviso, that if the judgment is fairly and honestly obtained. In Bladsdale *v.* Babcock, 1 John. R., 517, a record having been offered in evidence, it was objected to, because the party defendant had received merely notice of the suit, and not notice also *when the cause was actually tried*. It was ruled by the court that the first notice to 617
defendant was sufficient, and he was bound to know all subsequent proceedings, without a special notice of the time every subsequent court was to be held.

In 13 Johnson, 226, no *actual notice* of pendency of former action was averred, but that the party was a witness in the former suit; this was deemed by Judge Spencer an averment of *a fact tantamount*. We have taken some pains to ascertain the true principle upon this subject of notice, for when correctly understood, the task becomes comparatively easy as to its application. The decisions we have quoted go to the effect to declare, that if notice in this suit has been given to Love, he stands virtually in privity with Gibson, as to the effect of the judgment rendered against Gibson, if that judgment was fairly obtained, and no collusion existed either between Gibson and the parties who recovered the judgment against him, or [illegible] principal obligor of the bond.

The defendant in his plea says: "And although true it is, that afterwards, to wit, at Spring Term, 1845, of Gadsden Superior Court, a suit was instituted against said plaintiff, as an obligor on said bond or writing obligatory, in the name of John Branch, Governor, &c., for use of John Colson and others, yet the said defendant in fact saith, that no valid breach of the condition of said writing obligatory was assigned in the declaration in said suit, and no legal cause of action therein set forth, and that the said plaintiff was then and there so advised by the said defendant, and was then and there, before the rendition of the judgment in said suit, called upon and requested by said defendant to resist the said suit by all legal ways and means, but that the said plaintiff to the contrary thereof failed, and neglected to make legal defence to said action, and permitted the judgment to be rendered therein, and hath since paid the amount thereof, though not legally compelled to pay the same."

Here is a clear admission by the defendant that he knew of the pendency of the suit, and that, too, in time sufficient to have put in pleas to the action. He says, indeed, that he advised Gibson that there *was no valid* breach of the condition of the bond assigned in the declaration, and *no legal cause* of action therein set forth; but does not this language indicate rather defects in the mode and manner of conducting the suit, than that no suit at all could be sustained? Why did he not, if he was so well aware himself of the illegality of the bond, say so *in totidem verbis* to Gibson? But he speaks in gene 618
ralities—he uses no definite language—points out no specific error, and gives no clue by which Gibson was to shape his defence.

The first case cited by us, (Duffield *v.* Scott, 3 T. R., 374,) was decided directly upon an admission in the pleadings. After Love had notice of the suit, and, as before remarked, it seems from his plea it was in time to plead, why did he not request to be permitted to join in the defence—unite in shaping the pleadings, and in fine, defend the action, although not a party to the record? What is the object of notice in these cases of co-sureties? It is to enable parties in interest to do these very things, if they should deem it requisite—and not, after the utterance of some general allegations of error, either to hold aloof altogether, or to stand passively by and await the termination of the suit; and then if, perchance, on being sued for contribution, plead a defence based upon an hypothesis, saying if the party had pleaded such and such pleas, judgment would not have gone against him.

If the surety has notice of the suit, and he does not choose to defend it, he thereby waives all the defences he might otherwise have to the introduction of the instrument to be introduced in evidence, and his right is gone to contest its validity in a collateral way in a suit brought by the co-surety for contribution, for it must be deemed *res adjudicata*.

If there was any thing to show that the judgment was not fairly obtained, the case would present a different aspect. But nothing of the sort appears upon the record. That the motives of Gibson were honest can scarcely be doubted, when he pays the whole debt, trusting to the contingencies of litigation to recover half only from a co-surety with himself. It is true, he had a mortgage, but this mortgage enured as much to the benefit of Love, after paying his portion, as to Gibson, the principle of substitution applying equally to cases between co-sureties and those between a surety and his principal.—Littledale *v.* Robinson, 2 Brock. R., 169.

The principal of contribution does not seem to have sprung from contract, but is based on a principle of justice and equity, that one person should not be singled out by the creator to pay the whole demand; and where this occurs, the law intervenes and places sureties relatively to each other in a state of equality as to the amount paid, and gives the party paying a remedy by action for contribution.

619 This right of action grows out of an implied agreement, that if one surety shall be compelled to pay the whole, or a disproportinate part of the debt, the other shall pay such a sum as shall render their common burden equal. On page 290 of 6th Wendell's Reports, the court remarked in relation to this subject: "The action on the money counts are resorted to as substitutes for bills in chancery, and ought to be encouraged, whenever the law affords no other remedy, and where a court of equity would compel the defendant to repay to the plaintiff a sum of money which the latter has been compelled to pay for his benefit."

It is said that there can be no recovery now, because the bond for which the original suit was brought is void, it not having been given in compliance with our statutes. In accordance with the views we have expressed, that instrument cannot be inquired into in this collateral manner; if there were objections to its illegality, they should have been brought forward in the suit against Gibson. It must be recollected that this bond is not sued upon in this case, but is introduced merely as a piece of evidence, showing the original undertaking and the liability of Love as a joint and several obligor. Nor was it necessary to the conclusiveness of the former judgment, that issue should have been taken upon the precise point, (for instance, the bond,) which was controverted in the present action; it is enough if that point was essential to the finding of the former verdict. 1 Greenleaf's Ev., 572—citing 2 Saunders, 159, note, (10.) 7 Pick., 341. Peake's Cases, 219. 4 Dallas, 436. Besides, the judgments of courts of competent jurisdiction are presumed to be well founded. *"Res adjudicata pro veritate accipitur."*

We feel ourselves supported in the position last taken by the cases cited by counsel for appellee, from Massachusetts and Alabama.—Ford *v.* Keith, 1 Massachusetts, 139. Carr *v.* Burns, 6 Ala., 780. In the first case, it was decided that a surety may recover of his principal, although the money was paid for him upon a usurious contract made by the principal, and which *he* might have avoided. In the second, it was held that where one surety has been compelled by suit to pay the joint engagement, it is not competent for a co-surety, when sued for contribution, to show that the note, as between the principal debtor and payee, was without consideration.

Besides these, there are other cases showing that, although the original contract was void, or illegal, or could not have been en-
620 forced, if legally defended; yet, if the money sought to be recovered was paid in good faith, though technical defences were not pleaded, actions of *assumpsit* could be successfully maintained. See Firth v. Sprague, 14 Mass. R., 453. Here a party to a bond had paid on account of a breach of it by the principal, and brought *assumpsit* to recover the amount so paid. From the report of the case, it appeared that the bond was given in Turk's Island, and from the opinion of the court, it would seem that its legality was contested during the trial. The court say—"But the verdict was right, even if *there was no law authorizing the requisition of the bond* in this case. For admitting that requisition to have been wholly arbitrary on the part of the government of the Island, the surety who stepped in, in aid of the principal, has a right to indemnity, if he has been compelled to pay the penalty, without any fraud or negligence on his part." See, also, Riley and Wright *v.* Seymour, 1 Wendell, 143.—Swarthout *v.* Payne, 19 John. R., 296.

It is contended, also, that the payment by Gibson was a voluntary one, and that he was not compelled to pay.

The payment of debt by the surety, on the default of the principal, is not deemed a voluntary, but a compulsory payment. It is the legal liability that raises the presumption of a compulsory payment. Chitty on Contracts, 594. Thus, in 8 Mees. & Wels., 538, where one of two persons who, as sureties for a third, signed, together with the principal, a joint and several promissory note, on the note becoming due paid the amount although no demand was made, or action brought against him by the holder, it was held that such payment could not be deemed voluntary, and that he might sue his surety for contribution. 20 Maine Reports, 324. 3 N. H., 270. 5 Howard U. S. R., 103. Hale *v.* Smith. Judgments, too are presumed to be *in invitum. In presumptione juris, judicium redditur in invitum."* Coke Litt., 248.

A mortgage given by John C. Love, the principal obligor, to Gibson, and dated long posterior to the giving of the bond to indemnify Gibson as to his suretyship, was offered in evidence, but was ruled out by the court. What the party intended to show by its introduction, the record does not show—if to prove payments upon it was the object, and this appeared by the record, the court would have erred in its rejection, for Gibson would have been obliged to deduct any amount paid or reimbursed him, and he could only be entitled to contribution on the balance. Theobald on Pr. & Se., 267. But as 621
it does not appear by the record, that it was introduced to show payment, we cannot say that the court erred in ruling it out.

Upon a review of the whole case, applying those equitable principles of which we have spoken as being appropriate in this form of action, and being of opinion that the judgment against Gibson must be considered as *res adjudicata*, we think that Love is bound in conscience and in law to pay to Gibson the amount which he has advanced for his benefit.

The judgment of the court below is affirmed.

Per curiam.

JAMES LANIER AND BENJAMIN C. WEST, APPELLANTS, *vs.* ELIZABETH CHAPPELL, AN INFANT, BY HER NEXT FRIEND, THOMAS MONROE, APPELLEE.

Where there was a contract to pay money to one, as guardian, by a company of which he was at the time a member, this was not such an union of the characters of debtor and creditor in the same person as to extinguish the debt—it merely suspended the remedy as to the guardian; though, in such case, the infant's remedy is not suspended, but he may sue by his *prochein amie.*

An infant, by her *prochein amie*, brought an action of *indebitatus assumpsit* for the work and labor of slaves. A note had been given to her guardian for the hire of the slaves, and the contract as to the time of the hire and labor was closed and executed. Held, notwithstanding the *written* contract that this form of action would lie.

Replication of *infancy* to a plea of the statute of limitations is good: and a rejoinder thereto that the infant had a guardian at the time the action accrued and long after, was held to be bad on demurrer.

Appeal from Gadsden Circuit Court.

The case was this: An action of *assumpsit* was brought by Elizabeth Chappell, a minor, by her next friend, Thomas Monroe, for the hire of certain slaves belonging to the estate of the said minor.—The declaration contained but one count in *"indebitatus assumpsit"* for the work and labor of the said slaves. To this count the defend- 622
ants who were sued as the surviving partners of a firm doing business under the name of the "Quincy Steam Saw Mill Company," pleaded—1. *Non assumpsit.* 2 Payment. 3. That defendants had delivered their promissory note in full satisfaction of the plaintiff's demand. 4. The statute of limitations.

On the plea of *non assumpsit* issue was joined by plaintiff. To the plea of payment plaintiff replied a denial, and issue was taken thereon.

To the plea of satisfaction by the delivery of defendant's promissory note, the plaintiff replied specially that the note fell due before the commencement of this action and never was paid, and that plaintiff was the legal holder thereof at that time. Upon which allegations issue was joined.

To the plea of the statute of limitations plaintiff replied "infancy." To this last replication defendants rejoined that plaintiff had a guardian. And to this rejoinder plaintiff demurred. The demurrer was sustained by the court and the defendants compelled to take issue.

Defendant's counsel praved the court to instruct the jury "That, if they believed from the evidence that the contract upon which this suit was brought was made by Lanier as the lawful guardian of Elizabeth Chappell, with the Quincy Steam Saw Mill Company, of which he was at the time a member, that the right to receive and the duty to pay united in the same person, and the debt became thereby extinguished."

The court refused to give the instruction and the jury found for the plaintiff.

The counsel for appellants assign the following errors:

1. The court erred in sustaining the demurrer to the rejoinder to the replication of "infancy."

2. In refusing to give the instruction asked by the defendants below.

Carmack, Stephens & Baker, for Appellants:

The record in this case presents the following questions:

1. Can this suit under the proof be maintained in the name of Elizabeth Chappell by her next friend, Thomas Monroe?

Elizabeth Chappell appears to be an infant, and the question occurs whether the contract upon which this suit is brought was made *with her?*

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623 The proof in the case shows that the only contract made was with Lanier, the former guardian of Elizabeth Chappell. If this be so, it follows that no other person than Lanier can sue upon the contract. If Lanier declines to sue, then the present guardian may sue in the name of Lanier for the use of the present guardian. The case of Moseley, Ex'r, &c., *v.* Williams, Florida Reports, 304, is in point.

2. No contract was made with the *plaintiff*. The contract was made by all the defendants *with Lanier*, at that time the guardian of Elizabeth Chappell, the plaintiff. He had the legal right to hire out the property of his ward, and to make such contract for that purpose as he chose. The right of the guardian must be exclusive.—If the ward may repudiate the contract thus made by the guardian for her benefit, then she can only elect to charge the guardian on his official bond with the true value of the hire.

The ward cannot repudiate the contract made, and set up another and different contract never made in fact. The defendants clearly made but one contract, and that was *in writing* with Lanier. The guardian and the other defendant cannot be bound by *another*.

They are bound by the real contract made, and the same can be enforced in a court of equity, if not in a court of law. This court cannot make contracts for parties, and therefore cannot treat as a nullity the contract made with the guardian and *imply* a contract made with a different person.

3. The court erred in sustaining the demurrer to the rejoinder.—The replication is "infancy." The rejoinder states that the infant, at the time the contract upon which suit is brought became due, had a lawful guardian, capable of suing upon the contract.

The replication is bad, because the action of *assumpsit* is not included in the saving clause of the statute of limitations in favor of infants. Thompson's Dig., 443, part 2.

4. The court erred in refusing to give the instructions asked for by defendant's attorneys.

Dupont and *Thompson* for Appellee:

The only point raised by the instruction prayed in the bill of exceptions is that "where the right to receive and the duty to pay unite in the same person, the debt becomes thereby extinguished," &c.—Whether the doctrine contended for in the prayer be true or not, it
624 is not material to enquire in this place. It will be sufficient for us to show that it is not applicable to the circumstances of this case, as developed by the evidence.

The evidence proves that James Lanier, one of the defendants, as guardian of the plaintiff, hired to the firm of which he was a member the negro slaves, compensation for whose services it is the object of this suit to recover. Now the doctrine above contended for will be found to be inapplicable in this, that "the duty to pay" was incurred by *the copartnership firm* of which James Lanier was a member, and not by him in his individual character. Indeed, he never took upon himself, in his individual character, "the duty to pay, nor could he have been made *liable* "to pay," but in virtue of his character *as a copartner* of the Quincy Steam Saw Mill Company. As to the "right to receive," this was also in his special and qualified character as guardian; and the duration of this "right to receive" was cotemporaneous only with the existence of his office as guardian. It is perfectly manifest, then that James Lanier who had incurred "the duty to pay," was a different *character* from the James Lanier whose right it was to receive this demand. If the doctrine contended for by the appellants be at all applicable to his case, it is so only to the extent of the *"remedy"* as presenting a *technical difficulty* in the maintainance of an action at law upon this demand by *James Lanier;* but certainly it does not operate to the extent contended for in the instruction prayed, to wit: to "the extinguishment of the debt."—Vide Bradford *v.* Williams, 4 Howard S. C. R., 587.

But supposing that, according to the technicality of legal proceedings, James Lanier in his *two characters* be considered as *one and the same person,* then we contend that "the right to receive" must be considered with reference to the date of the legal demand, to wit:—the *time of the institution of the suit;* at which period it is very evident from the testimony that James Lanier had no "right to receive" the demand, he having been previously dismissed from the guardianship of the plaintiff. Vide Richards *v.* Richards, 22 Eng. Comm. Law Rep., 119.

That the doctrine contended for is laid down too broadly in the instruction prayed will be made manifest by adverting to the very common case of a firm executing its note payable to one of its own members, or the stronger and not infrequent case of an *individual* drawing a note payable to *himself*. In these instances, it is true, that the technical difficulty of maintaining an action at law exists so 625
long as "the right to receive" and "the duty to pay" unite in the same person; and to this extent the *"remedy"* is affected. But it will not be seriously contended, that in the former case *"the debt was extinguished,"* or in the latter that the note was absolutely *"void;"*—the utmost that can be contended for in these instances is that the debts are *inchoate,* and only requiring *an assignment* to impart to them full life and vigor.

In the instance just cited no action at law could be maintained so long as "the right to receive payment" remained in the payees of the note; but the moment that "the right to receive," passed out of the payees by assignment, and vested in a third party, the *technical difficulty* is removed and the action is maintainable; which conclusively demonstrates the correctness of our position that it is the *remedy* only, and not the *debt,* which is affected by the union of the character of creditor and debtor in the same person. Vide Chitty on Bills, 52. Ibid., 27, note b. 5 Cowen R., 711. 22 English Common Law Reports, 119.

The reasoning in the foregoing cases is much stronger when applied to the circumstances of the case at bar. It may be true that so long as James Lanier, one of the firm of the Quincy Steam Saw Mill Company, retained his office as guardian, *he* could not avail himself of the *legal remedy* to enforce the payment of this demand in favor of his ward, but the moment that his character as *creditor* was terminated by his dismissal from the guardianship, "the right to receive" vested in some other person and the technical difficulty was immediately removed. In order to show the strength of the argument as applied to the circumstances of this case, we contend that "the right to receive," or in other words the *remedy* was not *exclusively* with the guardian—the infant ward might, by leave of the court, have sued for this demand by *"prochien amie,"* notwithstanding the existence of the guardianship; and we venture nothing in asserting that the court will never hesitate to grant its concurrence for the protection of the right of the ward, whenever it is made to appear that the guardian is derelict of his duty. 4 Iredell Eq., 117, 121. Vide 1 Black. Com. 386, margin 465. Thompson's Digest, page 326, paragraph 5.

It will be noted, in this connection, that this suit was prosecuted by *"prochien amie,"* and that the plaintiff counted upon the *original consideration,* and not upon the promissory note which was given to 626
secure the payment for the hire of the slaves. The promissory note was introduced in evidence for two purposes, to wit: 1. to establish the value of the services of the slaves and 2, to sustain the replication that the note was still *unpaid* and in the possession of the plaintiff. Vide Chitty on Con., 593 to 599 and notes.

The propositions deducible from the foregoing argument and upon which we rely for an affirmance of the judgment are as follows:

I.—That the union of debtor and creditor in the same person, will operate an extinguishment of the debt *only* when that union has been effected *by the act of the original parties to the contract;* but that when that union is produced by *operation of law,* it does not *extinguish the debt,* but only *suspends the remedy* for the time being.—2 Williams on Ex'rs, 940. 1 Salk. R., 306—Wankford *v.* Wankford, by Holt, C. J.

II.—That in case of a guardian becoming a debtor to the estate of his ward, not even the *remedy is suspended,* for the minor may sue by *"prochien amie,"* notwithstanding the existence of the guardianship. 1 Black. Com., 386, margin 465. Thompson's Digest, 326, paragraph 5.

But should the court be against us on these propositions, then we assume,

III.—That the point of law embraced in the instruction prayed and refused was not raised under any issue made by the pleadings, and, as an abstract or hypothetical question, the judge was not required to declare the law in reference thereto.

1. The point was not raised by the pleadings. Vide, Rules of Practice for the Circuit Courts, page 10, par. 3.

2. As a hypothetical question the judge was not required to declare the law in reference thereto. 1 Crauch, S. C. Reps., 309—Hamilton *v.* Russell.

From the nature of the evidence incorporated in the bill of exceptions, it is anticipated that an effort may be made to relieve the defendants from the obligations resulting from the general law governing "copartnerships," by an attempt to distinguish the company of which these defendants were members, from an ordinary trading company. Should this effort be made we then assume the following positions, viz:

1. That the "Quincy Steam Saw Mill Company" was a *trading*

627 *company within the limits of its ostensible objects*, to-wit: *the sawing and vending of lumber.* Vide Collier on Part., 657, citing 1 Swanst. 495—Crawshay v. Maule. Ibid., 518. 1 Jac. & Walk., 208—Jeffreys *v.* Smith.

In the authority above cited a mining company was held to come within the definition of a trading association, and we can perceive no good reason why the same character may not attach to a steam saw mill company.

2. That as to the power of each member of the company to bind the company by contracts, (even should this association be viewed as a joint stock company) the general law of partnership must prevail, there being in this case no deed of settlement, limiting the authority of the individual members of the company. Collier on Partnership 645, 652, 661.

3. As to the power of an individual partner to bind the firm, the general rule is, "that the act or agreement of one partner, with reference to and in the course of the partnership business and affairs, and the management thereof, is, in point of law the act or contract of the whole firm and binding on them, *although it violate some private agreement between the parties.*" Chitty on Contracts, 200, 201. 4 Cowen Rep., 282—Reynolds *v.* Cleveland.

In the case at bar the subject of contract was the hiring of laborers to carry on and conduct the ostensible business of the company.

As to the saving in the statute of limitations see 15 Viner Abr., 104.

HAWKINS, Justice, delivered the opinion of the court:

Elizabeth Chappell, an infant, &c., brought an action of *indebitatus assumpsit* in the court below, against James Lanier and Benjamin C. West, the appellants. The declaration charges them as surviving partners of a concern, trading and doing business under the name, style and firm of the Quincy Steam Saw Mill Company, for the work and labor of the servants and slaves of the plaintiff done, performed and bestowed by them in and about the business of the defendants, at their special instance and request. The following note was attached to the declaration:

"On the first day of January next, we promise to pay James Lanier, guardian of Elizabeth Chappell, minor heir of Benjamin Chap-
628 pell, deceased ,three hundred and thirty-five dollars, for the hire of two negro boys, named Edward and Henry.

JAMES LANIER,
Treasurer Steam Saw Mill Company.

January 1, 1841.

To this declaration the defendants in the court below pleaded—1. Payment. 2. That they delivered the plaintiff, before the commencement of the action, a promissory note for the amount sued for, signed by James Lanier, Treasurer Steam Saw Mill Company, and payable to James Lanier, guardian of Elizabeth Chappell, and that the same was taken in full satisfaction and discharge of the several promises in the declaration mentioned, and of all damages by the plaintiff sustained, by reason of the non-performance of the same, and was accepted of and from the defendants in full satisfaction and discharge of the promises and damages.

3. The statute of limitations.

To the first plea the plaintiff replied non-payment and tender of issue.

To the second plea, that the note at the time of the commencement of the action was and still is wholly due and unpaid, and that plaintiff is the holder thereof.

To the third plea, of the statute of limitations, the plaintiff replies *infancy.*

In the consideration of the case, we will, in the first place, notice the instruction asked for by the appellant, and refused by the court below, to-wit: "That if the jury shall believe from the evidence, that the contract upon which this suit is brought was made by James Lanier, as the lawful guardian of Elizabeth Chappell, with the Quincy Steam Saw Mill Company, of which he was at the time a member—that the right to receive and the duty to pay united in the same person, and the debt became thereby extinguished."

We cannot think that the court erred in declining to give this instruction. In such a case, we do not regard the debt extinguished, but merely the remedy, so far as respects the guardian, suspended. Of course, as long as the fiduciary character of Lanier existed, an action could not be brought upon the note, for the reasons assigned by the counsel for the appellee but to say that the debt itself became extinguished, owing to this temporary and fortuitous union of

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payee and promisor, would be, we think, as little in consonance 629 with justice as the rules of law.

As soon as Lanier ceased to be the guardian of Elizabeth Chappell, this peculiar character of Lanier, to wit, the right to receive and the duty to pay, underwent a radical change, and the duty to pay only remained. The books draw a clear and visible distinction between the acts of a *party* and the acts of *law.* For instance, where the debtor was appointed executor—this at common law was deemed a suspension of the remedy by the *voluntary act of the creditor,* and, therefore, the action was gone, but the effect was different, where the remedy was suspended by the *act of the law.* "Thus, if administration of the effects of a creditor be committed to the debtor, this, being by act of law, is only a temporary privation of the remedy.—Therefore, if the obligor of a bond takes out administration to the obligee, and dies, the *administrator de bonis non* of the obligee may maintain an action for such debt against the executor of the obligor." 2 Williams on Executors, 940. So, in the Commentaries on Equity, vol. 2, page 454, Judge Story remarks: "At law, a testator, by the appointment of his debtor to be his executor, extinguishes his debt, and it cannot be revived; although a debt due by an administrator would only be suspended. The reason of the difference is, that the one is the act of the law, and the other is the act of the party." 1 Atkins, 461—Hudson *v.* Hudson.

The note in this case was a valid one, and given upon a good and meritorious consideration, to wit, the services of the slaves of the plaintiff in and about the business of the defendants, and though the forms of legal proceedings precluded her for awhile from suing upon it, there is no reason, when these technical objections have ceased to exist, that it should not at least be considered as evidence of a contract.

There was here no *voluntary act of the party,* by which she was to be indefinitely bound. She had no option, no discretion to exercise, for all that was vested in the guardian; and inasmuch as he, by the *act of law,* could not sue, the remedy was suspended, until a new and different state of affairs arose.

Before closing this part of the subject, we will refer to the case of Richards *v.* Richards, 2 Barn. & Ad., 447, cited by counsel for appellee. In this case, a married woman being administratrix, received a sum of money in that character, and lent the same to her

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631 It is admitted on the record and proven by evidence, that Lanier and West were partners, and after that fact is established, the act or declaration of either, relating to the subject-matter of partnership, is evidence as to the other. 2 Starkie on Ev., 44-5—1074. Gow. on Part., 63.

There is nothing upon the record to show that Lanier had not authority to bind the firm by his written admissions, or that there was any fraud practiced by Lanier in making these admissions. There is no new contract attempted to be set up by the plaintiff, and virtually it is the same as the written one. In any event there was a legal obligation on the part of the appellants to pay, arising from the consideration received, and to enforce this obligation, this suit is properly brought.

We do not think the court erred in sustaining the demurrer of the appellee to the appellant's rejoinder to the replication to the plea of the statute of limitations. We do not conceive that the plea of the statute of limitations is to operate against plaintiff, on account of the facts set forth in the rejoinder, viz: that Lanier was guardian at the time of the accruing of the action, and continued to act as such guardian, long after said action accrued to him. The remedy was suspended, as to action upon the note, so long as his character of guardian remained; but beside that, the suit is not brought upon the note—he certainly was not guardian at the time of bringing the action.

Although an infant *may* sue by *prochien amie* it is not a consequence that he must do so necessarily to save the statute. The right to sue and the privilege of availing himself of the statute are not incompatible. The law gives both. Besides, to say, that inasmuch as the infant could at any time sue, and not having sued therefore the statute cannot avail him, independent of depriving him of a positive right, it strikes us as a doctrine replete with the rankest injustice to a class of persons, whose interests the courts will go far to protect. Look at the results to grow out of such a doctrine. Suppose the guardian through negligence or dishonesty will not sue, or as in this case, could not sue, then, after the lapse of five years the debt would be barred according to this view. Such a doctrine we cannot countenance. In the case cited from Saunders, "It was said that the infant should have waited until his full age, because the six years had elapsed during his infancy, and therefore he could only
632 pursue his action according to the words of the saving clause of the statute, which is in six years (English act) after his full age, but this was not regarded by the court; and it seems to Saunders, that he may well pursue his action at any time within age, although the six years are elapsed. See for this case the case of *non clarius in finis*, 2 Inst. 519, Cotton's case." 182 Ballantine on Limitations. Our statute of limitations as to its proviso, or saving clause preventing its operation, is almost *verbatim* similar to that of 21 Jac. 1, c. 16, the only real difference between them being that our statute leaves out the clause *"actions upon the case for words."*

The same point taken here, that the word *"trespass"* in the saving clause of the statute did not embrace actions of assumpsit or upon the case, has been repeatedly decided that they were so embraced, as being within the equity of the statute.

In Chandler vs. Villet, Sid. 453, it was expressly adjudicated. An infant by his guardian brought action upon the case upon *assumpsit;* the defendant pleaded statute of limitations, and plaintiff demurred, and the question was upon this proviso, which saves to infants actions of trespass, &c., and it was urged that trespass upon the case is not mentioned in this saving. But the court were of opinion, that this saving extends to actions upon the case (as no doubt it was intended) for there is a saving of trespass generally, and all actions upon the case are trespasses (scilicet) trespass upon the case, and it shall be mischievous, if other construction shall be made." Same point also decided in 242, sec. 15, Viner, Ab. 104.

The case of Shandler *v.* Villet is reported at large in 2 Saunders' Rep. 120, where there is a citation of the case of Crosier *v.* Tomlinson, 2 Moad. Rep. 71. In the latter case the court said "that upon the whole frame of the act it was strong against the defendant, for it would be strange that the plaintiff might bring an action of debt and not of *indebitatus assumpsit*. Where the scope of the act appears to be in a general sense, the law looks to the meaning, and it is to be extended to particular cases within the same reason, and therefore they were of opinion, that actions of trespass mentioned in the statute are comprehensive of this action because it is a trespass upon the case, and the words of the proviso save the infant's right in actions of trespass." Fitz. 81, Ballantine on Limitations, 83, 185-6-7.

The judgment of the court below is affirmed.

Per curiam.

Douglas, Ch. Justice, remarked: 633

That Judge Lancaster and himself, in order that their views, in regard to the first proposition discussed in the opinion pronounced in this case, may not be misapprehended or misunderstood, deem it proper to say that they have reconsidered the doctrine of extinguishment as laid down by Judge Lancaster in the opinion delivered by him at the last term of this court, in the case of Williams *v.* Moseley, 2 Florida Reps. 351 to 357, and find no cause to doubt its correctness, and therefore adhere to it; but that they do not consider the principles there asserted, as at all applicable to the facts of this case, which are very clearly, they think, distinguishable from those presented in the case of Williams v. Moseley. We have no doubt, continued the Chief Justice, of the plaintiff's right to recover in this case upon the second ground assumed. And indeed, we can see no good reason why she might not have maintained an action of *indebitatus assumpsit* at any time after the first of January A. D. 1842. On that day it appears that there was three hundred and thirty-five dollars due from the Quincy Steam Saw Mill Company for the hire of her two negroes. The contract was then fully executed. The authorities cited abundantly shew that, in such a case, *indebitatus assumpsit* will lie. And in Thomas *v.* Dyke 11 Vermont Reps. 273 it was held that "an infant may sue by *prochien amie* notwithstanding he has a guardian, if the guardian does not dissent;" and in Isaac *v.* Boyd, 5 Porter's Reps. 388, it was said that a *prochien amie* is one admitted by the court to prosecute for an infant, because otherwise the infant might be prejudiced by the refusal or neglect of his guardian. The court may control him as well as a guardian *ad litem,* and should permit or direct what is most for the interest of the infant." Longnecker vs. Greenwade, 6 Dana Reps. 516, 2 United States Digest 162, No. 111-163, Nos. 131, 142. The trust of a *prochien amie* (it is said, 10 Petersdorf 579) was first created by statute, though by long practice it may now be considered as one of the rights of an infant, and was intended to provide for those cases where the lawful guardian omitted to protect the rights and interests of his ward or was *unable* or unwilling to commence a suit in his behalf. 5 Porters' R., 394.

John S. Shepard, Plaintiff in Error, *vs.* William Kelly, 634
Defendant in Error.

The act of December 11th, 1824 in relation to the foreclosure of mortgages by proceedings in the courts of law, requires *personal* service of notice of the intention of the party to institute his suit. If a party acknowledges service of notice, or appears and pleas or confesses judgment, it is sufficient under this statute to give jurisdiction of the person of the defendant.

An agreement by a defendant, under his hand and seal to confess judgment is not a power of attorney to confess judgment and is not within the prohibition of the statute.

A decree or judgment of foreclosure need not contain any more specific description of the property than a reference to the deeds of mortgage filed with the petition, which specially set forth the property mortgaged.

A judgment or decree of foreclosure under the statute should not award execution against the specific property mortgaged. The law requires that execution shall issue thereon as in other cases.

The following statement of this case was made by the court before proceeding to announce its decision:

This was an action at law brought by Kelly for the foreclosure of two mortgages, which he held to secure to him payment of a debt or liability due to him from Shepard, the plaintiff in this court and defendant below, or at the time of making said mortgages, to become due, and be paid in two instalments as in the said mortgages expressed: one of said mortgages purporting and expressed to be cumulative to the other as security for the same debt or liability for the consideration of an abatement or remission of twenty per cent. of the liability for which the original mortgage was given. The petition sets forth that, when the first instalment on said mortgages became due and payable, the plaintiff instituted suit and obtained a judgment for principal and interest of said first instalment, and decree for foreclosure of all right and equity of redemption of or in the said mortgaged property—and in this suit he alleges the second and last instalment to be due, and prays judgment for that and a foreclosure of the equity of redemption in the mortgaged property mentioned in the said two mortgages.

Upon the petition filed in the court below by the said Kelly the plaintiff in that court, the following endorsement is made:

635 "In Leon Circuit Court. I, John S. Shepard, Mortgagor, defendant in this petition, do hereby acknowledge due and legal service of notice of intention of petitioner to institute this suit, consenting that said petition shall be filed as of the first day of the Spring Term, 1847, of Leon Circuit Court, and do hereby under my hand and seal confess judgment, and agree that decree of foreclosure be rendered at said Spring Term, 1847, of Leon Circuit Court, with a stay of execution till the first day of February A. D., 1848, eighteen hundred and forty-eight.

"Witness my hand and seal.

(Signed) "JOHN S. SHEPARD, Seal."

Upon this state of case the court, under and by authority of the act to authorize the foreclosure of mortgages in the courts of common law of Dec. 11th, 1824, Duval's laws, p. 38, gave judgment at law for the plaintiff, Kelly, for the sum of $9066.40, his principal and interest, and also for his costs, to be taxed by the clerk of the court, and also adjudged, ordered and decreed a foreclosure of the equity of redemption, against the defendant Shepard, mortgagor, and all persons claiming or to claim by, through, or under him of or in the mortgaged premises, in the said deeds of mortgage in said petition set forth and therewith exhibited, and that execution issue according to the statute in such case made and provided, with stay of execution until after the first day of February, 1848, according to the agreement to confess judgment. The following entry also appears in the record preceding the trial, judgment and decree above mentioned:

"Principal sum,	$7,727,06 1-4
"Interest from 1st Feby. 1845 "to May 1847, 2 y. 2 M. at "8 per c.,	1,339,34
"Due 1 May 1847, second instalment, Princ. and Int.	$9066,40.

"The above calculation I believe to be correct.

(Signed) "JOHN S. SHEPARD."

On 6th April, 1848, a motion was made to amend the decree entered in this case at the Spring Term, 1847, by inserting a particular description of the mortgaged property therein instead of the reference to the petition and mortgage, which motion was granted, and on the 636 7th day of the same month in open court an amended decree in said suit was made and placed of record *nunc pro tunc,* in which the mortgaged premises are specified. Upon which said proceedings, petition, consent and agreement of said defendant Shepard, final judgment, decree of foreclosure and amended decree, the defendant Shepard obtained a writ of error returnable before this court, and assigns his errors as follows:

First. The agreement to confess judgment is void under the statute.

Second. There is error in giving one foreclosure on two mortgages.

Third. There is error in the original judgment, because the property foreclosed is not mentioned.

Fourth. There is error in the judgment as amended, because it awards execution against the specific property only.

Fifth. The judgment is incomplete.

Sixth. It does not appear by the amended judgment how much of the original entry is meant to be retained, nor how much is meant to be abandoned.

Seventh. The judgment as it now stands is irregularly entered, and inconsistent in its several parts.

Eighth. The court had no jurisdiction under our statute to render judgment for the debt and foreclosure of the mortgage, because it appears from the petition that said mortgages had been foreclosed at a former term of the court, so that when this suit was instituted no mortgage existed to be foreclosed.

Archer, for plaintiff in error.

The judgment is entitled as by confession. This is error. The alleged confession, endorsed on the petition, was made before the petition was filed, and before suit instituted. This is proved by the endorsement of filing by the clerk, which is made in pursuance of the agreement, as a thing *previous to the filing.* A confession before suit is void under the statute, and the court erred in acting upon it as valid. The waiver or acknowledgement of notice is simultaneous with the alleged confession, but if it were prior in time, the suit cannot be said to have been instituted before the court by such notice, for the notice under the statute is not by judicial writ, but only by

writing prepared and signed by the plaintiff, and is a notice not 637
of suit *instituted,* but of an intention to institute a suit in future.—This intention is carried out only by the filing of a *petition* according to the statute, and by such filing the court is *first advised* of the suit. From this latter date, therefore, the suit may be said to commence.

The agreement endorsed cannot conclude the plaintiff in error, so as to operate as a confession of judgment, or as a "general release of errors"—at all events, not as a "general release of errors," for these are the words of the statute. But if this agreement is no "general release of errors," then it can neither be a judgment by confession, or by agreement or consent—for there can be no such thing as a judgment by confession or consent, which is not "a release of errors." No appeal lies (where the court has jurisdiction) from a judgment by confession or consent, and, consequently, if the plaintiff's judgment is affirmed, on the ground that it is proper confession of judgment, and, consequently, a release of errors, then that is done which the statute prohibits, viz: the defendant is concluded from assigning errors in this court, by reason of an agreement made before suit. It is against the policy of the statute, that a defendant, before suit instituted, and before he has the benefit of advice of counsel, should be forestalled in his defence by injudicial consents, confessions, or releases.

2. The judgment is on two mortgages, which in the foreclosure are treated as *one.* Each mortgage is a separate security, and should be so recognized in the judgment, as well as petition. The decree should be in equity for the sale of the property first mortgaged—and if that was insufficient, of sufficient of the property last mortgaged to make up the deficiency. This is necessary to preserve regularity. Under the *statute,* I cannot understand how two mortgages can be foreclosed in one proceeding. A second mortgagee, holding a subsequent lien on the property in Kelly's second mortgage, would be entitled to redeem the property in second mortgage, by paying so much of Kelly's claim as the property in the first mortgage failed to pay. How could such subsequent mortgagee redeem, if the foreclosure were amalgamated, without being required to pay the whole debt, and discharge the property in the first mortgage? The irregularity in this respect is apparent, and can only be cured by separate proceedings on each mortgage, and as this cannot be done under the statutes without giving two judgments for the same debt, it would 638
follow that the foreclosure of one of the mortgages should have been had in equity. See the concluding paragraph of opinion of the Chief Justice, in the case of Parkhill's administrators *v.* Union Bank.

These objections apply to both the original and amended judgments. There is an additional objection to the original judgment, for which the judge in the court below quashed the execution in the first instance, and which gave rise to the amended judgment, viz: that the foreclosure does not name the property foreclosed, but refers to a paper, not part of the decree, for a specification of the property. This was clearly fatal. A judgment, to be regular and certain, should contain on its face, and not by reference, all the requisites of a judgment. For example, a judgment in favor of the heirs of A. B., would be invalid and erroneous, although it might be easily ascertained who were the parties entitled as such heirs. So a judgment "for the sum mentioned in the note appended to the declaration," would be erroneous for want of certainty.

There are also objections to the amended judgment:

1. It awards execution against the mortgaged property, and that alone, which is contrary to the statute, there being no "other cases" in which such execution is awarded or issued. Besides, this mode absolutely requires the sheriff to seize *all* the property, more than twice sufficient in value to pay the debt. But for the judgment authorizing it, such seizure would be a trespass, and certainly that judgment is erroneous which seeks to justify a trespass. Again: this process is an infringement of a *right* secured by statute to every defendant in execution, viz: the right to substitute other property in lieu of that levied on. Such substitution cannot be permitted under the process required by the judgment, because such process does not authorize the sale of any *other* than the mortgaged property.

2. The amended judgment is irregular—it is incomplete—it is but the conclusion of a judgment, and not only bad on that account, but it does not define how much of the original entry is retained, and how much repealed. Where is the point of junction, at which a union of the two entries takes place, is left uncertain. The judgment should have been entered as an amended judgment, *complete,* and entered *nunc pro tunc* in lieu of the original. For this defect, there is an uncertainty, which is fatal. The first requisite of a judgment is certainly, for by it the rights of the parties are finally settled.

Shepard vs. Kelly.—Argument of Counsel.

639 *Thompson* for defendant in error.

I.—It is alleged by the plaintiff in error, among other positions, that the court below had no jurisdiction of this cause, for the reason, as he contends, that the plaintiff had no existing mortgage to secure his debt when he filed his petition.

The counsel for the plaintiff in error and myself differ very widely on this point, for I contend that there was not only a valid and subsisting mortgage, but the question of *"jurisdiction,"* as I understand the meaning of the term, does not arise in the cause.

1. As to the question of jurisdiction. This is truly said to be the power to hear and determine a cause. Now, whether the instrument sued upon is or is not a mortgage, is a question to be decided by the court when the parties come before it, upon the pleadings and proofs, and whether it decides affirmatively or negatively, it is the exercise of jurisdiction. So the very position assumed by counsel here could not have been maintained by the court below, if it had been urged there, except by the exercise of jurisdiction. 9 Bac. Abr. 245, tit. *"statute,"* is cited to the point, that if a new remedy be given by statute in a particular case, this shall not be extended to alter the common law *in any other case.* I admit the principle, but deny its application to the case at bar. I do not contend that the statute of 1824, authorizing the foreclosure of mortgages by the courts of common law, alters the common law in any other case than that of mortgages; but in this respect I do contend, that it alters the common law in divers particulars, as will be hereafter shown. Nor do I consider the citations from the sup. U. S. Digest in anywise more favorable to the plaintiff in error, so far as I have been enabled to examine the Reports from which the notes are extracted. This is not a *summary* proceeding, nor does it profess to be, nor is it, in fact, so *"stringent"* a remedy as it is argued to be. The object of the statute evidently is to unite the powers of the law and equity courts in the application of a remedy—and while it would avoid multiplicity of suits, it favors the mortgagor, by greatly restricting, if not entirely abolishing, the old common law doctrine of *foreclosure,* which, in many instances, would bear rigorously upon the mortgagor. Instead of ordering the property to be delivered up to the mortgagee, and cutting off forever the power to redeem, it provides for a sale of the property under execution as in other cases, extending, *ex debito,* the privilege of redemption up to the time of sale, and giving him the
640 advantage of a sale, and the surplus, if any remained after the payment of the debt. By the common law, too, the mortgagee, after he obtained possession, and barred the redemption by his decree of foreclosure, might bring an action at law, and recover on his debt, whatever he could establish to the satisfaction of a jury the mortgaged premises were insufficient to satisfy. All this difficulty, and the vexation of the defence of a subsequent suit is avoided, by the equitable provision of a public sale to determine the value, and by a judgment rendered with the statute foreclosure for the mortgage debt.

The act under discussion is a *remedial* statute, and such construction ought to be put upon it as will tend to suppress the mischiefs intended to be remedied. 9 Bacon Abr. 257, tit. *Statute.*

The court is well aware of what the law was before the act—a comparison of this with the provisions of the act, will show clearly the intent of the Legislature, and the end to be attained by its enactment.

The case cited from 3 Humph. R. 313, arose under statute of Tennessee, which gave a summary and stringent remedy against a constable *and his sureties,* for a failure to pay over moneys collected, on a few days' notice to the *constable* only. Under this statute, a judgment was rendered against A. B., constable, and two other persons, not describing or averring them to be sureties, or to have had any notice of the proceeding. The Supreme Court very properly and justly reversed the order, the court below having no jurisdiction of the persons, by notice to them in fact, or constructively, *qua* securities. The two cases from 8 Porter R. pp. 99, 104, arose under a special statute of Alabama, which allowed the State Bank to recover of its debtors by motion, on ten days' notice, and in both these cases it did not appear that the parties were notified. The very summary, and I may add, penal character of these acts, authorized and demanded a most literal construction, and the decisions were doubtless right, but it is respectfully submited that they have no application to the case at bar. Assuming, then, that the counsel are in error in supposing the question of jurisdiction arises in the present case, I now proceed to discuss the other branch of his proposition, upon which he supposes the question to arise.

2. Is there a subsisting mortgage to be foreclosed? It is not denied that there was a large mortgage debt to be paid by instalments; but it is alleged that the mortgage, having been proceeded upon to recover the first instalment due, cannot now be enforced for the re- 641
covery of the other and remaining instalment.

The argument of the learned counsel in this court, it seems to me, is based upon an erroneous apprehension of the meaning of the term *foreclosure* in the act of 1824. Foreclosure, at common law, means the shutting out or exclusion of the equity of redemption of a mortgage—but this meaning is consistent with the provisons of the statute. A mortgage being held by the strict rules of the ancient common law to be a sale and conveyance of the thing mortgaged, upon condition—when the condition was broken, the estate became absolute in the mortgagee, and the mortgagor could not force the mortgagee to allow redemption, except in a court of equity; and if the mortgagee desired to cut off and debar him of his right, he might do so by his suit in equity, and, when decree of foreclosure passed, all right and all equity of redemption was forever gone. These strict common law doctrines have been departed from in most of the States of the Union—some by legislative interposition, and some by the action of the courts. The common law is believed to prevail with the most strictness in the New England States, Does *foreclosure* by our statute have any such effect? Certainly not; for although a *formal* decree of foreclosure is directed by the court, yet it is in fact but *nominal.* Execution is to issue upon the judgment for the debt rendered, with the decree of foreclosure, *as in other cases.* Until a sale actually takes place, the property, possession and legal right of redemption is not barred. If the mortgagor pay the execution to the sheriff, he defeats the foreclosure, and he has a *legal* right to pay. If the sheriff, by direction of the mortgagee, should refuse to accept the payment, a legal tender would be of equal force to defeat and vacate the decree of foreclosure. That the common law in this respect is altered cannot be denied. Even under the common law as it prevails in the New England States, payment and acceptance of the debt, or even a part of it, opens the foreclosure. 8 Vermont R., 164, 6 N. Hamp., 12, 5 Pickering R., 418, 4 Greenleaf, R., 495—showing that there the act of the parties may defeat a foreclosure.

Now, in the case at bar, if the decree had been rendered conformably to the ancient law, for a foreclosure of the first instalment, and the mortgagor had subsequently paid it, and the payment had been accepted, would it not defeat the foreclosure here, and open and vacate the decree? But it was rendered under the statute—in 642
which the judgment for the debt and the decree must be co-existent, and are dependent upon each other. The statute is imperative, that the mortgagor must set forth and show in his petition the amount actually due he must prove it by the production of his evidence of debt, and further verify it by affidavit—the court awards judgment for the debt thus shown to be actually due—the decree of foreclosure is, in effect, but a direction that the mortgaged property is the primary fund for its discharge, and execution by the statute is awarded as in other cases. In New York, there is a statute providing that the court may, in bills to foreclose, direct the sale of the whole property where part of the debt only is due, and apply the proceeds to the whole debt, with a rebate of interest for such part as is not due; and under this act the courts have held that they will so decree only in cases where the mortgaged property is incapable of division. 2 Johns. Ch., 486, 487. 4 Johns. Ch., 534. 5 Paige, 38. We have no statute upon the subject. Indeed, our statute of 1824, for the foreclosure of mortgages, does not provide for any order of sale; it directs execution to issue as in other cases, and which authorizes the officer executing to sell only so much of the property as will satisfy the debt. In New York, there is provision by law for a summary foreclosure and sale by advertisement; and, under this act, it has been held, in the case of a mortgage payable by instalments, if the whole mortgaged property is foreclosed and sold to satisfy the first instalment, subject, however, to the lien of the future instalments, the property is, in the hands of the purchaser in equity, the primary fund for the payment of the future instalments. Cox v. Wheeler, 7 Paige's Ch. R., 248.

In Alabama, where the power to foreclose mortgages is yet confined to the equity courts, they have held, that on the first default, a decree of foreclosure shall be rendered, and a sale ordered to satisfy the sum due, and other sales ordered as the future instalments fall due, until the debt is paid, or the property exhausted; and so in Maryland. But these are chancery courts, and the property is sold by order of the court, and it is the duty of the court to prescribe to its officer the mode in which the decrees are to be executed. In Florida, it is sold under executions as in other cases, and the general law directs the officer in the execution of the process.

If the counsel for the plaintiff in error are right in giving to the

643 *foreclosure,* under the statute, the force and effect of a common law *foreclosure,* then it would seem that the estate of Mr. Kelly, the mortgagee, is absolute at law and in equity, and he has the right to the immediate possession, with a demand for rents, issues and profits, since the date of the decree. If I am right, Mr. Shepard, the mortgagor, is still the owner of the mortgaged property, subject to the lien or incumbrance of the second instalment of the debt, which is now due, and the property may, by the statute, be applied to the satisfaction of the execution issued on the judgment.

The court will observe, that this question was not presented in the court below—that the judgment and decree was rendered by the consent and agreement of the party, and no opportunity was afforded of showing the vacation of the former decree, if, in law and under our statute, such a decree for the recovery of the first instalment, would bar and preclude the recovery of the remaining sum secured by the same instrument. It is not pretended that any portion of the mortgaged property has been executed or in any wise applied to the satisfaction of the former decree; but the claim to revise this, rests on the simple ground, that you have proceeded to recover the first moiety of your mortgage debt, and that proceeding concludes and debars you from the recovery of the remaining moiety, although the property on which it is secured remains untouched.

If there is anything in this objection, it is of the most technical character I have ever heard urged in a court of justice, and I have yet to learn that a court will give a strict and technical construction to a statute, which is remedial in its whole effect, to defeat a just claim. The defendant in error is entitled to every just and reasonable intendment, and, if necessary to support the judgment, the court will construe the consent and agreement endorsed on the petition, as a vacation of the former decree and judgment by the act of the parties.

II.—But this decree and judgment has been rendered by consent and agreement of the parties, endorsed upon the petition, and will the court go behind it for the purpose of reversing the judgment upon purely technical grounds? Various objections have been presented to this *consent* and *agreement,* and I will proceed to notice them.

1. It is said, the *consent* cannot give jurisdiction. This I have already noticed in my argument to show that the question of jurisdiction does not arise in the case.

644 2. By referring to the "*consent,*" which is incorporated into the record, the court will have no difficulty in seeing that its object was the ease and favor of the present plaintiff in error. Its effect is—1. To acknowledge that he had received due notice of the institution of the suit, which is a waiver of the four months' notice which he is entitled to by the statute. 2. To agree that the petition to foreclosure should be filed that day as duly filed, which is a waiver of the filing four months before that day. Both these provisions of the statute are for the benefit and advantage of the mortgagor, and to enable him to have time for his defence, if he has any to make. Surely, a party at any time may waive a right or privilege which he has in law Can it be denied? But it is said he waived the notice; he did not waive the filing. Look at the consent: it "confesses judgment and agrees that decree of foreclosure may be entered at the same spring term, 1847," at which it is to be filed. He is to be presumed to know the law, and to know also when he is asked to consent, it is because the other party cannot enforce the act to be done. But is it without a surrender of some right on the part of the petitioner? Is it without a consideration? Clearly not. The petitioner, on his part, consents that execution of such judgment and decree shall be stayed till the first day of February, 1348. The whole arrangement shows it to have been the result of mutual agreement and concession. The transaction occurred at the spring term of the Circuit Court which was held in April and May, 1847. If this arrangement had not been made, the mortgagor had not consented to waive the requisition of notice and filing petition four months previous to the term, why, the mortgagee, it is presumed, would have given the notice and filed his petition in time to have had his judgment at the fall term of 1847, which occurred in the month of November; ten days after the judgment, his execution would have issued as a matter of course; and by the first of December, he would have been prepared to execute his judgment. Now, by the consent rule, he stayed his execution till the first day of February, 1848, thus giving to the defendant, the mortgagor, till the first Monday of March, the sale day, to pay off the execution, and thereby satisfy the judgment and vacate the decree of foreclosure. There is no pretence of a defence upon the merits, and the whole agreement shows that the defendant surrenders no actual right thereby, but it was, in fact, a favorable arrangement for him.

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But it is said the agreement to confess judgment, or the confession 645 included within the consent, is bad, for two other seasons: 1. It does not state in whose favor the judgment is to be confessed: 2. There is no sum mentioned for which judgment is confessed. It will be recollected that this consent, agreement, or confession, is endorsed upon the petition, which fully states the plaintiff's name, the amount claimed, and all other facts of the case. The consent being endorsed upon it, is to be held, taken, and construed as a part of the consent or confession, and is incorporated in it, and, therefore, complies substantially with the requisition, and shows the objections are not well founded.

The learned counsel, in conclusion, abandoning his design of restricting the consideration of this consent rule, according to its very letter, and without reference to the petition on which it is endorsed, next endeavors, by enlarging its meaning, to bring it within the objection of the statute against powers of attorney to confess judgment, and general releases of error before the suit brought. And the process is this: It is a confession of judgment—a confession of judgment bars a writ of error; therefore, it is a general release of error. The writing which but a few paragraphs before could not, by any possibility, be available as a confession, is now, by force of argument, transformed from a confession of judgment into a general release of error, and so obnoxious to the statute. The position is very forcibly illustrated by the story of the quack doctor, who undertook to cure an attack of fever, by turning it into fits—here, finding his argument not conclusive to himself, he changes his attack, and proposes by argument to turn it into a "general release of error," and then, says he, I can kill it by force of statute. The last effort, I trust, will be as futile as the others.

It is void, say the counsel, because the consent was made before suit brought. Now, as to time, if that be material to the validity, the testimony of the record is, that it was a simultaneous and concurrent act with the commencement of the suit, and was not before it.

III.—Another ground assigned for error is, that an agreement to confess judgment is void under the statute, and Thomp. Digest, 350, is cited. On reference to the statute, it will be found to be directed against powers of attorney, and general releases of error. It does not apply to the case at bar.

IV. Another ground assigned is, that there is error in giving one foreclosure on two mortgages. It appears from the record, that after 646 the original mortgage was due, the mortgagee consented to a depreciation of the amount or sum of money claimed thereon, and to a further postponement of the debt, and its division into two instalments, and the mortgagor executed a second mortgage, on other property, as additional security for the debt. The agreement is recited in the second mortgage. The debt was the same debt as in the first mortgage, and is is conceived that but one judgment was necessary. No authority has been cited on this point, to show its error.

V.—Another ground assigned is, that there is error in the original judgment, because the property foreclosed is not mentioned.

The decree mentions the property by reference to the original petition and mortgages filed in the cause. On reference to the books of practice and forms in the Courts of Chancery in England, the property is never otherwise described than as "the mortgaged premises in question;" but that it is argued ought not to be sufficient here, where the proceedings are not recorded after final decree—especially where the decree of foreclosure creates a legal state in the mortgagee. The counsel has just reversed the order of things in England—the decree of foreclosure is the evidence of a title in the mortgage, not defeasible at law or in equity by the mortgagor, and there a simple reference to the property as the 'mortgaged premises in question,' is deemed sufficient; while in Florida, the foreclosure so called gives the mortgagee no estate in the property mortgaged, but it is to be sold under an execution issued as in other cases, under ordinary judgments, and the purchaser takes the property by virtue of the sale under the execution. If the mortgagee obtains the property, it is by virtue of the sale, in the character of purchaser, and not in the capacity of mortgagee. No authority has been cited on this point, nor have I been able to find any.

VI.—Another ground assigned, is, that there is error in the judgment as amended, because it awards execution against the mortgaged property. In this, the plaintiff in error is mistaken. It awards execution against "the mortgaged property according to the statute." The judgment is, therefore, controlled by law; and if the law gives a recourse over, after the mortgaged property is exhausted, against the other real and personal estate for any deficiency, it may be had under this decree. The effect of the decree is to di-

647 rect the execution *primarily* against the fund provided by the express covenant and deed of the debtor.

But if the counsel on the other side are right in supposing that the execution is, by the decree, restricted to the mortgaged property, it is still within the authority of the law, upon the maxim, *omne major in se continet minus*, it being within the power of the court. An act or judgment may be void for exceeding the authority given to do or pronounce it, when the excess cannot be separated from that portion which is within the authority; but no act or judgment has ever been declared void for not having gone so far as it might have done. Neither can it be declared to be error on the complaint of a party who is not injured thereby. The restriction is against the plaintiff or mortgagee, and he is the injured party, if any one is injured. If it is error, it is an error in favor of the party complaining.

VII.—Another ground assigned for error is, that the amended judgment is incomplete. In compliance with the intimation of the Judge below, the petitioners' counsel amended the judgment by adding thereto a specific description of the property contained in the mortgage, with the appropriate introduction, &c., and to which the court will be pleased to refer. It is contended that a full and complete entry should have been made as the amendment. In this objection, I apprehend there is no force.

VIII.—Another ground assigned for error is, that it does not appear by the amended judgment how much of the original entry is retained, and how much is meant to be abandoned.

The answer to this is, that from reference to the entries, it will appear most fully, that nothing was intended to be abandoned.

IX.—Another, and the last ground assigned for error is, that the judgment, as it now stands is irregularly entered, and inconsistent in its several parts. For the answer to this objection, I crave reference by the court to the judgment as it stands; the irregularities complained of in this assignment are not pointed out, neither is the inconsistency in its several parts shown by specification of the particulars. To the intelligence and justice of the court is it submitted by the defendants in error.

It appears to me that the several errors complained of, viewed in the most favorable aspect for the plaintiff in error, are of the most technical character—that no injury has been done to him, and that the judgment of the court below should be affirmed.

648 *Long & Walker*, for plaintiff in error:

1. The last error assigned (by leave of the court, and not discussed in the opening argument,) may, with propriety, be first considered, viz: That the court had no jurisdiction in this cause, because the plaintiff or petitioner had no existing mortgage to secure his debt when he filed his petition. The statute under which this proceeding was attempted, gives a court of law a very special jurisdiction, not only to render a judgment for the mortgage debt, but also to foreclose the mortgage. It is plain that the statute does not authorize the court upon *petition*, at the *first term*, to foreclose a mortgage, as is done in equity, and merely order the mortgaged property sold; nor does the statute authorize a judgment to be rendered for the debt merely, as at law, without a foreclosure of the mortgage. This is plain. In order to give the court jurisdiction at law to render a judgment for the debt, and foreclose the mortgagor of his equity or right of redemption by petition, at the first term of the court after the filing the petition, it is plain that the petitioner must not only have a debt due him, but he must also have a valid subsisting mortgage. This will not be denied. Now, it is equally plain from the face of the petition, that the mortgages filed with this petition had been regularly and formally foreclosed about one year before the institution of this suit. The petition states that the mortgages were due by two instalments, and that, for the first instalment, a petition was filed in Leon Circuit Court, a judgment was rendered on the 2d day of May, 1846, *"and decree of foreclosure of all right and equity of redemption of or in the said mortgaged property,"* &c. If then, "all right or equity of redemption of and in the said mortgaged property" had, by "decree of foreclosure," been already barred and cut off, we think it beyond dispute that there was no existing mortgage. There remained no right or equity of redemption to bar or foreclosure in May, 1847, if it had *all* been "foreclosed by decree" in May, 1846. The only answer which has been made to this point is, that this decree of foreclosure of 1846, recited in the petition, was only as to the *first instalment*. This answer, we reply, is a mere matter of fact, for the language is, that *"all* right or equity of redemption of or in the *said mortgaged property."* Language cannot be more plain. No part of the property is reserved from this decree of foreclosure, nor *any* part of the right to redeem. In other words, *all* the right or equity of redemption of *every* part of the property is specially barred and foreclosed. From this view, it follows that, as petitioner had no mortgage, he had no place in court, and the court had no jurisdiction to render a judgment for his debt, in the summary and peculiar mode adopted. And here we may remark, that if the court had no jurisdiction of the cause, consent of defendant could not confer it, even if he had consented. The whole proceeding becomes simply and absolutely void. It is scarcely deemed necessary to cite authorities to prove that when a special, summary and stringent remedy is given to the courts by statute, it must be strictly pursued, in order to give the court jurisdiction. "If a new remedy be given by a statute in a particular case, this shall not be extended to alter the common law in any other case." 9 Bacon's Ap., title "statute," page 245. "Every fact necessary to give the court jurisdiction in a *summary* proceeding, must appear of record, to give the judgment validity; if they do not appear, the judgment is *coram non judice* and void." 3 Yer., 355. 3 Hump., 313—cited 2 supplement to U. S. Digest, page 253, par. 137. Bates *v.* Merchants' Bank, 8 Porter R., 99. Leverett *v.* Pl. and Mer. Bank, 8 Porter R., 104. Webb *v.* Brown, 3 Pike's (Ark.) Rep., 488. 649

2. But it is contended by defendant in error, that this judgment cannot be now reversed, because it is a judgment by confession, &c. Two answers exist to this position, either of which is deemed sufficient. In the first place, if we are correct in the first position assumed, that the court had no jurisdiction, because the petition showed upon its face that the petitioner had no existing mortgage, then it is sufficient to refer to the familiar principle, that *consent* cannot confer jurisdiction.

But, if the language of the supposed consent and confession of judgment is examined, it will be found to fall very far short of consenting to what was done by the court. This alleged agreement or consent is in the record stated to have been endorsed on the petition, and is without date. The record states that the petition was filed on the first day of the Spring term, 1847, of the court. It was, then, certainly so written and endorsed on the petition that day, or some previous day. It clearly is not any manner of pleading, for the only pleading allowed under our statute for the "foreclosure of mortgages at common law," is declared to be "objections," which must be filed fifteen days before court. It is no confession of judgment, for that must be *ore tenus*, in the presence of the court, and addressed to it. This supposed confession of judgment could not be made to the petitioner, for he could make no use of it, or make it a matter of record. It must be, then, a mere agreement between the plaintiff and defendant, before the filing of the petition, or at that time, and an admission of certain facts. Now, what is thus admitted and agreed to?—In the first place, he acknowledges "due and legal service of notice of intention of petitioner to institute this suit"—that is, he had been notified for four months of this intention. In the next place, he is "consenting that *said* petition (*no* petition having been previously mentioned) shall be filed as of the first day of the Spring Term, 1847, of Leon Circuit Court"—that is, he agreed that petitioner might that day file his petition—a thing he had as good a right to do before as after this agreement, so far as we can perceive. "And I do hereby, under my hand and seal, *confess* judgment, and *agree* that decree of foreclosure be rendered at said Spring Term, 1847, of Leon Circuit Court, with a stay of execution till the 1st day of February, A. D., 1848." Now, if this *confession* had been made to the *Court*, as it must have been to be of any force, and as it clearly was not in fact, it is to be observed that he does not also confess foreclosure, but only agrees that a decree for that purpose may be rendered at the Spring Term, 1847. Now, does all this give the court jurisdiction? The petition was only filed on the first day of the term, and Shepard only admits that fact. It should have been filed four months before that time. This is admitted by the counsel for defendant in error, for he contends that that must be inferred from the language of the statute, and from the provision that defendant must, if he defends at all, file his objections fifteen days before court. On this point the language of the statute is imperative, and not merely directory, viz: "And the said petition, together with the original mortgage, shall be filed in the office of the clerk of the court to which the application for foreclosure shall be made, at least four months when the foreclosure is to be of real property, and two months when it is to be of slaves, or other personal property, before the term of the court at which the judgment of foreclosure *shall* or *can* be demanded or *rendered*." Thomp. Dig. 376. Now the judgment is to be *rendered* by the court, and the terms *shall* or *can* as strictly apply to its action, to wit: the rendering of judgment, as to the action of petitioner, to wit: the demanding a judgment. Leave out the word "demanded" and the sentence would read that the petition, &c., shall be filed four months 650

651 before the judgment "shall or *can* be rendered." Is not all distinction destroyed between summary and special remedies by statute, and matters of ordinary common law jurisdiction, if the court may or can render judgment under this statute when the petition has not been filed the length of time prescribed by its express terms? Has Shepard waived this irregularity? Surely not. The courts, as we have before remarked, can only get jurisdiction in pursuance of the statute—that is by having the petition filed four months before court, with notice to defendant. The notice is admitted, but not the filing according to law.

We will barely suggest, what must be too apparent to need illustration, that a judgment cannot be confessed under *hand and seal*—the thing is absurd, and without meaning. "The rendering a judgment is a judicial act, to be done by the court only." Mathews *v.* Moore, 2 Mur., 181. It is plain this endorsement on the back of the petition is the cause of the rendition of this judgment, and that the same is and was not a legal sufficient cause therefor. It is plain that the recital in the face of the decree that the petition had been '*duly* filed,' is contradicted by other parts of the record, which show it was not filed four months before court, but only on the first day thereof.

Again: This pretended confession of judgment is bad for two reasons not yet mentioned. First, it does not state in whose favor the judgment is so confessed. The name of the petitioner is neither stated in the caption nor in the body of the instrument. If this is a confession that somebody may have judgment, it does not say who, and no one will pretend that a court can do more than record the confession as made, whether in writing or verbally. Secondly there is no sum mentioned for which judgment is so confessed under hand and seal. This point has been expressly ruled by the Supreme Court of New York, where it is laid down that "a confession of judgment ought to be for a certain and specified sum." Nicholas vs. Hewett, 4 John Rep., 423. In that case, pending its trial in the court below, the parties referred the same to arbitrators. Before the award was known or punished, the court inquired whether the judgment should be confessed, according to the award when made. To this both parties agreed, and shortly thereafter the award came into court, and was entered accordingly for one of the parties. This judgment was reversed on error, upon the express ground that the confession of judgment was for no particular sum.

652 Again: But, if for the sake of argument, this could be construed into a confession of judgment, and consequent waiver of errors, the record does plainly show that the same was made before suit brought, and it is therefore void by our statute. Thompson's Dig., 350. This statute not only makes void all powers of attorney for confessing or suffering judgments to pass, &c., made before action brought, but also expressly makes void *"all general releases of error."* If this be a release of error at all, it is only so because it is a confession of judgment, and therefore sufficiently *general* to be embraced within the terms of this statute. The question of fact then only remains: was it made before or after "action brought?" If this action was ever legally brought at all, and this is questionable, it certainly was not until the petition was filed. Now upon examination of the record, it will abundantly appear that this endorsement was upon the petition when handed to the clerk and filed. The clerk would not have permitted a record to be so endorsed, after it was filed, and the record expressly sets it forth as an endorsement on the petition. No process had issued from nor any paper filed in the court before, and Shepard had only been notified of an intention to institute the suit. From this view of the subject it becomes apparent that if it be possible to confess a valid judgment in a suit before it is instituted, a thing little short of absurd, still such a confession, under our statute, does not operate a general release of error, as in other cases of confession of judgment. It cannot be said that this release of error is not meant by our statute, as it is only a release implied by law from the fact of confessing the judgment—assuming that a judgment can be confessed before action brought—because the words of the statute are *"all* general releases of error." "All" includes implied releases as well as express.

It is contended by counsel for defendant in error, that in fact the amended decree does not restrict the execution to be issued thereon from issuing as "in other cases," viz: against the goods and chattels, lands, and tenements of defendant. It is also admitted that if this error does exist in fact, it is well assigned if it and all other errors were not waived by confessing judgment, &c. That it is not waived, we have endeavored to show, and will only refer to the language of the decree to prove that it exists in fact. Petitioner is to have execution against *"said mortgaged property* according to the statute," &c. The mortgaged property and no other is mentioned

of which execution shall be had—whether such execution is to be 653
according to statute or otherwise. But does this reference to the statute help the matter? Is the Clerk to judge what statute is referred to; and then judge what the statute requires? This would be too uncertain. This has been expressly decided in the case of Harman v. Childress, 3 Yerger, 426.

To recapitulate briefly:

1. The judgment is void, for want of jurisdiction in the court. 1. Because the petitioner had no valid existing deed of mortgage, the same having been foreclosed a year before; and 2. Because the petition under our statute had not been filed four months before the term of the court at which the judgment was rendered—and if this be true, consent, if given, cannot confer jurisdiction.

2. The judgment is erroneous, if not void. 1. Because the endorsement of Shepard upon the petition, which is relied upon to justify the rendition of the same, was made before the filing of petition or institution of the suit. 2. Because the pretended confession of judgment does not mention the person in whose favor the confession is made. 3. Because no sum or amount is named, for which judgment is confessed. We will not add to the argument of our colleague (Mr. Archer) upon the other errors assigned.

The judgment should be reversed, and the cause remanded with instructions to dismiss the petition.

LANCASTER, Justice, delivered the opinion of the court.

The last assignment of error is first noticed in the briefs of counsel, and will, therefore, be first disposed of by this court. It alleges the court had no jurisdiction, under the statute, to render judgment for the debt, and foreclosure of the mortgages, because from the petition, it appears the mortgages had been foreclosed at a former term of the court, when judgment was rendered for an instalment due on them, and therefore, there remained no mortgages now to foreclose. Admitting the facts to be correct, it is difficult to see how they affect the jurisdiction of the court. *Jurisdiction* consists in authority to try the subject-matter of the suit, and over the person of the defendant. These two requisites attaching, it would be difficult, if not impracticable, successfully to assail the jurisdiction even of a court of special powers. But that the Circuit Courts of this State are courts of general original jurisdiction, will be abundantly manifest 654
to every one who reads the 6th clause of the 5th article of our State Constitution: "The Circuit Courts shall have original jurisdiction in all matters, civil and criminal, within this State, not otherwise excepted in this Constitution;" and by the 8th clause of the same article, they are invested with the original equity jurisdiction, until the General Assembly shall establish and organize a separate equity court or courts with that jurisdiction. That has not yet been done, and it is not known that the Constitution makes any other exception to the original jurisdiction of the Circuit Courts.

The Circuit Court was then a court of general original jurisdiction, and having jurisdiction of the foreclosure of mortgages, this suit was brought to foreclose the mortgages therein set forth, as well as for judgments for the sum alleged to be secured by them, as owing and due from defendant to plaintiff in the action. This was the subject-matter of the suit, and we apprehend no one will seriously deny the jurisdiction of the Circuit Courts over such a subject-matter. But that the jurisdiction may properly attach to render judgment, it is necessary also for the court to have jurisdiction of the party defendant. The ordinary mode to acquire this jurisdiction over the party defendant is by *summons ad respondendum*, admonishing him to appear in court and defend against the suit. By law this summons should be served on the defendant by the officer of the court, at least ten days before the first day of the term; yet an acknowledgment of service endorsed on the writ by the defendant, or an appearance in court and plea to the merits, or confession of judgment, will be sufficient evidence of the court's jurisdiction over the person of the defendant, and so, it is believed, has been the uniform practice in the courts, from the date of the act to regulate judicial proceedings.

These proceedings were instituted under the act of December 11th, 1824, before referred to, which authorizes courts of law, in addition to the power before possessed, of rendering judgment for the debt due plaintiff by defendant, to foreclose a mortgage given to secure its payment, and to issue execution as in other cases. But in this particular case, the law requires personal service of notice of the intention of the party to institute his suit, and that service of this notice shall be made by the officer appointed to serve writs issuing out of and returnable to said court, four months, when the foreclosure is to be of real property, before the term of the court at which judg-

Shepard vs. Kelly.—Opinion of Court.

655 ment shall be rendered. It also requires that the petition for judgment and foreclosure, together with the original mortgage, shall be filed in the office of the clerk of the court, at least four months before the term of the court, at which judgment of foreclosure of real estate shall or can be demanded or rendered.

These provisions are clearly intended for the benefit and protection of the defendant, and he has an undoubted right to insist upon their literal and full performance, before a valid judgment and foreclosure on a mortgage can be rendered against him, unless he thinks proper to waive them.

The former was intended, perhaps, partly to afford him time to redeem, as well as time to prepare for his defence; the latter that he might understand and inspect the demand against him, as well as afford him time to mould that defence. If it was shown the subject matter of this suit was not comprehended by the statute of 1824, or it was doubtfully comprehended, or that a prior judgment at law had been given upon the identical demand for which this suit was instituted, according to the decisions of this court, in 1 Flor. R., 182, the statute affording a new remedy should be rigidly construed, so as not to take jurisdiction in any doubtful case. The requirement of a statute for bringing a party defendant before the court is never so rigidly, but only substantially observed. The act of 1828, regulating judicial proceedings, provides for issuing process at the commencement of actions at law, (different from the common law writ of *capias ad respondendum*,) which, by the act, is to be served by the officer at least ten days before the first day of the term to which it is returnable. By the common law, it is required to have the body of the defendant in custody, to give the court jurisdiction of the person; yet here a summons, regularly served, as required by the act of 1828, gives the court jurisdiction of the person of the defendant. This act greatly modifies, in many respects, the practice as at common law, yet no one has thought or claimed that it should be construed strictly. The courts in practice have held, if a party acknowledges services on the back of the writ, it is good. If a party file a declaration, and the defendant plead thereto by confession of judgment, without writ issued or served, it is good Yet the statute no where by express enactment provides for these cases, but they have been continually held to be within the reason of the act; and this practice, upon a sound construction of the statute, it is not doubted
656 is correct. The court can discern no good reason why the statute of 1824, to regulate the foreclosure of mortgages at common law, so far as respects the mode of summoning the defendant into court, or the time of filing the petition for foreclosure, should not be subjected to the same rule of construction. "An acknowledgment by the defendant of service of the writ, and a waiver of a particular entry required in the case, is sufficient to give jurisdiction of the person, and every thing consistent with the record will be intended to sustain the judgment." 9th Porter's R., 291.

The reason assigned in this case against the jurisditcion of the court, appear rather to be such as might have been made in the court below to the court or petition, and to the writ. But, according to logical reasoning and logical practice, they were waived by a consent of judgment. Had no written acknowledgment or consent been executed, the court certainly would not have proceeded to judgment or foreclosure until notice had been served on defendant, and petition filed acording to the requirements of the statute—assuming that these objections could be only properly addressed to the court, and the writ would be an admission of the jurisdiction of the court.

But it is urged that petitioner showed by his petition he had no existing mortgage to secure his debt at the time of filing it, and, therefore, the court had no jurisdiction. This objection, it seems to the court, would best be made by way of plea in bar to the action, and that plea would admit the jurisdiction of the court. Yet we cannot see how in any shape it should avail the defendant, who, upon the back of the very petition in which this allegation is contained, confesses judgment for the sum therein alleged to be due, and agrees that a decree of foreclosure shall be rendered on the mortgages therein set forth and sought to be foreclosed, at the Spring Term of the court in 1847. Is it asked of this court to decide there was no existing mortgage in favor of petitioner against the defendant, Shepard, when he, Shepard, under his hand and seal, agrees there is, and that it may be foreclosed, and this agreement, too, made, in consideration of a stay of execution?

The rule of law, that where the court has not jurisdiction of the subject-matter of a suit, consent cannot give it jurisdiction, is, without doubt, correct; but as to the person of the defendant, the formal service of the process, or the time of filing the declaration or petition, though necessary steps, are rendered unnecessary, if the defendant 657
appears and pleads issuably, or confesses judgment—and having done so, he ought not afterwards to be permitted to take advantage of irregularities in those respects. We think, therefore, the court had jurisdiction of the suit, by having jurisdiction of both of the subject matter of the suit, and by the defendant's acknowledgement of due service of process, of the filing the petition on the first day of the term, and consenting that judgment might be rendered at the said term and foreclosure decreed, with a stay of execution, &c. This assignment of errors is, therefore, overruled.

The first error assigned, and next to be considered is this: The agreement to confess judgment is void under the statute, which enacts, "All powers of attorney for confession or suffering judgment to pass by default or otherwise, and all general releases of error made or to be made by any person or persons whatsoever within this State before action brought, shall be, and are hereby declared to be, absolutely null and void." Thomp. D., 350. Upon this assignment of error, it will sufficiently express the views of the court to say, the agreement of the defendant, under his hand and seal to confess judgment, is not a power of attorney to confess judgment, and is not within the prohibition of the statute. Neither does it appear from a careful examination of that agreement, written on the back of the plaintiff's petition, that it was made before action brought. They appear rather to have been done simultaneously, and if necessary to give effect to an agreement made on a valuable consideration, to wit: a delay of payment. The court will understand it to be admitted that notice of the intention of the plaintiff to bring his suit (which notice is the intention of the suit) was given before the defendant, Shepard, signed any agreement on the back of the petition. We think this assignment of error should be overruled.

The second error assigned, is, "there is error in giving one foreclosure on two mortgages."

The debt, which the two mortgages were given to secure, was one debt, due from defendant, Shepard, to the plaintiff, Kelly. The last mortgage was cumulative or additional security on the first, and both were but security for one debt. If the debt had been paid, which they had been made to secure, that act would have discharged both mortgages; if it became necessary to push that debt to judgment, no good reason is perceived why the equity of redemption should not be foreclosed on all the property mortgaged to secure its pay- 658
ment; and this, we think, within the equity of the statute, the court had power to do. This assignment of error is, therefore, we think, not well taken, and is overruled.

Third error assigned, "there is error in the original judgment, because the property foreclosed is not mentioned."

So much of the original decree as is material in this assignment of error, is in these words: "And it is further adjudged, ordered and decreed, that the said John S. Shepard, mortgagor, and all persons claiming or to claim by, through, or under him, shall be, and they are hereby forever foreclosed and barred of, and from all right and equity of redemption of or in the property mortgaged by the said deeds of mortgage in said petition set forth, and therewith exhibited, and every part thereof, and that execution issue according to the statute in such case made and provided, after the first day of February, Anno Domini, one thousand eight hundred and forty-eight, until which date execution will be stayed according to the agreement before stated." It is perceived that, by this original decree, the equity of redemption of or in the property mortgaged by the said deeds of mortgage exhibited with the petition and therein set forth, is foreclosed. *Id. certum est quod certum reddi potest.* And so far as can be collected from the forms in the Courts of Chancery in England, it is believed no more specific or certain description of the property is contained in the decree of foreclosure than the mortgaged premises in question. It is argued if such a decree be good in England, it ought not to prevail here, because the exhibits are not recorded after final judgment. By legal intendment, the files of the court are as secure as the records, and if this were not so, the law requires mortgages to be recorded when or soon after they are executed. This, by the petition and exhibits, appears to have been done, and admitting the files of the court should be lost or destroyed, it is fairly presumable, the record of these mortgages is as safe as the record of the judgment. We think the property, intended to be foreclosed, is sufficiently designated by reference to the mortgages in which it is specified, and a specific statement of it in the decree of foreclosure, is immaterial and unnecessary. The third error assigned is therefore, in our opinion, not well grounded, and is overruled.

The fourth error is, "There is error in the judgment as amended, because it awards execution against specific property."

659 The 8th sec. of the act of 1824, Thompson's Digest, 377, is in the words following: "The judgment of the court on the foreclosure of a mortgage, shall in all cases be entered up and filed, and execution shall issue thereon as in other cases." By the law applicable to other cases, execution goes against the lands and tenements, goods and chattels of the defendants in execution. The amended decree, after specifying the mortgaged property, adds, "and that said petitioner have execution against said mortgaged property, according to the statute in such case made and provided." It is contended if this be error, it is in favor of the plaintiff in error, and unless he is injured by it, he cannot take advantage of it. Without contravening the force of this objection, or without stopping to enquire narrowly, whether a party might not be injured by subjecting a specific fund (if a favorite fund) to execution, when the law requires that execution shall be against the lands and tenements, goods and chattels of the defendant, upon an examination of the original judgment and decree entered in this cause, it seems to the court that said judgment and decree is good and valid in law; and that the amended judgment and decree entered on Friday, the 7th day of April, A. D. 1848, is, for the reasons set forth in the fourth assignment of errors, erroneous: wherefore, the said assignment of error, so far as applicable to said amended decree, is allowed and sustained.

The *fifth, sixth* and seventh errors assigned, having reference to the judgment as amended, that amended judgment being to be reversed and vacated, it is deemed unnecessary to examine.

It is, therefore, ordered, adjudged and decreed that the original judgment and decree of foreclosure, rendered in this cause at the Spring Term, eighteen hundred and forty-seven, be in all things affirmed, and that execution issue thereon according to law; and that the amended decree of foreclosure, rendered *nunc pro tunc* in said cause on the 7th day of April, A. D. 1848, be set aside and reversed, and that the appellant recover his costs, &c.

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660 UNION BANK OF FLORIDA *vs.* PARKHILL'S ADMINISTRATORS *de bonis non.*

S. PARKHILL'S ADMINISTRATORS *de bonis non vs.* UNION BANK OF FLORIDA.

The Bonds made by the late Territory, payable to the Union Bank of Florida, are, under the charter of that institution, the property of the Bank, and the funds arising from the sale of them, the funds of the Bank.

Shares in the Union Bank, are the mortgage securities given for stock, and a pledge of shares is a pledge of those mortgage securities.

The mortgage given by the stockholders to the Bank was executed for the purpose, 1st. as provided by the 8th sec. of the charter, of securing payment by the Bank, of the principal and interest of the bonds. 2d. Of securing payment by the stockholder to the Bank, of his stock note or obligation and interest, if he fails to renew the note and pay interest as provided in the 29th section.

When a stockholder of the Union Bank fails to renew his note, and pay up the interest, if the Bank shall file for cancellation with any officer of the government whose duty it may be to receive them for cancellation, or with the Clerk of the Court in which the suit is pending, as many Territorial Bonds as were issued on the faith and value of the mortgage securities of such defaulting stockholder, the Bank, upon judgment rendered and execution issued, may of right levy upon and sell the mortgaged premises of such defaulting stockholder, to be applied to the extinguishment of the judgment rendered on his stock note debt together with interest due and costs accrued.

A stockholder has a right to a continuance of the credit or loan which the charter gives him *only* upon his renewing his note and paying up the interest annually—and the taking of interest in advance is not a violation of the charter.

Under the plea of *plene administravit*, an administrator cannot be allowed to offer in evidence a receipt for the payment of money by him which payment has been rejected and disallowed by the probate court. Before any right attaches to offer any evidence of expenditures made by the administrator under this plea, such expenditures must have been allowed by the court of probate. The action of that court in regard to accounts of executors, &c., is conclusive, unless appealed from.

On the 31st March, 1846, the Union Bank of Florida instituted suit in Leon Circuit Court against Martha Ann Manly, administratrix, (and Hiram Manly, in right of his wife, administrator,) and William

D. Moseley, administrator *de bonis non* of Samuel Parkhill, deceased 661
to recover the amount of a sealed note of defendant's intestate, of which the following is a copy:

"Dolls. 94,182 22-100. Tallahassee, Dec. 9, 1840.

"Six months after date I promise to pay to the Union Bank of Florida at their Banking house in the City of Tallahassee, ninety four thousand one hundred and eighty two 22-100 Dollars, for value received, for securing payment whereof I do hereby pledge my shares in the capital stock of said Bank.

SAMUEL PARKHILL, [SEAL.]

The declaration is in debt, and contains a special count on the note, and common count for *money had and received.*

The defendants filed various pleas as follows:

And the said defendants, as administrators and administratrix *de bonis non* as aforesaid, by J. T. Archer, their attorney, come and defend the wrong and injury when, &c., and as to the first count in the declaration say, that the said supposed writing obligatory is not the deed of the said Samuel Parkhill, deceased, and of this they put themselves upon the country, &c.

And for further plea in this behalf, the said defendants as administrators and administratrix *de bonis non* as aforesaid, say *actionem non,* &c., as to the second count in the declaration, because they say that the said Samuel, in his life time, was not indebted to the said plaintiff, in manner and form as in the said second count is alleged, and of this they put themselves upon the country, &c.

And for further plea in this behalf, the said defendants, as administrators and administratrix *de bonis non* as aforesaid, say *actio non,* &c., as to the first count in the said declaration mentioned, because they say that, before the institution of this suit, to wit, on the first day of January, in the year of our Lord one thousand, eight hundred and forty-four, to wit, at the county of Leon aforesaid, Martha Ann Manly, administratrix, and Hiram Manly, administrator, in right of his wife, said Martha, of the estate of said Samuel, which remained at his death, paid to the said plaintiff the said sum of ninety-four thousand dollars, in the said writing obligatory mentioned, together with all interest then due thereon, according to the form and effect of the said writing obligatory and this the said defendants, as administrators and administratrix *de bonis non* as aforesaid, are ready to verify; wherefore, they pray judgment whether the said plaintiff ought to have or maintain their aforesaid action thereof against them, &c., 662
by reason of any thing in the first count mentioned.

And for further plea in this behalf, the said defendants say *actionem non,* &c., because they say that the said plaintiff before and at the time of the commencement of this suit, to wit, at the county aforesaid, was and still is indebted to the said defendants, as administrators and administratrix *de bonis non* as aforesaid, in a large sum of money, to wit, in the sum of three hundred thousand dollars, for the proceeds of the sale by the said plaintiff of one thousand four hundred and twenty-eight shares of capital stock in the Union Bank of Florida of the said Samuel deceased, before that time sold by the said plaintiff, on account of the said Martha Ann, as administratrix, and that said Hiram, as administrator, in right of his wife, said Martha, of the estate of said Samuel which remained at his death, which said sum of money has never been paid by the said plaintiff to the said Martha Ann and Hiram, as administratrix and administrator as foresaid, or to these defendants, as administrators and administratrix *de bonis non* as aforesaid. And the said defendants further say that the said plaintiff, at the time of the commencement of this suit, to wit, at the county aforesaid, was and still is indebted to the said defendants, as administrators *de bonis non,* &c. as aforesaid, in the further sum of three hundred thousand dollars, for divers goods, wares and merchandizes sold and delivered to the said plaintiff, and at the request of the said plaintiff, by the said Martha Ann and Hiram Manly, administratrix and administrator as aforesaid, of the estate of said Samuel which remained at his death; and for money by the said Martha Ann and Hiram, as administratrix and administrator as last aforesaid, before that time lent and advanced to, and paid, laid out and expended for the said plaintiff, and at the request of the said plaintiff; and for money by the said plaintiff before that time had and received, to and for the use of the said Martha Ann and Hiram Manly, as administratrix and administrator as aforesaid; and for money due and owing from the said plaintiff to the said Martha Ann and Hiram Manly, as administratrix and administrator as last aforesaid, upon an account stated between them; and the said defendants further saith that the said plaintiff before and at the time of the commencement of this suit, to wit, at the county aforesaid, was and still is indebted to the said defendants, as administrators and administratrix *de bonis non* as aforesaid and the further sum of three hundred

Union Bank vs. Parkhill's Admr's—cross writs of error.—Statement of Case..

663 thousand dollars, for money by the said defendants, as administrators and administratrix *de bonis non* as aforesaid, before that time lent and advanced to, and paid out and expended for the said plaintiff, and at the request of the said plaintiff; and for money by the said plaintiff before that time had and received, to and for the use of the said defendants, as administrators *de bonis non* as aforesaid; and for money due and owing from the said plaintiff to the said defendants, as administrators and administratrix *de bonis non* as aforesaid, upon account stated by them; which said sums of money so due and owing to the said defendants, as administrators and administratrix *de bonis non* as aforesaid, exceed the debt and damages in the plaintiff's declaration mentioned, and out of which said sums due as aforesaid, the said defendants, as administrators and administratrix *de bonis non* as aforesaid, are ready and willing and hereby offer to set off and allow to the said plaintiff the full amount of the said debt and damages, and this the said defendants are ready to verify: wherefore they pray judgment that so much of the said several sums of money above mentioned, as exceed the debt and damages in favor of the said plaintiff, be allowed to these defendants, according to the form of the statute in such case made and provided.

And for further plea in this behalf, the said defendants say *actionem non*, &c., because they say they have fully administered all and singular the goods and chattels, rights and credits, lands and tenements, which were of the said Samuel Parkhill, deceased, at the time of his death, and which ever came to the hands of these defendants, as administrators and administratrix *de bonis non* as aforesaid, to be administered, to wit, at the county aforesaid; and that they, the said defendants, have not nor on the day of the commencement of this suit, or at any time since, had they any goods or chattels, lands or tenements, which were of the said Samuel Parkhill, deceased, at the time of his death, in the hands of these defendants, as administrators and administratrix *de bonis non*. to be administered, and this the said defendants are ready to verify: wherefore, they pray judgment whether the said plaintiff its action thereof against them ought to have or maintain, &c.

And for further plea in this behalf, the said defendants say *actio non*, &c., because they say that heretofore and before the grant of letters of administration *de bonis non* to these defendants, and before the marriage of the said Hiram Manly and Martha Ann Manly, and
664 before the institution of the suit, to wit, on the fourth day of April, in the year of our Lord one thousand eight hundred and forty-two, in the county aforesaid, one Henry Bond impleaded the said Martha Ann Manly, (then Parkhill) as administratrix of the estate of said Samuel which remained at his death, before the Superior Court of the Middle District of the Territory of Florida in and for the county of Leon, in an action of trespass on the case on promises for and on account of certain promises and assumptions by the said Samuel Parkhill in his life time, made to the said Henry Bond, and proceedings were so far had therein that afterwards and before the marriage with said Hiram Manly by said Martha Ann Parkhill, and before the commencement of this suit to-wit, on the fifth day of May, in the year last aforesaid at the spring term of the Superior Court aforesaid, to-wit, at the county aforesaid, the said Henry Bond, by the consideration and judgment of the said court recovered against the said Marthat Ann Manly (then Parkhill) as administratrix, as aforesaid, the sum of twelve thousand four hundred and forty six dollars and fourteen cents for his damages which he had sustained by occasion of the non-performance by said Samuel in his life time, and said Martha Ann as administratrix as aforesaid, after his death, of the said promises and undertakings, so by the said Samuel in his life time made to the said Henry Bond, to be levied of the goods and chattels, slaves, lands, and tenements of said Samuel Parkhill, deceased, in the hands of the said Martha Ann Manly, (then Parkhill), to be administered, whereof the said Martha Ann, as Administratrix as aforesaid, was convicted, as by the record and proceedings thereof, remaining in the Circuit Court of the Middle Circuit of the State of Florida in and for the County of Leon, more fully and at large appears, which said judgment against said Martha Ann, as administratrix, as aforesaid, is still of force, and not paid, satisfied, vacated, cancelled or reversed, and the said defendants as administrators and administratrix *de bonis non*, as aforesaid, further say, that they have fully administered all and singular the goods and chattels, rights and credits, lands and tenements, which were of the said Samuel at the time of his death, and which ever came to the hands of these defendants, as administrators *de bonis non*, as aforesaid, to be administered, to-wit, at the county aforesaid except goods and chattels of small value, to wit, of the value of five dollars; and that they, the said defendants, as administrators and administratrix *de bonis non*, as aforesaid, have not, nor on the day of the commencement of this suit, or at any time since, had they any 665 goods or chattels, lands or tenements, which were of the said Samuel, deceased, at the time of his death, in their hands as administrators and administratrix *de bonis non*, as aforesaid, to be administered, except goods and chattels, of the value aforesaid, and which are not sufficient to satisfy the judgment aforesaid and are liable for the payment of the same: And this they are ready to verify. Wherefore they pray judgment whether the said plaintiff ought to have or maintain their action aforesaid against the said defendants as administrators and administratrix *de bonis non* as aforesaid, &c.

And for further plea in this behalf, the said defendants say *actionem non*, &c., as to first count, because they say that the sole consideration for which the said writing obligatory was given by the said Samuel, was the loan by the said plaintiff to the said Samuel, of ninety thousand, one hundred and seventy seven 34-100 dollars, in notes of the Union Bank, calling for that sum, but then greatly depreciated, and that thereby the said plaintiff did knowingly, wilfully take and receive, and insist upon a greater rate of interest than eight per centum per annum, contrary to and in violation of the provisions of charter of the said Union Bank: And this the said defendants are ready to verify, &c. Wherefore they pray judgment whether the said plaintiff ought to have or maintain its action thereof against these defendants as administrators and administratrix *de bonis non*, as aforesaid, by reason of any thing in the first count mentioned.

The plaintiff moved to strike out the first plea of the defendants, but afterwards joined issue thereon.

To the second plea, the plaintiff demurred, but afterwards joined issue thereon.

To the third, fourth, and fifth pleas, the plaintiff tendered issue upon the facts, which was joined by the defendants.

To the sixth plea the plaintiff filed a replication as follows:

And the said plaintiff, as to the said plea of the said defendants by them sixthly above pleaded, saith that he the said plaintiff, by reason of anything in the said plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him, because he says that the said judgment in the said plea mentioned was claimed against the original administrator and administratrix of Samuel Parkhill, deceased, and that the same is in no wise binding upon the said defendants in this present suit, administrators and ad-
ministratrix *de bonis non* of the said Samuel, and that the said defen- 666
dants, administrators and administratrix *de bonis non* of the said Samuel, have not fully administered all and singular the goods and chattels which were of the said Samuel Parkhill, deceased, at the time of his death, and which came to their hands to be administered, but that they the said defendants, at the commencement of this suit administrators and administratrix *de bonis non*, as aforesaid, had goods in their hands to be administered, of the estate of said Samuel, over and above the said amount admitted in the said plea, and more than sufficient to pay and satisfy the debt of the said plaintiff above declared, and the damages on the same, and wherewith the said defendants might and could have satisfied the same: And this the said plaintiff prays may be enquired of by the country, &c.

The defendants joined the issue tendered by this replication. To the seventh and last plea, the plaintiff demurred, but by leave of the court the defendants were permitted to amend the last plea, and did so amend by filing in lieu thereof on the 29th June, 1847, the following amended plea:

And for further plea, &c., said defendants come and defend, &c., when, &c., and say *actio non*, &c., because they say that the said supposed writing obligatory is not the act and deed of their intestate the said Samuel, in his life time, but the same is and was when the same was made, sealed and delivered to the said Union Bank of Florida, wholly null, illegal and void, and is and hath been at all times since, wholly illegal, null and void, because the same was made and delivered for the sole and only consideration of a loan of money from said Union Bank of Florida to said Samuel in his life time, (he being then and there a stockholder, and the same being on a pledge of his stock) and that upon the said loan the said Bank wilfully and knowingly reserved and took more than the lawful rate of interest allowed to said Bank to take upon such loans, to wit, the sum of one hundredth of one per cent. interest per annum beyond the amount allowed by said charter and law upon the said loan of and from said Samuel in his life-time, contrary to the form of the statute in the case of the Union Bank, made and provided, and against the form and letter of its charter and powers, and transcending and going beyond and violating the same, to-wit: at the time and place of the delivery of the bond in the declaration mentioned: And this they are ready to verify.

667 Wherefore they pray judgment whether the said plaintiff ought to have or maintain its action aforesaid against these defendants.

On the same day the plaintiff demurred to the amended plea, and after argument, the demurrer was sustained by the court.

The cause was afterwards tried before His Honor, Judge BALTZELL, upon the issues joined, which were submitted to a jury duly empanneled for this purpose. On the 13th July, 1847, a verdict was returned and judgment entered, as follows:

The jury empannelled in this cause this day returned into court, and upon their oath do say: "We the jury find for the plaintiff $143,782 81-100, and no assets in the hands of the administrators." Therefore it is considered by the court, that the plaintiff recover against the defendants $188,364, 44-100, the debt in the declaration mentioned, and its costs by it about its suit in this behalf expended, to be levied of the goods and chattels, slaves, lands and tenements of the defendant's intestate, when assets sufficient therefor shall come to the hands of the said defendants. But this judgment is to be discharged by the payment of the sum of one hundred and forty-three thousand seven hundred and eighty-two dollars and eighty-one cents, ascertained by the jury as aforesaid and the costs, and the said defendants in mercy, &c.

At the trial of this cause, the plaintiff excepted to various rulings of the court, which exceptions were noted in the following bill of exceptions filed by the plaintiff:

Be it remembered, that on this 13th day of July, in the year of our Lord one thousand eight hundred and forty-seven, this cause came on to be tried upon the issues joined, and thereupon the plaintiff offered in evidence to the jury the bond sued upon, to-wit:

Dolls. 94,182 22-100. Tallahassee, Dec. 9th, 1840.

Six months after date I promise to pay to the Union Bank of Florida at their Banking House in the City of Tallahassee, Ninety-four thousand one hundred and eighty-two 22-100 dollars for value received: for securing payment whereof I do hereby pledge my shares in the capital stock of said Bank. Witness my hand and seal.

SAMUEL PARKHILL, [L. S.]

which was read to the jury without objection. It was admitted by the plaintiff's counsel that the instrument was a Stock Bond evidencing a loan made under the 29th section of the charter or act of incorporation of the said plaintiff.

668 The charter of the Union Bank and the several amendments thereto, were offered in evidence by the said plaintiff: And it was expressly admitted by defendant's counsel that the requisition of the act of incorporation had been complied with, and that the Bank had gone into operation under authority thereof.

The said plaintiff, further to maintain the issues joined, offered to the jury the inventories and appraisement filed by the defendant Moseley, in the office of the Judge of Probate for Leon County.

These inventions and appraisements, were read to the jury, and embrace items as follows:

Slaves, - - - - - - - -	$75,925
Bonds, - - - - - - - -	3,142 60
Cash, - - - - - - - -	373 47
	$79,441 07

The said plaintiff also introduced and offered in evidence the audit by the Judge of Probate of Leon County, of the account of the defendant, William D. Moseley, up to 1st April, 1846, to wit:

ACCOUNT AUDITED TO THE 1ST OF APRIL, A. D., 1846.

DR. *William D. Moseley, administrator de bonis non, in account with the estate of Samuel Parkhill, deceased.*

I find this administrator chargeable for the following amounts, viz:

For notes and bonds, as per his inventory filed 15th January, 1845,		$3,142 60
Cash received from J. G. Gamble,		373 47
Inventory 16 slaves, filed June 22, 1844, appraised at		4,800 00
Inventory of 93 slaves, filed January 4, 1845, appraised at	$27,850	
Inventory of 112 slaves, filed January 4, 1845, appraised at	$37,275	
Less Error in addition,	100	37,175 69,825 00
Inventory of 13 slaves, filed 4th January, 1845, appraised at		4,000 00
Balance of hires at Springwood, as reported on account of administrator, filed 8th April, 1846, due January 1, 1846,		861 88
Rent of Springwood plantation for the year 1845, due 1 January, 1846,		125 00

Hires of negroes at Tallahassee, on 27th January, 1845, (after deducting the time from the date of levy, &c., as reported in the administrator's account, filed 8th April, 1846,) due January 1, 1846,		1,793 09
		$80,121 04

669

CR.

I find this administrator entitled to allowance on this account as follows, viz:

For the appraised value of slave Celia, who died on the 4th January, 1845,		$500 00	
For the appraised value of Cuba, a slave, who died on the 10th January, 1845,		100 00	
For amount claimed on his account, filed 8th April, 1846, on vouchers No. 1 to No. 23, inclusive,	$2,433 90		
Less for the following amounts, viz:			
Voucher 10 suspended, not being filed,	$2 25		
Voucher 11 suspended, not being filed,	1 00		
Voucher 12 suspended, not being filed,	2 00		
Voucher 13, amount paid H. Manly, on account of wife's dower, suspended for evidence that dower has been decreed to her,	658 60		
Voucher 18, payment to J. T. Archer suspended, his receipt not being the proper voucher,	51 00		
Voucher 20, suspended in part, say amount p'd H. Manly for bill of D. McRany, Clerk, the same being improperly paid by this administrator,	32 14		
Voucher 22, paid H. Manly, on account of wife's dower, suspended for evidence that dower has been decreed to her,	560 24	1,307 23	1,126 67
For 184 slaves, sold by John G. Camp, Marshal, for the disbursement of which, the vouchers are not yet filed, carried down to new account,		57,133 00	
Less error in Marshal's addition,		100 00	57,033 00
For excess of appraisement over sales of 184 slaves, sold by John G. Camp, Marshal,			192 00
For appraised value of slaves, remaining on administrators account, undisposed of, carried down,			16,000 00
Balance carried down as cash on 1st April, 1846, subject to commissions and suspended items, when sustained,			5,168 69 $80,121 04
April 1. Balance of appraisement brought down,			16,000 00
Amount of sales by marshal, for which vouchers are not yet filed, brought down,			57,033 00
Balance as cash on hand this day, subject to commissions and suspended items, when sustained,			5,160 27
			$78,202 37

Settled—July 2, 1847.

JAMES E. BROOME,
Judge of Probates.

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671 The foregoing account and vouchers are examined, and as audited are approved, allowed and admitted to record.

JAMES E. BROOME,
Judge of Probates.

JULY 2, 1847.

Which was read in evidence to the jury, and here the plaintiff rested his cause.

Defendants by their counsel then offered in evidence the entry of judgment in favor of the Union Bank of Florida against Martha Ann Manly, and Hiram Manly, in right of his wife, administrators of Samuel Parkhill, deceased, which judgment was founded upon the same cause of action as the present case—the execution issued thereon, and the report of the sale made under said execution, by John G. Camp, Marshal of the Middle District; and plaintiff admitted that the slaves so sold by Camp, Marshal, were to that extent, the identical slaves in the inventory mentioned—which judgment, execution, levy and report of sale are in these words, to-wit:

At a Circuit Court for the County of Leon, continued and held at the Court House in the City of Tallahassee, on Saturday, the 1st day of March, A. D., 1845. Present, the Honorable SAMUEL J. DOUGLAS, Judge.

The Union Bank of Florida, plaintiff,
vs.
Martha Ann Manly, late Parkhill, and Hiram Manly in right of his wife, Martha Ann, administrator of Samuel Parkhill, deceased, defendants. } In debt.

This day came the parties by their attorneys, and the plaintiff by his attorney filed his special demurrer to the defendant's rejoinder to the plaintiff's replication filed herein, to the defendant's amended plea *puis darrien* continuance, filed by leave of the court, on the 24th February last, in which demurrer the defendants joined: whereupon the matters of law arising upon the plaintiff's demurrer to the said rejoinder being argued, it seems to the court here, that the said rejoinder and the matters and things therein alleged are not sufficient in law to bar or preclude the plaintiff from having and maintaining its action aforesaid against the said defendants. Therefore it is considered by the court, that the said plaintiff recover against the said defendant, the sum of $94,182 22-100, parcel of the debt in the declaration mentioned,and the sum of $27,982 65-100,
672 its damages, making together the sum of one-hundred and twenty-two-thousand one hundred and sixty-four dollars and eighty-seven cents, and its cost by it about its suit in this behalf expended, to be levied of the goods and chattels, slaves, lands and tenements of the said intestate, Samuel Parkhill, deceased, in the hands of the defendants to be administered, and the said defendants in mercy, &c.

THE TERRITORY OF FLORIDA.

To all and singular the Marshals of said Territory—Greeting.

We command you that of the goods and chattels, slaves, lands and tenements of Samuel Parkhill, deceased, in the hands of Martha Ann Manly, late Parkhill, and Hiram Manly, in right of his wife, said Martha Ann, administrators of Samuel Parkhill, deceased, remaining to be administered, you cause to be made the sum of ninety-four thousand one hundred and eighty-two dollars and twenty-two cents, its debt, and also twenty-seven thousand nine hundred and eighty-two dollars and sixty-five cents, its interest and damages, making together the sum of one hundred and twenty-two thousand one hundred and sixty-four dollars and eighty-seven cents, which the Union Bank of Florida lately, on the 1st day of March, 1845, recovered in our Superior Court for the County of Lee, in the Middle District, as well for its debts as its damages occasioned by the detention of said debt; and likewise the sum of seven dollars and eighty-two cents, which to the said Union Bank of Florida in the same court adjudged for its costs by it in that behalf expended, together with lawful interest on said damages, from the rendition of said judgment till paid, and the costs of this writ and of your proceedings herein; and that you have the said sums of money before the judge of our said court, at Tallahassee, when satisfied, to render the said Union Bank of Florida the sums aforesaid, and have then and there this writ. Witness Richard T. Birchett, clerk of our said court at Tallahassee aforesaid, this 20th day of March, A. D., 1845, and of the independence of the United States the sixty-ninth year.

[SEAL] R. T. BIRCHETT, *Clerk.*

Came to hand 20th March, 1845, and levied on the following slaves:

[Here follows a list of slaves levied on, and a statement of the sale thereof by the marshal, for the net sum of $55,173 64.]

To the admission of which evidence, the plaintiff, by his counsel, objected, but the court overruled the objection and permitted the same to be read in evidence; to which decision the plaintiff, by its 673 counsel, excepted.

The said defendants, by their counsel, then offered in evidence nine mortgages executed by Samuel Parkhill in his life time, to the Union Bank of Florida, to secure his subscription of shares in the said bank, to wit:

Memorandum of Samuel Parkhill to the Union Bank of Florida, 19*th March,* 1835.

North East quarter Sec. 3, T. 1; East half North West quarter, Sec. 3, T. 1; West half North West quarter, Sec. 2, T. 1; South East quarter Sec. 34, T. 2, R. 2, North and East; East half South West quarter Sec. 34, T. 2, R. 2, North and East; West half North East quarter Sec. 34, T. 2, R. 2, North and East; South West quarter Sec. 35, T. 2, R. 2, North and East.

For fifty shares, 50.

1*st February,* 1837.

North West quarter Sec. 31, T. 1, R. 4, North and East; East half South East quarter Sec. 31, T. 1, R. 4, North and East; East half South East quarter Sec. 35, T. 1, R. 3, North and East; West half South West quarter Sec. 31, T. 1, R. 4, North and East; West half South East quarter Sec. 36, T. 1, R. 3, North and East. Slaves Hemady, Poll, Elias, Sarah, Hagar, Elizabeth, Sam, Johnny, Juba, Jane. For sixty shares, 60.

(*Note*—The land with 31 shares transferred to H. J. Mills.)

7*th March,* 1838. Remortgage of the property in the two preceding, mortgages for forty-one shares, 41.

(*Note*—13 shares transferred to H. J. Mills.)

16*th May,* 1838.

North East quarter Sec. 33, T. 2, R. 2, North and East; East half North West quarter Sec. 33, T. 2, R. 2, North and East; North West quarter Sec. 34, T. 2, R. 2, North and East; South East quarter Sec. 33, T. 2, R. 2, North and East; South half Sec. 34, South West quarter Sec. 35; West half North West quarter Sec. 2, T. 1, R. 2, North and East; North East quarter Sec. 3, T. 1, R. 2, North and East; East half North West quarter Sec. 3, T. 1, R. 2, North and East.

Slaves—Cæsar, York, John, Toney, Bristo, Frederick, Elias, Claiborn, Dick, Bob, Johnny, William, Old Tom, Ned, Albert, Dany, Frank, John, Sy, Lisbon, Ben, George, William, Primus, Ellick, George, Jim, Tony, Harris, Toney, Cuff, York, Dick, Cuba, Amy, 674 Grace, Abram, Rose, Malinda, Francis, Beck, Juba, Fillis, Chloe, Amy, Francis, Susanna, little Juba, Jane, Margaret, Frank, Mahala, Julia, Louisa, Rachel, Ellen, Matilda, Caroline, Celia, Maria, Nancy, Winny, Minica, Eddy, Kitty, Fillis, Hester, Amy, Israel, Sibby, Scipio, and Long Mary, for four hundred and seventy shares. 470.

(*Note*—105 shares transferred to the Prest. U. Bk. of Florida.)

16*th May,* 1838.

West half South West quarter Sec. 1, T. 2, R. 1, North and West; South half Sec. 2, T. 2, R. 1, North and West; South East quarter Sec. 3, T. 2, R. 1 North and West; West half North West quarter Sec. 3, T. 2, R. 1 North and West; Lot 1, Sec. 4, T. 2, R. 1, North and West; Lots 1 and 5, Sec. 9, T. 2, R. 1, North and West; North half Sec. 10, T. 2, R. 1, North and West; South East quarter Sec. 10, T. 2, R. 1, North and West; East half South West quarter Sec. 10, T. 2, R. 1, North and West; Fractional Sec. 11, T. 2, R. 1, North and West; Frac. Sec. 14, T. 2, R. 1, North and West; Frac. Sec. 15, T. 2, R. 1, North and West; Lot 1, Sec. 21, T. 2, R. 1, North and West; Lots 1 and 2, Sec. 22, T. 2, R. 1 North and West.

Slaves—John, William, Edmund, Wilson, little Wilson, Pitman, Sam, Henry, Rochester, Israel, Daniel, Richard, Tom, Eliza, Polly, Nancy, Matilda, Barbara, Spotswood, Peggy, Mary, Daniel, Penny, Rachel, Emily, George, Phil, Billy, Frederick, Hemady, Ned, Jack, Morgan, Anthony, Gully, Jack, Tom, Hackney, Tom Gander, Sam, Homady, Primus, Isaac, John, Dolly, Sarah, Hagar, Elizabeth, Fanny, Morgianna, Martha Ann, Mary, Molly, Margaret, Diana, Ellen Elizabeth, Sam, Sarah, for six hundred and ninety shares. 690.

(*Note*—93 shares transferred to the Prest of the U. Bk. of Fla.)

20*th May,* 1838.

South West quarter Sec. 3, T. 2, R. 1, North and West; East half North West quarter Sec. 3, T. 2, R. 1, North and West; West half North East quarter Sec. 2, R. 1, North and West; Lot 6, Sec. 4, T. 2, R. 1, North and West; Lots 2, 3, 6, and 7, Sec. 9, T. 2, R. 1, North and West; Lot 8, Sec. 4, T. 2, R. 1, North and West; for one hundred and one shares. 101.

15*th May,* 1839.

Gabriel, William, Squire, George, Isaac, Jacob, Keeling, Jack, Moses, York, Albert, Adeline and child, Martha, Ann and two chil-

675 dren, Mary and child, Clarissa, Sarah and child, Billy, Mariah and child, Francis, Goodwin, Ann and child, Queen and child, Hannah, and child, Eliza, Emily, Rachel, Margaret, Fenton, Radney, Jane, Kitty, Judy, Patty, Jacob, Jim, Peter, Gabriel, Dick, Daniel, Harkless, Harriet, Walker, Willy, George, Nancy B. and child, Maria and child, Patsy, Cely, Nancy Burwell, for two hundred shares 200.

January 15th, 1840.

Slaves—Sey, Kitty, for five shares. 5.

29th February, 1840.

West half South East quarter Sec. 29, T. 2, R. 3, North and East; South East quarter South East quarter Sec. 30, T. 2, R. 3, North and East; South East quarter North East quarter Sec. 30, T. 2, R. 3, North and East, for eight shares. 8.

19th March, 1835,	50	shares.
1st Feby., 1837, for 60 shares transfer 31 to Mills,	29	"
7th March, 1838, for 41 shares, transfer to Mills, 13	28	"
16th, 1838, 470 transfer to Pres. Union Bank, 105	365	"
16th May, 1838, 690 transfer to Pres. Union Bank, 92	597	"
20th May, 1838,	101	"
15th May, 1839,	200	"
25th Jan. 1840,	5	"
29th Feb. 1840,	8	"
	1383	shares.

Union Bank of Florida, 15th July, 1847.

C. G. ENGLISH,
Solicitor Union Bank.

To the admission of which evidence the plaintiff, by its counsel, objected, but the court overruled the objection and allowed the same to be read in evidence, to which decision, the plaintiff excepted.

The said defendants, by their counsel, then offered in evidence a deed of mortgage of certain slaves named in said inventories and appraisement,, executed by said Samuel in his life time, dated the —— day of —— A. D. 18 and proved that said mortgage was in suit
676 for foreclosure in this court, plaintiff's and counsel admitted that the same was assigned and in fact belonged to other persons thar the Bank, which deed of mortgage is in these words:

This Indenture, made and entered into 19th day of October in the year of our Lord one thousand eight hundred and forty, between Samuel Parkhill of the county of Leon in the Territory of Florida, of the *first* part and the Union Bank of Florida, of the *second* part: Whereas the said Samuel Parkhill is justly indebted to the said Union Bank of Florida, in several sums of money as follows, to wit:

1. In a certain Bill of exchange dated 29th August, 1839, payable at ninety days after the fourth day of November, 1839, drawn on Hamilton & Co. of New York, in favor of William H. Brodie, for twenty-five thousand dollars, which bill, at request of said Parkhill, was not forwarded for acceptance and payment; and on which there is endorsed a payment of nine thousand three hundred and fifty dollars, as on the 22d February, 1840.

2. Also a certain note payable to order of John Parkhill, Esq., Cashier, dated 28th August, 1839, and payable at ninety days from the 24th October, 1839, for twenty thousand dollars, upon which note there is endorsed, July, 18, 1840, a payment of three thousand nine hundred and twenty-three 58-100 dollars.

3. Also a bill of exchange dated 8th February 1837, drawn on Hamilton and Cole, of New York, by William H. Brodie, in favor of and endorsed by said Samuel Parkhill, for the sum of ten thousand five hundred dollars, payable six months after date, which bill was accepted by said Hamilton & Cole, and protested for non-payment.

4. Also one other note dated 24th April 1839, for fifteen thousand dollars, signed by said Saml. Parkhill, and endorsed by William P. Craig, and payable eight months after date, upon which said note, the following payments are endorsed, to wit: on 21st January, 1840, the sum of ten thousand dollars, and on the 1st January, 1840, the sum of one thousand and ninety nine 35-100 dollars.

5. Also a bill of exchange dated 22d March, 1837, drawn by Wm. P. Craig in favor of, and endorsed by, Saml. Parkhill, upon Maitland, Kennedy, & Co., at four months after date, for five thousand two hundred dollars, which bill was protested for non-payment.

6. Also a certain promissory note dated January 4th 1840, payable to, and endorsed by R. H. Berry, payable ninety days after date, for fourteen hundred and forty three 58-100 dollars.

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7. Also a certain note dated January 10th, 1840, payable to, and 677
endorsed by, John Parkhill, payable ninety days after date, for the sum of six thousand dollars.

8. Also a certain other note dated 18th March, 1840, payable sixty days after date to the order of William P. Craig, and endorsed by him for the sum of ten thousand dollars.

9. Also a certain other note signed by said Samuel Parkhill, dated January 19th, 1840, payable ninety days after date, to the order of and endorsed by John Parkhill for the sum of five thousand dollars.

10. Also a certain other note signed by said Samuel Parkhill, dated February 1st, 1840, payable ninety days after date, to the order of, and endorsed by John Parkhill for five thousand dollars.

11. Also one other note dated October 19th, 1840, and payable to the Union Bank of Florida, or its assigns on demand, for the sum of thirteen thousand, two hundred dollars.

And whereas, the said Samuel Parkhill is desirous of installing the payment of said debts, notes and bills of exchange, so as to pay thereof twenty-five thousand dollars on or before the first day of April in the year one thousand eight hundred and forty-one, and to pay annually thereafter, on or before the first day of April in each succeeding year, the further sum of fifteen thousand dollars, until the whole of said debts with the interest thereon, shall have been duly paid and discharged. And whereas, the said Samuel Parkhill is desirous to secure the payment of said notes, bills and debts, at the times and in the sums before stated. Now this Indenture witnesseth that for and in consideration of the premises and in further consideration of the sum of one dollar to him in hand paid by the said Union Bank of Florida, the receipt whereof at and before the sealing and delivery of these presents, is hereby acknowledged, the said Samuel Parkhill hath granted, bargained, sold and transferred, and by these presents doth grant, bargain, sell and transfer unto the said Union Bank of Florida, and to its assigns, the following slaves, together with the future increase of the females thereof, to wit: Prisley, 40 years; Lucy, 45; Mary, 17; Asia, 40; Henry, 10; Susannah, 35; Nancy Eppes, 17; Nancy Dowdy, 18; Ailsey, 28; Francis Smith, 17; Melinda, 16; Lucy, 18; Priscilla, 12; Ann Eliza, 16; Rosetta, 14; Rachel, 16; Martha, 8; Phillis, 25, and child; Dick, 30; which before named slaves were mortgaged to the said Union Bank of Florida on the 6th November, 1839, to secure the payment of the first described bill of exchange, for twenty five thousand dollars. Also 678
the following other slaves and the future increase of the females thereof, to wit: Diana Clark, 24; Little William, 10; Martha, 9; Webb, 18; Irven, 18; Dick Petersburg, 17; Becky, 20; Edmund, 40; Patsey, 18; William Cary, 15; Henry, 11; Sarah Dawes, 15; Willis, 15; Jerry, 18; Henry, 18; Diana Brooks, 20, a daughter of Diana, 8; Black Ellen, 12; Smart, 35; Little Rosetta, 12; Gabriel, 12; Daniel, 12: To have and to hold the said slaves, unto the said Union Bank of Florida, and to its assigns forever: Yet upon this condition, that if the said Samuel Parkhill, his heirs, &c., shall well and truly pay the debts herein before described by payment of the several instalments described, at the times when the same shall become due and payable, then this indenture shall be null, void, and of no effect, else shall remain in full force and virtue. In witness whereof the said Samuel Parkhill hath hereunto set his hand and affixed his seal on the day and year first above written.

SAMUEL PARKHILL, [Seal.]

Signed, Sealed, and delivered in presence of
HENRY L. RUTGERS,
J. RICHARDSON, JR.

To the admission of which evidence the plaintiff by its counsel objected, but the court overruled the objection and allowed the same to be read in evidence to the jury; to which decision the plaintiff excepted.

The said defendants then called James T. Archer, who, being duly sworn in this behalf, deposed as follows, viz:

In consequence of an advertisement in the month of November, 1843, attended a sale before the banking house of the plaintiff, of (1428) fourteen hundred and twenty-eight shares of stock sold by the Union Bank of Florida—it was sold as the property of Samuel Parkhill, deceased, and was bid off by Col. John G. Gamble at one cent per share, premium; some directions were given at the sale, but does not distinctly recollect what they were. Being *cross-examined,* said, does not know whether the sale was ever completed or not, does not know what was done after that. Does not recollect the terms of the sale which were announced; it was cried by Henry L. Rutgers, an officer of the bank. Being *re-examined,* says, he was the attorney for the estate of Parkhill, and attended said sale as such, in

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679 consequence of seeing the advertisement—does not know whether any credit was given to the estate on account of the stock

Defendants then called Charles G. English, who being duly sworn in this behalf, deposed as follows: This statement which I have prepared as a statement of the original discounts for Samuel Parkhill on account of loans on pledge of stock, and the renewals of the same, of which the bond in suit is the last renewal, to wit:

680 *Memorandum of Stock Notes discounted for S. Parkhill by the Union Bank of Florida.* 681

No.	Date of Entry.	Date of Note.	Note due.	Amount.	Discount.	N. Proc'ds	Date of Payment.	
	7th April, 1835		22d January, 1836	3,334	Subs'ted for Prioleau's note 22d Jan. '36.			
1757	31st August, '36	31st August, 1836	22d January '37	3,333	267 43	3,065 57	26th January, 1837	Arrear of inte-
2023	14th December, '36	25th December, '36	25th December, '37	333 37	26 93	306 24	12th April '38	[rest 160 03
2199	26th January, '37	25th Jan., '37	25th July '37	3,333	136 28	3,196 72	" " "	
2248	8th February, '37	10 February, '37	10th April, 37	4,000	56	3,944	9th May, 37	
2569	8th May, '37	13th April, '37	13th August, '37	4,000	112	3,888	12th April, '38	
3429	12th April, '38	28th December, '37	28th June, '38	7,666	631 21	7,034 96	5th February, '39	Arrear of inte-
3962	17th July, '38	17th July, '38	17th October, '38	50,000	1,044 47	48,955 53	" " "	[rest 317 76
4013	29th July, '38	24th July, '38	24th October '38	12,300	256 93	12,043 07	" " "	
4223	8th September, '38	17th July, '38	27th November, '38	20,000	417 79	19,582 21	" " "	Int. from 27th
4236	15th Sept'r, '38	15th Septem., '38	14th November, '38	6,483 22	92 20	6,391 02	" " "	[Aug. 1838.
4264	22d Sept'r, '38	22d September, '38	22d October, '38	16,982 08	128 31	16,853 77	18th January, '39	
4797	18th January, '38	18th January, '39	19th March, '39	4,500	64	4,436	10th April, '39	
4883	5th February, '39	5th February, '39	6th April, '39	88,783 22	1,262 72	87,520 50	" " "	
4884	" "	" " "	" " "	7,666 17	109 03	7,557 14	" " "	
5179	10th April, '39	9th April, '39	9th October, '39	88,783 22	3,630 27	85,152 95	31st October, '39	
5180	" "	" " "	" " "	7,666	313 45	7,352 55	" " "	
5181	" "	" 22nd March, '39	" " "	4,500	201	4,299	" " "	
5352	15th May, '39	4th March, '39	4th November, '39	13,333 33	545 07	12,788 26	5th December, '39	
6292	30th October, '39	12th October, '39	12th April, '40	88,873 23	3,630 27	85,242 95	8th May, '40	
6293	" "	" " "	" " "	7,666	313 45	7,352 55	" " "	
6294	" "	" " "	" " "	4,500	184	4,316	" " "	
6460	13th December '39	7th November, '39	7th May, '40	13,333	545 11	12,788 22	2d June, '40	
7319	8th May, '40	15th April, '40	1st June, '40	4,732 67	52 59	4,680 08	" " "	
7320	" "	" " "	" " "	88,783 22	986 45	87,796 77	" " "	
7321	" "	" " "	" " "	4,500	50	4,450	" " "	
7407	2d June, '40	1st June '40	1st October '40	533	14 70	518 30	7th November, '40	
7408	" "	" " "	" " "	4,732 67	130 43	4,602 24	" " "	
7409	" "	" " "	" " "	88,783 22	2,446 49	86,336 73	" " "	
7410	" "	" 10th May '40	10th Septem., '40	13,333 33	367 40	12,955 93	10th October, '40	
7411	" "	" 4th June, '40	4th October, '40	4,500	124	4,376	7th November, '40	
7484	10th October, '40	13th Septem., '40	" " "	13,333 33	74 08	13,259 25	" " "	
7868	7th November, '40	7th October, '40	6th December, '40	4,500	64	4,436	1st January, '41	
7869	" "	" " "	" " "	75,583 22	1,074 99	74,508 23	" " "	
7870	" "	" " "	" " "	13,333 33	189 63	13,143 70	" " "	
7871	" "	" " "	" " "	4,732 67	67 32	4,665 35	" " "	
7872	" "	" 4th Otcober, '40	" " "	533	7 95	525 05	" " "	
8047	1st January, '41	9th December, "	9th June, '46	94,182 22	3,851 04	90,381 18		
8043	" "	" " "	9th September, '41	4,500	274	4,226	26th August, '45	

682 Interest was always required to be paid in advance, but it was not always so paid in advance. Samuel Parkhills stock notes frequently lay over, as will be seen from the statement. Where a note would lie over for some time, and then be renewed, interest would be calculated from the maturity of the old note to the time of renewal, and then in advance upon the renewal for as long a period not more than twelve months, as the stockholder desired. *Cross-examined.* By this operation, the bank would lose the profit upon the interest so deferred. Discount is the counting off the interest, and there is a difference between interest paid in advance, and interest paid after the lapse of the time. The bank would lose by the operation upon the interest. *Re-examined.* Proves resolution declaring Parkhill's stock forfeited, to wit: . Copy of Resolution adopted by the Board of Directors of the Union Bank of Florida at their meeting 1st November 1843: Resolved that the shares of stock standing in the name of Samuel Parkhill on the books of the bank are forfeited by non-payment of interest, and that the same be advertised and sold as directed in the amendment of the charter of the bank passed, approved on the 1st March 1839, and subsequently accepted by the stockkholders. Says that Rowlett's tables were always used by the bank; by those tables, the days less than a month are calculated at 360 days to the year, the year is composed of three hundred and sixty-five days, and the months are aliquot parts of the year.

Defendants then called Henry L. Rutgers, who being duly sworn, deposed as follows: He has attended to the business in bank of renewing stock notes—the bank required the interest to be paid in advance, and so took it whenever it could get it—stock notes frequently lay over —when such was the case, the interest was paid from the time the note fell due, to the time of renewal, and as much interest in advance as the party was willing to pay, not exceeding twelve months interest.

Interest is always calculated in bank, for convenience, by Rowlett's tables; by these tables, interest for days less than a month, is calculated at 360 days to the year. This is the only peculiarity. Does not recollect a case of an executor or administrator renewing a note in bank; if any such had been offered, would have applied to the President for instruction—stock notes or bonds are discounted, and the interest taken in advance whenever the bank could get it. *Cross-examined.* Says the notes of Samuel Parkhill frequently lay

683 over for some time—that pursuant to an advertisement, and under the amended charter of 1839, on the 18th November, 1843, the stock of Samuel Parkhill, consisting of thirteen hundred and eighty-three shares, was offered for sale, and knocked off to John G. Gamble, at one per cent. per share, he having thereby the privilege to secure the shares, which was never done. The stock still continues to stand at the credit of Samuel Parkhill on the books of the bank—Colonel Gamble, who bid off the shares, did not pay the one per cent. per share, neither did he secure the stock according to the requisitions of the charter: in other words, he did not complete the purchase. Witness produced copy of the advertisement, to wit:

UNION BANK SHARES.

By order of the Board of Directors of the Union Bank of Florida, the following shares in the capital stock of said bank will be offered for sale at public auction, to the highest bidder, before the front door of the banking house of said bank, in the City of Tallahassee, between the hours of 11 o'clock, A. M. and 3 o'clock, P. M. on Saturday, the 18th day of November, 1843, said shares being forfeited under the amended charter of said bank, for non-payment of interest upon stock notes, viz: Samuel Parkhill, 1,428 shares.

JOHN G. GAMBLE, *President.*

Tallahassee, Nov. 2, (7,) 1843.

Re-examined.—Said there were forty-five (45) shares of cash stock which were not offered for sale—they still remain at the credit of Samuel Parkhill—the bank had loaned forty-five hundred dollars, the full nominal value on them. The stock offered for sale was bid off at one per cent. per share. Being asked if he had never said the bidding was for one cent. per share premium, answered he had, and by which he meant one cent per share, for the privilege of securing the nominal amount of the share by mortgage on lands and slaves. Being asked by defendant's counsel, if he had bid one cent per share for the shares, would be entitled to a transfer of the shares, on payment of the one per cent. per share bid, he answered no—he would have to pay the one per cent. share, and also secure the nominal amount of the shares by mortgage on lands and slaves, or pay the one hundred dollars per share, besides the one cent. That stock had been sold *bona fide* at 25 per cent. premium at sales by individuals, and sales on forfeiture by the bank—that in all the stock notes days of grace were added and the interest calculated, and as for four
684 days, and then were calculated by days. If the cash stock had been sold at one cent per share premium, the purchaser would have had to pay one hundred dollars, and one cent per share.

Again cross-examined.—Said the board of stockholders kept a record or minutes of their proceedings—the proceedings of each meeting were signed by the chairman and countersigned by the secretary. The book shown him is the record book, or minutes of the stockholders proceedings. Reads to jury the minutes or record of a meeting held 4th January, 1840, accepting the amendment of the charter, passed in 1839, to wit:

At a meeting of the stockholders of the Union Bank of Florida, held on the 4th day of February, 1840, pursuant to adjournment, Mr. James Gadsden submitted the following resolution: *Resolved*, That the stockholders do approve and accept as part of their charter the amendment thereof, passed by the Legislative Council, and approved by the Governor of Florida, in the following words, viz:

An act to amend an act entitled an act to incorporate the subscribers to the Union Bank of Florida, approved 1st March, 1839.

SEC. 1. *Be it enacted by the Governor and Legislative Council of the Territory of Florida*, That, if any stockholder who has heretofore or may hereafter obtain a loan upon the pledge of stock, as is contemplated in the twenty-ninth section of the act to which this is an amendment, shall neglect to renew or pay up his stock note, for the space of thirty days after the same shall have become due, the shares so pledged shall be forfeited to the bank, and any premium that may be received from the sale thereof shall accrue and be added to the surplus profits of the bank.

SEC. 2. *Be it further enacted*, That it shall be the duty of the Board of Directors, when any share may be forfeited as aforesaid, to proceed to sell the same at public outcry to the highest bidder, before the banking house in the City of Tallahassee, after giving ten days notice, by publication in all the papers published in Tallahassee, of the time and place of sale, and the purchaser shall, within ten days thereafter, execute to the bank the bonds and mortgages necessary to constitute him a stockholder, and be subject to the same rules, regulations and restrictions, and to be entitled to the same rights, privileges and immunities as are guaranteed to an original stockholder: *Provided*, That the sale and forfeiture of shares shall not operate to divest the bank of any lien which it may have had on

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the property of the defaulting stockholder, but the same shall remain 685
bound for the security of any debt he may owe the bank, whether as payer, endorser, or surety, until the same shall have been fully satisfied.

On this resolution, much debate ensued—after which, Mr. Richard H. Long called for the ayes and noes on its passage, when the following vote was taken:

Ayes—Messrs. R. W. Alston, R. C. Allen, J. G. Anderson, H. W. Braden, T. A. Bradford, R. H. Bradford, Edward Bradford, E. E. Blackburn, S. J. Baker, Wm. Bailey, T. M. Bush, Bruton & Zeigler, T. P. Chaires, W. P. Craig, John A. Craig, J. W. Dabney, C. H. Dupont, A. F. Duval, F. Eppes, F. Fitzgerald, J. G. Gamble, Robert Gamble, James Gadsden, A. M. Gatlin, S. Parkhill, C. Rouse, H. V. Snell, J. B. Taylor, Richard VanBrunt, T. B. Watson, George T. Ward, J. M. Gilchrist, I. R. Harris, A. F. Holmes, John Judge, J. W. Lea, Thomas Livingston, J. H. T. Lorimer, Banks Meacham, J. C. McGehee, John Miller, J. C. McMillan, B. K. West, D. C. Wilson, W. Wyatt, A. Myrick, B. F. Whitner, Robert W. Williams.

Noes—Thomas Brown, R. Hayward, L. G. Lamb, Richard H. Long, M. C. Livingston, John N. Partridge, and Jacob Robinson, who voted in this our right as stockholders, and in virtue of their premises, the vote stood 10,027 votes for the resolution, and 353 votes against it.

Mr. Richard H. Long asked leave to file a protest against the resolution, which was granted.

Defendants then offered and introduced in evidence a judgment and execution in favor of Henry Bond, against Martha Ann Parkhill, administratrix of the estate of Samuel Parkhill, to wit:

At a Superior Court for the county of Leon, continued and held at the Court House in the City of Tallahassee, on Thursday, the 5th day of May, A. D., 1842. Present, the Honorable SAMUEL J. DOUGLAS, Judge.

Henry Bond, plaintiff,
vs.
Martha Ann Parkhill, administratrix of S. Parkhill, deceased, defendant. In assumpsit.

This day came the plaintiff by his attorney, and the defendant being solemnly called came not: therefore it is considered by the court, that the plaintiff recover against the defendant the sum of 686
twelve thousand four hundred and forty-six and 14-100 dollars, the damages which the plaintiff has sustained by occasion of the defendant's intestate's non-performance of the promises and assumptions in the declaration mentioned, to be levied of the lands and tenements, goods and chattels of Samuel Parkhill, deceased, in the hands of the defendant to be administered, and his costs by him about his suit in this behalf expended, and the said defendant in mercy, &c.

[*Copy fi. fa.*]

THE TERRITORY OF FLORIDA.

To all and singular the Marshals of said Territory—Greeting:

We command you, as oftentimes before we have commanded, that of the goods and chattels, slaves, lands and tenements of Samuel Parkhill, deceased, in the hands of Martha Ann Parkhill, administratrix, to be administered, you cause to be made the sum of twelve thousand four hundred and forty-six dollars and fourteen cents, which Henry Bond lately, on the 5th day of May, 1842, recovered in our Superior Court for the county of Leon, in the Middle District, as well for his damages which he hath sustained by the occasion of the non-performance of certain promises and assumptions by the said Samuel Parkhill in his life time to the said Henry Bond lately made, and likewise the sum of ——— ———, which to the said Henry Bond in the same court adjudged, for his costs by him in that behalf expended, together with lawful interest on said damages, from the rendition of said judgment until paid, and the costs of this writ and of your proceedings hereon; and that you have the said sums of money before the judge of our said court, at Tallahassee, within 120 days from date, to render the said H. Bond the sums aforesaid, and have then and there this writ. Witness Richard T. Birchett, clerk of our said court at Tallahassee aforesaid, this 28th day of October, A. D., 1843, and of the independence of the United States the sixty-eighth year.

[SEAL.] R. T. BIRCHETT, *Clerk.*

[*Endorsed.*]

MEM.—This execution is entitled to a credit of seven thousand four hundred and ninety-two 46-100 dollars, as appears by the return on the *alis fi. fa.* returned to this office.

Test: R. T. B., *Clerk.*

By virtue of this execution, I have this day, 30th October, 1843,

687 levied on one hundred and two negro slaves, the property of defendant, a schedule of which is attached to execution No. 2,115.

J. G. CAMP, *Marshal.*

By A. A. FISHER, *Deputy Marshal.*

Defendants also called James E. Broome, Judge of Probate, who, being duly sworn, deposed that the commissions due defendant, Moseley, on the account of his administration, excluding the 184 slaves sold by John G. Camp was $377. 76—if those slaves are to be considered as administered upon, then he will be entitled to commissions to the sum of $3,799 74. If all the property contained in the inventories is to be considered as chargeable for commissions, then the sum will be assessed at $4,807 26.

Defendants counsel then asked the plaintiff's counsel for an admission that the one hundred and eighty-four slaves sold by Camp were included in the inventories and appraisements exhibited, and also in the stock mortgages heretofore introduced—to which, with the additional fact that the defendants herein are now suing the purchasers for the same slaves, is assented to by both parties, and these facts to be considered as proved.

Defendant's counsel then moved to introduce the vouchers rejected by the Judge of Probate, viz: two receipts for payments made to Mrs. Martha Ann Manly, on account of her dower interest, and on account of James T. Archer, and to have allowance therefor, to wit:

Received, Tallahassee, 27th March, 1846, of W. D. Moseley, administrator *de bonis non* on the estate of Samuel Parkhill, deceased, five-hundred and sixty 24-100 dollars, on account of my wife's dower in said estate for the year 1845. H. MANLY.

$560 24-100.

Received of W. D. Moseley, administrator *de bonis non* of the estate of Samuel Parkhill, the following notes in part payment of my wife's dower out of said estate, to wit: Edward Houstoun, R. A. Shine, J. S. Bond's note for $352, with a credit by J. G. Gamble, of $129; L. H. Branch, Joseph Branch and E. Bradford's note for $80; credit by 9 90-100 dollars; Thomas Lang, John Hardin and W. S. Murray's note for $54, credited with $8; R. A. Shine, Edward Houstoun, and J. B. Bull's note for $176; R. W. Alston, Minor Walker and Thomas Gordon's note for 144 dollars, credited with 94 60-100 dollars; H. Bond, J. W. Argyle and W. F. Lloyd's note for $64; T. A. Bradford, E. Bradford and L. H. Branch's note for $20.

H. MANLY.

688 Received of William D. Moseley, administrator *de bonis non* of the estate of Samuel Parkhill, the sum of fifty one dollars on account of moneys paid by me to the clerk of Leon Circuit Court, for expenses and costs on appeals taken by the administrators to the Supreme Court of the State, 28th February, A. D. 1846.

JAMES T. ARCHER.

To the introduction and allowance of the payments made to Mrs. Manly, widow of said Parkhill, the plaintiff, by its counsel, objected because her allowance or share in the personal estate of said Samuel Parkhill had not been allotted and set apart to her as provided by law, but the court overruled the objection, and allowed the receipts to be read in evidence to the jury: to which the plaintiff, by its counsel, excepted.

Defendant's counsel then moved to introduce evidence under the said issue of *plene administravit* of the liability of defendants for counsel fees and expenses of the administration on the ground of a right of retainer to that extent, to the admission of which evidence the plaintiff, by its counsel, objected; but the court overruled the objection and ordered the evidence to be admitted; to which decision the plaintiff excepted.

And thereupon, under said decision, the defendants introduced Medicus A. Long, who being duly sworn deposed, says he is aware of the services rendered the administrators by their counsel, in the following suits, to wit: The foreclosure suit brought by the bank against Mrs. Manly and her husband; was present at the trials in the Superior and Supreme Courts. He also knows of the detinue suits now pending brought by the administrators of Parkhill, said to be some twenty in number, for all which and other services he thinks the sum of three thousand or thirty-five hundred dollars, including the present suit, a reasonable charge.

Also Simon Towle, a witness duly sworn in this behalf, who deposed that certain suits for slaves had been brought in Louisiana, fifteen slaves in number, there were two purchasers of these slaves. Defendants are liable for costs of suits there, if they fail, and also for counsel fees; no sum of the latter has been agreed upon, would probably be some three or four hundred dollars if unsuccessful—if successful, it may amount to seven or eight hundred dollars.

Also John B. Keen, who deposed that the Clerk's office of the Circuit Court had claims for fees against defendants as administrators—two hundred dollars would cover the amount.

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Also recalled Judge Broome, who deposed that the defendants as 689 administrators of Parkhill, were indebted to his office from two hundred to two hundred and twenty dollars; it is for fees in the audit of accounts.

And here the defendants rested their cause.

Plaintiff, by its counsel, then introduced the mandate of the Supreme Court reversing the judgment of the Union Bank of Florida, against Manly and wife, administrators of S. Parkhill, to wit:

STATE OF FLORIDA.

To the Honorable the Judge of the Circuit Court of the Middle Circuit of Florida in and for Leon County—Greeting.

Whereas, lately in the Superior Court of the Middle District of Florida in and for the county of Leon, before you in a cause between the Union Bank of Florida, plaintiff, and Martha Ann Manly and Hiram Manly in right of his wife, said Martha, administrators of Samuel Parkhill, deceased, defendants, the judgment of said Superior Court was in the following words, to wit: This day came the parcial demurrer to the defendant's rejoinder to the plaintiff's replication ties, by their attorneys, and the plaintiff, by its attorney, filed its special demurrer to the defendant's amended plea *puis darrien* con- which demurrer the defendant's joined: Whereupon the matters of law arising upon the plaintiff's demurrer to the said rejoinder being argued, it seems to the court here, that the said rejoinder and the matters and things therein alleged, are not sufficient in law to bar or preclude the plaintiff from having and maintaining its action aforesaid against the defendants. Therefore it is considered by the court, that the said plaintiff recover against the said defendant, the sum of $94,182 22-100 parcel of the debt in the declaration mentioned and the sum of $27,982 65-100 its damages, making together the sum of one hundred and twenty-two thousand one hundred and sixty-four dollars and eighty-seven cents, and its costs by it about its suit in this behalf expended, to be levied of the goods and chattels, slaves, lands, and tenements, of the said intestate Samuel Parkhill, deceased, in the hands of the defendants to be administered, and the said defendant in mercy, &c., as by inspection of the transcript of the record of the said Superior Court which was brought into the Supreme Court of the State of Florida, by virtue of a writ of error, agreeably to the act of the Legislative Council of the Territory of Florida, continued in force in this State by the Constitution of this State in such 690 case made and provided, fully and at large appears: And whereas, at the January term, in the year of our Lord one thousand eight hundred and forty-six, the said cause came on to be heard before the said Supreme Court on the said transcript of the record, and was argued by counsel; on consideration whereof it was considered by said Supreme Court,, that the said judgment of the Superior Court for Leon county, to be reversed, annulled, and set aside, and that the plaintiffs in error recover against the said Union Bank of Florida, the defendant in error, their costs by them about this suit in this behalf expended, which costs amount to the sum of $25 89-100.

You therefore, are hereby commanded, that such proceedings be had in said cause as according to right and justice and the laws of the State of Florida, ought to be had, the said writ of error notwithstanding. Witness the Honorable Thomas Douglas, Chief Justice of said Supreme Court, at Tallahassee, this fourth day of May, A. D. 1846.

[Seal.] M. D. PAPY,
Clerk Supreme Court.

Also the judgment of the Circuit Court and dismissal of suit therein to wit: At a Circuit Court for the county of Leon, continued and held at the Court House in the City of Tallahassee, on Saturday the 9th day of May, A. D. 1846: Present the Honorable George W. Macrae, Judge, &c

The Union Bank of Florida, plaintiff,
vs.
Martha Ann Manly, and Hiram Manly, in right of his wife, said Martha, administrators of Samuel Parkhill, deceased, defendant } In debt.

This day came the defendants by their attorney, and presented to the court here, the mandate of the Supreme Court of this State, to which an appeal had been taken by the defendants from a judgment heretofore rendered in this cause, by which mandate it appears that the judgment heretofore rendered in this cause was reversed, annulled and set aside, and that the cause be ordered to be remanded to the Circuit Court for Leon county, with directions to that court that such proceedings be had in said cause, as according to right and justice and to the laws of Florida ought to be had. It is, therefore, ordered that the judgment heretofore rendered in this cause in the Su-

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691 perior court for the county of Leon be annulled and set aside, and that the said defendants, as administrators as aforesaid, recover against the said Union Bank of Florida their costs by them about their defence in this behalf expended, as well in the said Supreme Court, as in the said Superior and Circuit Courts, to be taxed by the clerk of this court.

The said plaintiff offered in evidence sixty-nine bonds of the Territory of Florida, issued and negotiated by the Union Bank of Florida, under its act or charter of incorporation, amounting to the sum of sixty-nine thousand dollars, being the amount for which the slaves of Samuel Parkhill, in the said nine stock mortgages, were held and bound; for the purpose of showing that the plaintiff had, by taking up the said bonds of the territory, relieved the property from any lien, real or pretended, of the said Territory of Florida upon the mortgages in question, or so much of the property specified and conveyed therein. The plaintiff admitting that the security on all lands and negroes in the mortgage mentioned was in *solido* and attached to all and every part of the same, and that the bonds offered were not the property of the bank, but held in trust by it for a creditor of the bank. But the court refused to allow said evidence to go to the jury—to which refusal, the plaintiff by its counsel excepts.

This being all the evidence introduced, and the cause having been fully argued to the jury, the said plaintiff by its counsel prayed the court to instruct the jury—

That the Union Bank, for itself, and as trustee, a depository of the territory, and for the security of the territory itself, hath, by virtue of the stock mortgages offered in evidence in this case, and of the act of incorporation of the Union Bank, and the acts amendatory thereto, a lien on the mortgaged property covered by the stock mortgages of Samuel Parkhill, not only for the nominal amount of the mortgages for stock, but also for the amount of the stock note or loan of two-thirds, made to the stockholder, Parkhill, on pledge of stock, and which is sued upon in this action, with interest on such stock loan, and, therefore, the property contained in the inventory, and included in the said stock mortgages, are assets in the hands of defendant Moseley, applicable to the discharge of the plaintiff's debt demanded in this action.

Which instruction the court refused to give, and the court instructed the jury as follows, to-wit:

692 1. That the capital of the Union Bank of Florida was raised through means of the territorial bonds—that these, though in form the obligation of the territorial Government, were in effect and actually bonds of the stockholders, the obligation by the Territorial Government being assumed as a means to effect their negotiation in the foreign market.

2. That the said bond and mortgage executed to the bank by the stockholder, are by the 8th section of the charter, intended to secure payment of the principal and interest of the bonds issued by the territory, and are in contemplation of law as if both bond and mortgage had been originally made and executed to the capitalist, or holder of the territorial bonds, by the stockholder. That so soon as the money was raised by sale of the bonds, the stockholder became debtor and bondholder, or capitalist, the creditor, the debt being secured primarily by the bond and mortgage of the stockholder, and again by the endorsement of the bank, and by the engagement of the territory.

3. That the bond and mortgage of the stockholder being payable to the bank, constituted the bank as agent and trustee to see principal and interest paid agreeably to the terms of the bond and mortgage. That so soon as the bank received the money, through the sale of the bonds at par, *eo instanti* the shares of stock were paid in full.

4. That the bank cannot, through a judgment and execution in its favor, divert the mortgaged property from the purposes and objects designed by the mortgage and the charter of the bank, and that a sale thereunder is in violation of its trust and illegal.

5. That the debt on which the present suit is founded is for a loan and though secured, like every other debt of a stockholder, by his shares, is not secured, either directly or indirectly, by the mortgage of the stockholder.

6. That an assignment of the bond and mortgage of the stockholder by the bank, in payment of territorial bonds, will entitle the assignee to coerce payment through a sale of the property, on the terms prescribed by the mortgage, and that the bank itself may enforce sale thereof in such manner and for such purpose, but that said property may not, except by consent of all parties, interested, be sold by the said bank in any other manner.

To all which said several decisions, rulings, judgments, instructions and refusals to instruct the jury, as prayed for by plaintiff 693 the said plaintiff by its counsel excepts; and forasmuch as the said several decisions, rulings, judgments, instructions and refusals to instruct, do not appear of record, the said plaintiff by its counsel tenders this his bill of exceptions, and prays that the same may be signed, sealed and made part of the record, and it is done accordingly.

[SEAL.] THOMAS BALTZELL, *Judge*.

The defendants by their attorneys also excepted to various rulings f the court, which exceptions were noted in the following bill of exceptions filed by defendants:

On the trial of this cause, the evidence was offered and admitted or refused, and other proceedings had, in all respects as set forth in plaintiff's bill of exceptions, to which bill of exceptions reference is here made by consent, to avoid useless repetition.

Upon which state of facts and the pleadings, the court gave the following instructions, to which the defendants by counsel excepted, save the second:

1. That it is competent for a person obtaining a loan (on stock) to pay the interest in advance at the time of the loan, and such an arrangement freely and fairly made is not condemned or prohibited by the laws of usury, or by the charter of the bank.

2. That the stockholder under the 29th section was entitled to a loan equal to two-thirds the amount of his shares—in other words, was entitled to the entire sum, without a deduction of interest, at the time of the loan.

3. That it was competent for the stockholder, however, to waive his privilege of taking the entire two-thirds, and pay the interest in advance, as provided under the 28th section, and that such an arrangement is not illegal.

4. That if the jury are of opinion that such an arrangement was made with the mutual consent and approbation of the officers of the bank, and the stockholders, and became a custom and usage of the bank, thereby asserting and fixing such a construction that defendants are precluded by it, and cannot now complain of it.

5. There being no pretence that more than ten per cent. interest was taken under this contract, or that there was any corrupt or wilful design to take more than the amount allowed by the charter, there is no forfeiture of the interest, as provided by the law of usury, or of the principal and interest, as contended by the defendants.

6. That the taking interest in advance on the note sued on, except 694 in pursuance of such wilful and corrupt design, was not illegal, and was not improper in this case.

11. That there was no disposition or sale of the stock by the bank, as provided by the charter, and defendant is not entitled to a set off therefor.

12. That if there was neglect of duty in making a sale as provided, it was matter for suit, and to be compensated in damages, and not the subject of set off or payment.

13. That the sale of shares by the bank was a cumulative remedy, and that it might elect either a suit on the note, or sell after forfeiture, and until satisfaction by one of the means, the note was not extinguished.

14. If the jury are of opinion that the arrangement of reserving interest in advance on the stock note, was not with assent and free accord of said Parkhill, but coerced from him by the bank, and submitted to as the only means of securing his rights under the charter, then the arrangement was illegal, so far as the exaction of interest was received in advance.

Defendants by counsel then moved the court to instruct the jury, as follows:

1. That plaintiff had not power in loans under the 29th section of its charter, being stock loans to stockholders, to deduct interest in advance, or discount bonds or notes; which was refused by the court.

2. That plaintiff had no power by its whole charter, and the general law of the land in force, pending the whole of its stock loan transactions with defendant's intestate, to take more than at the rate of eight per centum per annum interest in any case or in any manner, whether taken in advance or paid subsequently; which was refused by the court.

3. That interest on loans under the 29th section of the charter, could only be required to be annually paid up; which was granted.

4. That in calculating the interest due annually upon the stock loan of each stockholder, it was lawful only to calculate interest by the year, or proportions of a year; and if the jury believe from the evidence that at any time, at any of said stock loans or renewals for any number of days, or in discounting for days of grace, that interest was calculated by reckoning a day as the 360th part of a year, and

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695 interest was so taken or deducted in the loan or transacted, that such calculation and taking or deducting was illegal; which was refused by the court, who gave in lieu thereof, "that in such case the excess of interest was illegal, and should be deducted."

5. That if the jury believe from the evidence that the bank, by taking interest in advance, upon any of the original stock loans which have resulted in and been consolidated in the paper now in suit, or by calculating a year at 360 days, took more than the rate of eight per centum per annum interest, that the plaintiff had no right by charter so to do, and cannot recover in this action; which was refused.

6. That the plaintiff's charter, is an enabling charter, and only gives power to do that which is expressly granted or necessarily implied in the granted powers. That plaintiff can do nothing which is prohibited, so as to give itself any right thereby; and that in all things done or attempted to be done by the plaintiff, which are prohibited by the charter, or power to do which is withheld or not given, either expressly or by necessary implication, such acts or attempts are without law or authority, and as to them there is no charter or corporation, and out of such acts or attempts no contract or cause of action can arise, and as to the same there is no party on the side of the corporation, capable of contracting or of bringing an action for violation of contract, and no suit can be instituted or recovery had, on any such act or attempt beyond the law of its existence and nature. And that there is no express grant and no necessarily implied power to take interest in advance upon stock loans, or in any wise or mode on such loans, to take more than at the rate of eight per centum per annum interest in the charter of the plaintiff; and on the contrary the taking of more than the rate of eight per cent. per annum is expressly prohibited.

Which was refused by the court.

7. That though by the general law in force pending these transactions, natural persons might take more than the rate of eight per cent. per annum, by expressing the same in the contract, yet in this case there is no evidence of any express agreement to give or take more than eight per cent. per annum yet the bank being entirely a creature of legislation, and expressly prohibited, could not take in any case, more than at the rate of eight per centum interest, and any attempts so to do could create no contract.

8. That any contract by the bank under the 29th section, taking
696 or reserving more than at the rate of eight per centum per annum, is usurious, and by the charter, each stockholder is entitled to a credit or loan fully equal to two-thirds the amount of his shares, and Parkhill's administrators are entitled to have a credit for all monies paid or withheld upon pretence of interest in advance, or beyond the rate of eight per centum per annum, together with interest on the same at the rate of eight per cent. from the time of such payment or withholding, and the same may be allowed either by way or recoupment under the plea of judgment or money had and received in the plea of set-off; which was refused by the court.

9. That by the 29th section of the charter, Parkhill, and his representatives after his death, were entitled to a loan equal to two-thirds the amount of his shares, to continue pending the existing of the bank, subject only to the proviso, that the note or obligation should be annually renewed, and the interest paid up: That this proviso does not make a condition precedent or subsequent to defeat the loan and render the same payable or recoverable by action thereon, upon the stock obligation, but is simply directory to the officers of the bank and the stockholder, and further operates as an agreement or covenant to pay interest by the stockholder annually, and in default thereof gives a right of action for such interest only or to sell stock.

Which was refused by the court.

10. The 9th being refused, counsel further prayed the court to instruct the jury—That if the proviso is to be considered as a condition, it could only be a condition subsequent to defeat the continuance of the loan, and if so, there were two conditions required, 1st—giving a note or obligation annually, 2d—paying up interest annually, and that the continuance of the loan could not in this case be defeated by failure to give an obligation annually, because that is rendered impossible by the act of God, in the death of Samuel Parkhill, and act of law, which renders his representatives incapable of giving a new obligation of a character to bind the estate, or constitute a proper legal renewal of Parkhills obligation. And that if the jury believe that at any time more than the rate of eight per cent. per annum has been intentionally taken by the bank upon this loan, or any part of it, embraced in the note in suit, then all interest is void and irrecoverable, and all obligation to pay interest by Parkhill or his representatives is done away with, by the act of the other party, and so there is in the case supposed no condition broken in this case to the continuance of the loan, and it cannot be recovered; which was re- 697
fused by the court.

11. That, if there has been a valid sale of Parkhill's stock, his representatives would in this action be entitled to recover its value as sold—and if there has been no valid sale, and Parkhill's representatives are still the owners of the stock, the bank cannot recover in this action upon the stock note, because the administrators could not renew the note, and upon payment of interest would be entitled to keep the loan—and to give a judgment for the principal would be to give judgment against them to recover that which they have a right to keep, the interest only being due to the bank; which was refused by the court.

12. That, by the second section of the amended charter, March 1, 1839, it became the duty of the bank to sell, on ten days' notice, the shares of any stockholder, which became forfeited under the first section of that act, and that the bank must show a compliance with this duty and the amount of sale, before it can sue on the stock note, and that the amount of such sale (except the premium) must be credited to the owner of the stock; which was refused by the court.

13. That the bank, after lawfully declaring Parkhill's stock forfeited, and advertising and selling to the highest bidder, (if the jury believe such was the fact,) diverted all interest of Parkhill or his representatives at the moment of such sale, and they were in no manner responsible for the conduct of such purchaser, and could not, either by his failure or compliance with the charter, become re-invested, without their own express consent, with the ownership of said stock, or responsible for any conduct of the purchaser, or bound to enquire into the same, but had a right to treat the said sale as legal, and to insist upon all legal consequences therefrom arising; which was refused by the court.

14. That, upon forfeiture, the bank was bound to sell, on ten days' notice, and if it failed so to do, was responsible in this action for the highest rate at which sales had been made, or at least the par value of the stock, unless they proved it to be then worth less than par; which was refused by the court.

15. That the restriction in the 28th section of the charter to the bank, not to exceed the rate of eight per cent. per annum, is the *"expression"* of the rate of interest which the bank could not exceed, when no other rate is mentioned, and as a part of every contract (as a limit) the bank might make—and if it is not such an ex- 698
pression in this case, then no rate of interest is expressed, and the rate of eight per cent. could not be exceeded by the general interest law then in force; and if the jury believe this has been exceeded intentionally, (not by miscalculation or mistake,) then the defendants are entitled to recover all the interest paid since such excess was first taken; which was refused by the court.

To which refusals, the defendants by counsel excepted, and prayed that this their bill of exceptions might be signed and sealed by the court, and made a part of the record, which is done accordingly.

[SEAL.] THOMAS BALTZELL, *Judge.*

The plaintiff prosecuted a writ of error in this court, to reverse the judgment rendered in the Circuit Court, and assigned errors in conformity with the exceptions taken in the plaintiff's bill of exceptions.

The defendants also prosecuted a writ of error in this court to reverse the judgment, and assigned errors in conformity with the exceptions taken by them at the trial, and specified in their bill of exceptions.

The questions arising on the errors assigned by the bank, were first argued.

Thompson, in support of the errors assigned.

Archer, contra, contended—

That inasmuch as the verdict and judgment were in favor of the plaintiff (the bank), except as to the question of assets in the hands of the defendants, the only error assignable by the plaintiff is, that upon the pleadings and proofs in this case, the judgment should have been rendered for assets in hand, and not for assets *quando acciderint.* That all the other points raised in argument upon this assignment of errors, are irrelevant, and therefore, require no response.

2. That the lands and slaves mortgaged by Samuel Parkhill to secure his subscription for stock to the Union Bank, were by the charter secured to the possession of the stockholder, (Samuel Parkhill,) until the maturity of the mortgages, to be held as a fund to redeem the outstanding obligations of the Territory issued to accommodate the bank, and upon faith and pledge of these mortgages, and the property therein contained—That to allow these slaves and lands to be sold by the bank under judgment and execution based upon the stock note or any accommodation paper, would be a diversion of this fund and a destruction of the indemnity secured to the territory of Flori-

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da—That therefore these lands and slaves, if in the possession of the defendants, are not assets in their hands liable for the payment of the stock note.

3. That the shares of stock pledged for the payment of the stock note cannot be construed to embrace the lands and slaves mortgaged by the stockholder to secure the ultimate payment of his subscriptions to the bank—That upon failure of the stockholder to pay his annual interest on the stock note, the charter contemplated a sale of his *shares* of stock, not of his *lands and slaves*—That according to the testimony, such sale of the *shares* was made in this case, and a premium bid for the stock.

4. That the amendment of the charter, (1839,) on which the plaintiff mainly relies to establish that the property mortgaged for subscriptions of stock, is liable to sale under judgment on the stock note, is not obligatory upon the stockholders—That the original charter is a contract, and contains no provision for its amendment or alteration and cannot be amended or altered by the Legislature, except by the unanimous consent of the stockholders—That unless there be authority in the *original charter* for amendments, no subsequent amendment can bind any stockholder who rejects the amendment; and if any reject it, it cannot bind the others, for it cannot be the law of the corporation unless it binds all.

5. That the deposit of sixty-nine Territorial Bonds in the registry of the court calling for $69,000, does not relieve the incumbrance upon these lands or slaves, created by the stock mortgages.—It is admitted that the lands and slaves are thus mortgaged *in solido* for about double that sum—if these incumbrances can be relieved in this mode so as to make the property subject to execution, based upon the stock note—Territorial Bonds to the whole amount should have been deposited.

6. That upon the proofs in this case, the finding of the jury as to the question of assets, was correct, and that by reason of any thing in the plaintiff's exceptions, the judgment ought not to be reversed.

Randall, for the Bank, in reply:

The object and purpose of the creation of this corporation were to promote certain ends, deemed beneficial to the public, viz:

I. The introduction of foreign capital into the country, and as consequences to result—

700 1. Greater extension and facilities to business.

2 Diminution of the rate of interest.

3. Increased facility to the State, of the power of taxation. These benefits were realized to the extent anticipated.

II. The *"bonus"* secured to the State by the 23d section of the charter. This last benefit, it is admitted, has not been realized—nevertheless, its promise was a part consideration to the territory for the franchise granted.

Principles of law applicable to this and other corporations. "It possesses only those properties which the charter of its creation confers upon it, either expressly, *or as incidental to its very existence.* These are such as are supposed best calculated to effect the object for which it was created." Opinion of Ch. J. Marshall, in Dartmouth College *v.* Woodward, 4 Con. R., 544.

These objects "are such universally as the government wishes to promote. They are deemed beneficial to the country, and this benefit constitutes the consideration for the grant." Ibid.

Distinctive character of this bank, as compared with ordinary banks of discount and deposit—

First and great distinction. The stockholders paid in no money, on account of their subscription for stock. The capital of the bank was borrowed on faith bonds of the Territory of Florida, payable to and endorsed by the bank, on the sale of which the fund was raised. Bonds and mortgages by the stockholders on their lands and slaves were made payable to the bank, to cover the amounts of their subscription, and to an amount equal to that for which the territory issued its bonds. See 1st and 10th sections of Charter, Thompson's Digest, 284, 287.

By 11th section of the charter, Thomp. D., 288, the *bank*, and not the territory, was primarily to pay—although by the terms of the bond, the territory was *absolutely bound to the bondholders.* See 13th and 14th sections of the charter.

Second. Another provision distinguishing this Union Bank was, that the stockholders, on the faith of their subscription thus secured, were entitled to a loan of two-thirds of their stock shares. 29th section of Charter.

From a review of the whole charter it results—

1. That, though the faith of the State was pledged to raise the capital of the bank, yet the *loan*, which brought this capital into the vaults of the bank, was negotiated and made by the bank, and its 701
proceeds to be subject to the management of the bank, under the terms of its charter, and is resulting *negatively.*

II. The loan was not made to the State, nor to the stockholders of the bank *individually*, but to the corporation aggregate, the bank alone. See 1st, 10th, and 11th sections of the Charter.

III. That all mortgage securities taken by the bank, under terms of its charter, and contracts made in pursuance thereof, *belong to the bank exclusively, in every legal sense.*

1. Such pledges were taken to the bank alone.

2. They were to remain in custody and possession of the bank, by 9th section of charter.

3. By same 9th section, the bank could transfer, release and discharge them, substituting others—releasing old stockholders and their property and receiving new ones.

Thus, then, the bank had full control of these securities, with no power reserved to the State to direct its action. If there was any equity in the State to control or interfere with the subject, it was a latent equity, to be called into action by a suitable remedy, and not to be collaterally invoked by third parties.

If the bank was a trustee, it was a trustee coupled with an interest and free to act, unless controlled by a court of equity acting directly on the subject, and at the instance of proper parties.

But if it were possible that the mortgagors had any thing to do with the application of the trust fund, (if trust fund it is to be considered,) then finally we reply, *that payment, or tender to pay,* must precede the application.

Let the present defendants make payment, and its application will go, as they contend it should go, to the bondholders of the bank, and to the release and indemnity of the State.

The exhibition in court in this case of sixty-nine bonds, adequate to cover all the mortgaged property, and their tender in release of and indemnity to the State, prove this intended application.

The case before the court exhibits beyond question, that defendant's intestate was largely indebted to the bank on his stock loan, and for arrears of interest for many years—with an enormous floating debt, and only partially secured, on accommodation paper.

How is this large debt to be collected? By the forfeiture and sale of his shares of stock—say defendants—the only remedy secured to the bank, according to their agreement.

But the facts of this case, and the whole history of the bank, prove 702
that this is no remedy at all. The shares now and for years, have been nothing worth—cannot be sold, on the terms of the charter. They could only be sold on the condition of a new stockholder substituting other mortgaged property of equal value in place of the retiring stockholder. None such can now be met with—for it would be incurring a burden, a liability, with no prospect of advantage or safety. Even the loan of two-thirds of the amount of stock could not now be secured to the new stockholder, if he was willing to take it—for that yet remains with the defaulting stockholder, not collected, and not collectible, *say defendants,* until the expiration of the charter.

We say that the forfeiture and sale of the *"shares,"* provided for in the 29th section of the old charter, and by the amendment of 1839, necessarily involves and carries with it the forfeiture of the property, real and personal, mortgaged to secure these shares.

This amendment of 1839 is said not to be valid or binding, although accepted by a large majority of the corporation, at general meeting of the stockholders. On principle and authority we affirm the contrary. The powers previously imparted to the company made it a legal being, an equity and a unit—acting not through the agency of its individual corporators, but in its aggregate and corporate capacity.

Its consent then to the amendment being expressed in the mode pointed out in the charter, binds and concludes as well as those assenting to, as those dissenting from, the amendment.

Samuel Parkhill, defendant's intestate, in his life time voted with the majority to accept this amendment. Angel & Ames on Corp. p. 280, and cases cited. Witshul *v.* Gaither, 6 T. R. 388. Ex parte Rogers, 7 Cowen, 530, note.

And now the main question which I have to discuss, properly arises, and that is:

Whether on failure of any stockholder, to renew his note or bond for his stock loan, and to pay the interest due thereon—and after a judgment at law upon said bond or note, it is competent for the bank to subject the mortgaged premises to execution in satisfaction thereof?

1. We hold that such a resort is indispensable to preserve the very existence of the bank, to enable it to observe its faith and obligations to the State, to its bondholders and general creditors. It is only necessary to sustain the negative of this proposition, in the present

705 case, and in two or three more even of less magnitude, to wind up and close the institution in bankruptcy and ruin.

The very end and object of its creation would be defeated by such a principle of construction. For unless the bank can collect its debts, it is obvious it cannot discharge its liabilities. Invoking here the principles announced by the Supreme Court of the United States in the Dartmouth College case—quoted in the outset—as applicable to the construction of charters,

2. We proceed to the special facts and law of this case.

The bond in suit is for a loan obtained by defendant, Parkhill, in his life time, under the 29th section of the charter—and "on a pledge of his shares of stock." And now what does this *pledge* mean?

In ordinary banks, a pledge and forfeiture and sale of "shares of stock," when those shares represented money paid, would insure a full satisfaction of the debt.

In the Union Bank, unless the term "shares of stock," carry with it and involve also, "the property pledged" to secure those shares, the forfeiture and sale of the shares simply and alone, as was attempted in this case, secure to the bank *no return whatever*.

That surely was not the design of the charter. By the 29th section, the stockholder can only obtain a loan by giving and renewing his notes, &c., *"for the repayment of the money annually, and having paid the interest up."*

If he do not pay the interest up, he cannot renew his note or bond. At maturity if not renewed, is it not due and payable—principal as well as interest? How can this result be avoided? But on the other side, it is said the loan is permanent to the end of the charter.

Now this we deny—and we challenge the production of a line or word in the charter which can sustain such an assertion.

The 29th section speaks no such language—imports no such privilege.

The *loan* is not to exceed one year. It is then limited. It is to be made upon condition precedent of renewing note and paying up interest.

It is then not *absolute*—the right—but *conditional*. Being then a loan for one year, when past due and not renewed or paid, what is to become of it? May it not be sued for and recovered? So the court below decided and gave us a judgment. But how is it to be satisfied?

It is in evidence in this cause, that except the property mortgaged to this bank, Parkhill's estate has none other, is utterly insolvent.

704 Why then may not the plaintiff, the judgment creditor, holding this very property mortgaged to secure this very debt, apply it to its satisfaction?

We know of no principle of law or equity without the charter, to prevent it.

If it is right to do so, be kept in abeyance, be suspended to the end of the charter, its final resort will be utterly valueless.

And now looking to the terms of the charter in this connection, and particularly of the 9th section, we confidently assert:

1. That at their own creation "the shares of stock" and "the mortgaged property," which secured them, were intimately blended, and formed one subject of property, were in fact convertible terms.

2. That when *loaned* on the terms and conditions of that section, by the substitution of money—of *cash* for property—the loan contracted on the faith of this subject, attached not to the "shares" alone, but to the "property." The words "such loans as may have been made on the faith of it," refer for their antecedent to the word "property" in the line above—the word "property" is the only antecedent.

This 9th section preceding the other sections which bear upon this point, furnishes the cardinal rule of construction to them all, and to be made sensible, they must be made consistent therewith.

Now refer to the 22d section and it will be seen that to secure any remedy for the debt of the retiring stockholder, this same identity of "shares" and "property mortgaged," must be maintained; we see by that section that while the shares pass to the new stockholder, the *lien* for the *debt* attaches to the property pledged by the old or retiring stockholder.

See next the 26th section and note the terms "mortgages for loans" as there used. They are said to be "for loans given by virtue of this act." Then the "mortgage" is by the very terms of the act, to secure the "loan" as well as the "stock or bond."

How utterly does this reading repudiate the notion on the other side, that the mortgage was given only to secure the latter, the stock bond or note—while the "shares" alone were held to secure the loan.

The 27th section sustains our construction also. "Any individual who shall have obtained from said bank 'a loan,' secured by mortgage," &c. The term "loan" here is generally used, and applies as well to "stock loans" as others.

In answer to the position advanced on the other side, that until 705 the expiration of the charter, the *interest* only, and not the principal of the loan can be collected by the bank, let the 22d section be again referred to; and it will be seen that, in cases of default of payment, "the debt," the whole debt, and not mere "interest" is recoverable, and that upon *"failure of payment,"* and not at the end of the charter.

This critical analysis of the charter, then, leads to the same conclusion, that an inquiry into the spirit and object of the institution, and the means essential to its successful operation, if not to its very existence, would conduct us; and we respectfully suggest to the court, that convinced, as they must be, of the necessity of the resort to secure payment, for which we contend, the judicial eye of the court should be directed to the charter, with a view favorable to the construction for which we contend. But we ask for no strained or forced construction, but that their ordinary meaning be given to ordinary terms.

An objection has been made to the use by the bank of Rowlett's tables for the computation of interest. A full and satisfactory answer to that objection will be furnished by my associate counsel, Mr. Thompson.

Another objection and ground of defence has been taken to our recovery, on the ground of the practice of the bank in exacting *interest in advance, or by way of discount,* as in this case, on stock loans. That objection, too, will be more fully considered and answered by Mr. Thompson. But I may here briefly state, that the only section in the charter which regulates the rate of interest, the 28th section, gives the power to the bank of deducting the interest in advance, both upon *"loans and discounts."*

Moreover the uniform practice from the beginning of the bank—the acquiescence of all parties, and the fact that it was adopted in good faith, being a provision against the interest of stockholders, and in favor of the territory and creditors of the bank—make it a matter of public policy to sustain the usage if possible. Nay, to allow one of the corporators to escape from his debt on this ground, would be to offer him a premium for his own error or misconduct, and at the expense of honest creditors.

This cause was further argued on the questions arising upon the errors assigned by the defendants.

Brockenbrough, for the administrators: 706

1. To prove the plaintiff's case, it must show *a grant.*

The corporation is extinct. This bank was incorporated by the act of the Governor and Legislative Council of the Territory of Florida, on the 13th February, 1833—amended on the 14th February, 1835—again in 1836, and March 1, 1839.

By the 15th section of the act, 1833, it is created a body politic and corporate, for and during the term of *forty years* from the passage of that act.

By act of Congress, 3d of March, 1845, Florida was declared to be a State of the United States of America, and thereby admitted into the Union on equal footing with the original *States "in all respects whatsoever."*

The question is, whether the corporation did not perish on the 3d of March, 1845, notwithstanding its forty years' grant? To determine this, we must look to the power of the *grantor.*

The grant was made by the Governor and Legislative Council.—The first act of the establishment of a Territorial Government, March 30, 1822—3 Story's Laws, 1828—invests the power of legislation over all rightful subjects of legislation—not violating the laws or constitution of the United States, or the right to religious freedom—in a Governor and thirteen discreet persons, to be appointed annually by the President, by and with the consent of the Senate.

The act of 3d March, 1823—3d Story, 1902—made no alteration in this respect.

The act of May 15th, 1826—3 Story, 2025—only altered this system so far as to make the council elected by the people, instead of the President and Senate; and all subsequent acts have not changed the investiture of the powers, but only added to the numbers of the council, and erected it into two houses, and in *all,* the unlimited power of repeal is reserved to Congress.

The question will not be made, whether this legislative power could grant a charter to a bank, to be valid during the Territorial Government. But the power to make such a grant, to exceed the territorial life, is denied, as a general proposition, and specially with regard to Florida.

Assuming this power to be as great as the power of Congress over Florida, (and it could not be greater)—let us suppose that this grant has been made by the same charter, directly by act of Congress

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707 with or without the power of repeal, which was reserved over all acts of the Legislative Council, the act or grant must be held repealed and annulled, by the admission of the State upon an equal footing with the original states—or in other words, the grant of forty years must always have had the implied and necessary limitation going with it, "provided the territory shall so long continue"—because, in addition to the great questions of right and of constitutional law, the whole charter shows that the existence of the territory is incorporated with its own existence in every fibre, and is absolutely necessary to it. The one could not be destroyed without the other. The 25th section, providing for exemption from taxation, manifestly considers the existence of the territory and continuance of the charter as *co-terminous.*

Apart from all reserved and implied power of repeal or implied limitation in the grant, the very act of admission must annul the grant. States cannot be admitted, except on an equal footing with the old States. Congress has power to make all needful rules and regulations respecting the territory and other property belonging to the United States—and conceding that this gives control over all rightful subjecs of legislation it does not follow that *that power and right* extends over a sovereign State, and that sovereign power can be exercised and franchises and privileges granted away, which belong to the people, for a longer time than the power over the Territorial Governments continue. Congress cannot grant such a privilege in the body of a single State, therefore it cannot grant such a privilege in a territory, to continue over after the State becomes sovereign and is admitted. If so, the States would not be on equal footing. If this franchise could have been validly granted in Florida, to continue now, why might not all the privileges, and franchises and rights of the people have been granted away—and if for forty years, why not forever? If the hands of the people, or their legislature when sovereign, can be tied by contracts of Congress, made whilst they were in pupilage and had no right to consent, in any one paricular, why not in all?—where is the line of limitation? They considered these franchises important in the State constitution, and were very strict with the State legislature in regard to them.

In Permoli *v.* First Municipality, 3 Howard, 610. in which it was contended that religious liberty, secured by the ordinance of 1787, extended by Congress to Louisiana, was violated by laws and ordi-
708 nances of the First Municipality of New Orleans, it was held by the Court, that those acts were in no further force than part of the territorial law of Orleans—and so far as they conferred political or civil and religious rights, the laws of Congress were all superseded by the State Constitution, and none of them were in force, only so far as the constitution adopted them as laws of the State. Can this grant be in force in Florida, then?—or are all acts of Congress only null, which called to aid the political rights of the citizens, but *omnipotent,* when granting away their franchises?

In Polard's lessee *v.* Hagan, *et al.,* 3 Howard, 228-'9 the Supreme Court United States says: "Alabama is, therefore, entitled to the sovereignty and jurisidction over all the territory within her limits, subject to the common law to the same extent as Georgia was, &c. To maintain any other doctrine, is to deny that Alabama has been admitted into the Union on equal footing with the original States, the constitution, laws and compact to the contrary notwithstanding."

In the same case, 223-'4, after showing that Alabama, on her admission, succeeded to all the rights of *sovereignty, jurisdiction* and *eminent domain,* which belonged to Georgia before the cession, and that by agreement the United States retained nothing but the public lands—and that if an express agreement and stipulation had been inserted, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been inoperative and void, because the United States has no authority to take or exercise municipal jurisdiction, sovereignty, or eminent domain within the limits of a state or elsewhere, except when expressly granted by the constitution of the United States, the court concludes thus: "The right of Alabama and every other new State to exercise all the powers of government which belong to and may be exercised by the original States of the Union, must be admitted and remain unquestioned, except so far as they are temporarily deprived of control over the public lands." That case decides, in the face of the compact, giving all waste and unappropriated lands to the United States, that the soils and shores of navigable rivers belong to the State, in virtue of its eminent domain and municipal sovereignty.—To whom, then, shall the franchises of the people, which *they* have never conveyed away, belong?

If an express stipulation could not confer upon Congress the power of municipal legislation, or to grant away the common property of 709
the people within the body of a State, how can it make such a grant without stipulation?

But independent of any general reasoning upon this subject, applicable to all territories, Congress could not grant away any of the franchises of the people of Florida for a longer term than its own temporary powers of government. It is inhibited by the supreme law of the land, the treaty of 1819, from so doing.

It is true that, by the 2d article of that treaty, His Catholic Majesty cedes the Floridas in full property and sovereignty. But this is of course subject to the subsequent stipulations in the treaty, which show that though the property and sovereignty was full, it was *temporary* in its nature, and upon *condition* of its being made a *State as soon as possible,* and in conformity with the principles of the Federal Constitution.

The 6th article, 1 Elliott's Diplomatic Code, 420, (on the Spanish side, which is very different from the English side, but which Spanish side is the correct one, to look to, to see what the United States engaged to do in behalf of the subjects of Spain then transferred, and being the language of the party granting, is to be taken most strongly againt the grantor,) stipulates that the inhabitants of the territory which His Catholic Majesty cedes by the treaty to the United States, "shall be incorporated into the union of the same States *as soon as possible,* according to [or in conformity with *'legus,*] the principles of the Federal Constitution, and admitted to the enjoyment of all the *privileges, rights* and *immunities* which the citizens of the other States enjoy." The Spanish side makes admission as soon as possible, and applies the principles of the Federal Constitution to the terms of admission, *not the time,* as in the English side.

This admission as soon as possible in conformity to the principles of that constitution, must mean as that constitution requires upon an equal footing with original States—and especially when coupled with the subsequent part of the same article, which not only secures admission of the State upon an equal footing, but that the inhabitants each and all shall be admitted to the enjoyment of all the rights, privileges and immunities which the citizens of the other States enjoy.

Can this claim be complied with, if a portion of their rights and privileges are previously ceded away by Congress, or its agent, the 710
Territorial Government? The other States are privileged—have immunities, which secure them from such grants by Congress—has Florida, if this grant still continues?

But it follows, also, from this article, that the government of Congress was temporary—it never had perpetual power. It in the act of taking, guaranteed full State's sovereignty unimpaired to the people of Florida, and the full privileges of the people, as soon as possible. Could they in 1833, fourteen years afterwards, cede away those privileges for forty years? It was a violation of the obligation of contracts, of the treaty with Spain, and the constitution of the United States, if such result was intended. That treaty was supreme law. Florida could not violate it in her constitution—could the Territorial Legislature do more than a sovereign State?

This charter was a grant—a contract executed—all the cases in the Supreme Court have gone upon that position, and because they were *grants,* they have been held inviolable and unsusceptible of repeal. If such was the case, and this grant extended bevond the 3d of March, by virtue of the acts of Congress and the territorial grant, it follows now that it cannot be repealed, or altered, or modified by any power, for its whole term of forty years; for Congress has lost all power of repeal, and the State never has acquired it, if this charter exists by *right paramount to the State Constitution and laws.*

All these franchises, privileges, immunities granted are *property,* and have been held inviolable by a State, when validly granted, because they were *property.* However shadowy may have been the interest of the grantee, though a mere naked trustee, without the slightest beneficiary interest, these franchises have been held to be property, and where valid, contracts irrevocable.

The franchise and privilege in question was one, existing in Florida, to be exercised in Florida, it is carried out of the mass of the privileges of the people of Florida and ceded away—whose property, then, was it that was given away?—not the property of the United States, but of the people of Florida. *Their* rights, privileges, and immunities were ceded to certain persons.

It matters not for this argument how omnipotent may have been the powers of Congress, they were but *temporary.* This power to grant was either a part of the sovereign power of the State, with which Congress cannot be invested by treaty with Spain, or other-

711 wise, or it was not. If it was *not*, then the grant was void now that the State exists, because none but a sovereign power can grant away the privileges of the people and create corporations. If it *was* one of those sovereign powers of the State, it belongs to the State the instant it is formed and in full perfection, and the grants of the temporary government cannot continue a moment, because if they could then Congress might make such a grant in the body of a State, which is absurd.

If the United States succeeded to all the rights of the King of Spain, that power was but temporary, and could not be exercised beyond the limited time, without violation of the treaty.

But in Pollard's lessee *v.* Hagan, et al., 3 Howard, 225, it is said "it cannot be admitted that the King of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives, and much less can it be admitted that *they* could have *capacity* to receive or power to exercise them." Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it. See Vattel's Law of Nations. And the Court declared a grant invalid, made by the Union ,in Alabama, because the sovereign powers of the King went to that State, and not to the Union.

Suppose this grant for forty years, made on the 2d of March, the day before the admission, it would have been held by all invalid and a fraud upon the right of the State. A person who has an estate for life, or other uncertain interest, may make a grant for years, be cause it is a lesser estate, but it is only valid during the continuance of the uncertain estate.

If this charter had been granted on the 2d of March, and could have been therefore valid on the 5th, why might it not have been granted on the fifth; and what difference can there be in a grant made to take effect in a State which you are bound by treaty to admit untrammelled, and in a State already admitted.

It is stated by Kent, (1 Com., 384,) in a note in his commentaries, that it was decided in the State *v.* New Orleans Navigation Company, 11 Martin, 309, that a territory could grant a charter binding on the State. No such proposition seems to have been made or decided. The positions were, that Congress had no right to establish a Territorial Government, and if so, that such government could not
712 grant such a charter, and that the charter in that case was void, because repugnant to the acts of Congress—all of which the court decided in the negative. But the position that Congress could not make such a grant, to exist beyond the Territorial Government by its own powers, has never been decided.

Chancellor Kent also refers to Williams *v.* Bank of Michigan, 9 Wendell, 540, 566, as deciding the territories may incorporate a bank, but it decides nothing more—the question for how long is not settled.

The power was given in that case to adopt such laws of the original States as in their judgment were necessary and suitable to the circumstances of the district, and it was decided they might make similar laws.

It is contended upon these grounds, that the grant necessarily terminated *ipso facto* by the admission of Florida. If this doctrine be correct, it follows that, on the 3d of March, 1845, the bank expired—that it could live no longer by virtue of its original grant, and it is, therefore, incumbent on the bank to show some new power perpetuating its existence—some authority from the State preserving its life, and this must be something more than a mere implication, it must be equal to the positive *grant*. There is no such grant to be found in the constitution or laws of the State, and every inference to be drawn from them is the other way.

The only clauses which have ever been quoted as continuing this corporation, as a grant, is the 14th section of the XIIth article of the constitution, which gives the General Assembly power, at its first session, to regulate, restrain and control all associations claiming to exercise corporate privileges in the State, so as to guard, protect and secure the interests of the people of the State, not violating vested rights, or impairing the obligations of contracts. This is utterly inconsistent with the idea of a previous *grant*, which could not be disturbed in any particular, without consent of the grantees. It is also not a *grant itself*.

The only legitimate construction of this article is, that the Legislature may, at its first session, make such disposition as it may think proper, concerning "associations claiming to exercise, &c.," necessary to protect the interest of the State, not violating rights and property and contracts previously vested in such corporations. But this is no enactment or grant or any particular corporation, or acknowledgement of the existence of any one.

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The next clause quoted to sustain this bank, as a grant, is the last 713
clause of section 1 of Article XVII, which declares that nothing in this constitution shall impair the obligation of contracts, or violate vested rights, either of individuals, or of associations claiming to exercise corporate privileges in the State." This, doubtless, relates to contracts with corporations and rights vested in them, which it was necessary to save, because the corporations themselves, the franchises, were to go by the board, by the act of admission. At all events, they are not words of grant—they give away none of the privileges of the people, or the state.

They do not continue alive contracts terminated, rights before divested, and corporations already dead. They only declare that the constitution shall not violate contracts, and which it does not. But neither does it preserve alive grants which expired the moment it came into existence; but it is held by some, in despair of fixing this charter upon the State, as a contract, that it is a *law*, and that it is in force by virtue of the first part of the 1st section of the XVIIth article of the constitution, which declares "that all laws and parts of laws now in force, or which may be hereafter passed by the Governor and Legislative Council of the Territory of Florida, not repugnant to the provisions of this constitution, shall continue in force until by operation of their provisions and limitations, the same shall cease to be in force, or until the General Assembly of this state shall alter or repeal the same."

If it is *a law*, it has been always and always would continue to be subject to repeal. As a law, it is repealed by the act of Congress which admits Florida upon the same footing as the original States. As a *law*, it is not in force by its own provisions and limitations almost every one of which require the continuance of the Territorial Government.

As a *law*, it is not in force, because repugnant to the Constitution. Almost every clause of the 13th article entitled "Banks and other Corporations," is wholly repugnant to this bank, and seem in effect to have been aimed at it, and intended to provide expressly against the existence of such an institution in the State, and now the same instrument is invoked as a new grant of the same charter. The 6th section alone of Article XIII is wholly repugnant to the charter of this bank—"Capital shall be created by actual payment of specie therein, and no bank shall borrow money to create or add to its capital, or to conduct its business, and no loans shall be made on stock." 714
The whole capital here, is borrowed and the very life of the bank is loans upon stock. Again, the whole charter absolutely requires the existence of the *Territory*; the State cannot substitute itself, if it is a contract, and has not done so if it is a law. But the bank cannot live without the territory which is incorporated as a part of it—and an essential part, without which it cannot exist. See King *v.* Possmore, 8 Tenn., 241-242-3-245-248. Charter U. Bank, Sec. 16 & 30. Duval's Compilation. When any integral part of a corporation is gone, it is dissolved—a corporation dissolved is dead, and treated in court as a dead man. Morrison *v.* the Potomac Co., 8 Peters, 208.

Mr. Brockenbrough further argued that under proper constructions of the charter of the bank, and under the facts in this case, the instructions asked by defendants, and refused by the court, as set forth in defendant's bill of exceptions, should have been given the jury.

Thompson for the Bank:

1. The first position assumed by counsel of plaintiff in error, and which it is claimed arises upon the judgment of the court below sustaining the demurrer to the seventh plea, is this:—That there is no such corporation as the Union Bank of Florida now existing and capable of suing.

It is admitted that the act of incorporation passed by the Governor and Legislative Council of the Territory, in 1833, was a valid exercise of power, and that it continued legal and valid up to the 3d March, 1845, when it is contended it expired with the power which called it into existence. The Territorial government it is contended. was a power dependent on Congress and existed but for temporary purposes, and could not make a grant to survive and continue beyond the period of its own existence. That the admission of Florida into the Union operated as a constructive repeal of the charter.

It seems to me that when the power of the territorial government to make the grant is conceded, the question of the existence of the corporation beyond the period of the existence of the government is conceded with it.

The Territorial government was but temporary, it is true; still it was to continue until, by the terms of the treaty with Spain, of 1819,

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715 it was admitted into the Union of the States. Its duration was indefinite, too, yet while it continued it must have possessed the ordinary powers of a government to have made the grant; and if contracts grow up under the government, surely a change in its mere form, or the person of the ruler, will not work an abrogation and destruction of such contracts.

That a grant of the powers of incorporation forms a contract is fully maintained in the Supreme Court of the United States, (Dartmouth College *v.* Woodward, 4 Peters' Cond. Rep., 547-8.) And it is also maintained in that case that the American Revolution did not at all affect the grant of the powers of incorporation to the College made by the British Crown. See pp. 552, 583, 584.

If such be the rule in case of a revolution, in which the former government is put down and abolished by force, surely it cannot be contended that a mere change of government, when the essential form of the State remains unchanged, can have a more injurious effect upon rights acquired under a former government.

The case of Permoli *v.* the First Municipality of New Orleans, 3 Howard's Sup. Court Rep., 609, decides only that the laws of Congress organizing the Territory of Orleans were repealed by the act of admission of the State of Louisiana. This is not doubted. So, also the laws of Congress organizing the Territorial government of Florida were repealed by the act admitting Florida into the Union, passed 3d March, 1845; yet no contracts or rights which became vested under those laws were destroyed by the repeal.

The case of the State *v.* the New Orleans Navigation Company it seems to me does go further than the counsel for plaintiff in error was willing to admit. The company was chartered by the Territorial Legislature and, after the admission of the State into the Union, it directed a *scire facias* against the company and sought to deprive it of its rights. It is true that the principal ground assumed was that the former government had no power to make the grant, yet if there had been any force in the point now made it could not have escaped the notice of the able counsel and court there. At any rate the Supreme Court of Louisana maintained that it was a valid and existing grant at the time of decision. See 2 Condensed Louisiana Reports, 203.

But it is contended that there is a difference between the Constitutions of the two States, that of Louisiana providing for the validity
716 of contracts of the State as well as of individuals under the Territorial government. Our Constitution is fully as broad, as we contend, for it provides for "all contracts;" and it is, also, careful in excluding the idea of the violation of any right by the provision of the 1st section of the 17th article: "And nothing in this Constitution shall impair the obligation of contracts or violate vested rights, either of individuals or associations claiming to exercise corporate privileges in this State." See Thompson's Digest, 8. This, it seems, should be conclusive. The form of government was changed by the Constitution, and that instrument was not to impair contracts or violate rights of individuals or corporations.

Under this head a second objection was taken. It is contended that, as no appointment of government directors has been made since 1845, the corporation has ceased to exist.

The 16th section provides, first, for the election of seven directors by the stockholders on the first Monday of February; it also provides for the appointment of five directors on the part of the Territory to be made on the 4th Monday of January annually. It also contains a provision that if such election and appointment shall not be made on the days limited and appointed it may be made at any other time, and those in office shall continue until a new election or appointment, and the board is empowered to fill vacancies by death, resignation or removal from office. These provisions are, it seems, a full answer to the objection. If the State does not make the appointment of government directors, those last in office continue until a new appointment; if they die, resign, or are removed from office, the Board can fill the vacancy. No omissions, therefore, of duty on the part of the State government can work the destruction of the corporation.—The provisions of the charter are ample and cover all contingencies which can arise on this subject. The authorities cited by the counsels for the plaintiffs in error do not apply to such a case.

II. A second point made is as to the right of the bank to sue for the principal sum mentioned in the bond. Although this is a loan under the 29th section of the charter which a stockholder of the bank has a right to require, yet we contend the continuation of the loan is dependent upon the payment of interest at least once a year, and renewal of the obligation by the borrower. But it is argued that when the sum so borrowed is sued for because of the failure to pay interest, and recovered and paid into the vaults of the bank, the stockholder of the bank has a right to put in his note or obligation and 717
take it out again on loan, and therefore, it is an act of absurdity to sue for and recover the principal. This bank is one of peculiar features and differs from ordinary banks. It was to borrow its capital upon the Territorial bonds and to pay interest semi-annually upon the amount so borrowed, and two-thirds of its capital was to be lent to the shareholders. The utmost punctuality on the part of this class of its debtors was vitally important to the successful operation of the institution. Therefore we say that payment of interest at least once a year was interposed as a condition, the non-performance of which defeated it. I have no doubt but the bank would have been justified by a court of equity or of law in refusing to renew a loan where the party had failed to pay the interest and forced the bank to the vexation and expense of a law suit. It was a forfeiture which the party must excuse for some good reason, before he should be restored to his original rights. If the bank has to sue each and every stockholder for the annual interest, the delay and expense would materially cripple the bank in its ability to meet its engagements and preserve the credit of the Territory which had been pledged for its accommodation.

By the amendatory act of 1839 it was provided that the omission to renew the note and pay interest for thirty days should work a forfeiture, and the bank should proceed to sell the stock and receive from the purchaser a bond and mortgage on property of the value of the stock, and such new stockholder should be entitled to all the rights and privileges of an original stockholder.—(See Thompson's Digest, 296, sec. 43.) The effect of this was to cut off, as an useless member of the body corporate, one who should fail to perform his obligations, and obtain a new and useful one in his place. This provision would have been effectual, and probably was about the time of its passage, in enforcing the performance by this class of debtors of their obligations, but unfortunately it was applied too late. The bank had extended itself too far—had lent too much money—had got into difficulties and embarrassments and its notes were becoming depreciated, and the bank could not sell the stock. The prudent who were already in were anxious to get out, and the prudent who were out were determined to keep so. The visionary and speculative and those embarrassed, who were anxious to obtain money at any price might have purchased, but such were not the men who were calculated to save the institution on the verge of ruin. This 718
was an ancillary remedy, provided by the Legislature to ensure the performance of the obligations of the shareholders; but from the causes I have mentioned, and the depression of values of every species of property which commenced shortly afterwards, has rendered it inoperative. It is, however, useful, as showing the views and intentions of the Legislature, and is, I contend, explanatory of the 29th section and its proviso.

III. The plaintiffs in error place their defence on another ground, viz: that the obligation not being made in strict compliance with the powers given to the corporation by its charter, is, therefore, void, for want of authority on the part of the bank to contract, and the following particulars are assigned:

1. That for the interest on the note a bond was taken in advance, at the time of making the loan.
2. That the obligation was made for a less period than one year.
3. That a greater rate of interest was reserved and taken than was authorized by the charter.

As to the first point, I refer to the 28th section of the charter, which regulates the rate, time and manner of taking interest. It provides for "loans or discounts," and says "the interest may be paid or deducted in advance." Thomp. Dig., 293.

The 29th section does not, in express terms, or by any just implication, change this rule. Its office is merely to provide the loan which the shareholder shall have a right to require, and establishes no new rule as to the time when the interest shall be paid. The term credit is the only new term introduced into this section, and it is to be granted without security.

But if the 28th section does not apply to the time when the interest may be demanded and paid, then I contend it may be taken in advance, under the general authority "to discount on such *terms* and such securities as they shall judge proper," contained in the 15th section of the charter. Thomp. Dig., 289.

The right to discount, *ex vi termini*, gives the right to take the interest in advance—such is the only mode in which a discount can be made. Bk. U. S. *v.* Fleckner, 5 Pet. Cond. R., 462. Upon this question, I cite, also, the decision of the Court of Appeals of the Territory of Florida, in the case of the Union Bank *v.* Brown, decided at January term, 1844.

719 2. That the obligation was taken for a less period than one year. I apprehend there is no force in this objection—one year was doubtless the *maximum* of time for which these obligations should be made—they could not be taken for a longer period, but might for any time within that stipulated. See Union Bank *v.* Brown, before referred to.

3. That a greater rate of interest was reserved and taken than that authorized by the charter, and was, therefore, a valid contract, for want of power. This is supposed to have been effected by two modes: 1. Taking the interest in advance. 2. Computing it by Rowlett's tables.

There is a difference between the exercise of an admittedly existing power in a mode and manner different from the directions of the charter of incorporation, and the assumptions and exercise of powers not given or expressly denied. See 7 How. Miss. R., 508, Commercial Bank *v.* Nowlan.

When a bank takes a greater rate of interest on a discount than is allowed by its charter, the contract is not void, for want of authority, inasmuch as a discount or loan is within the scope of the powers of a bank; otherwise, where the power exercised is foreign to the purposes of the creation. Ibid. See also Angell & Ames on Corporations, 200, sec. 3. 8 Gill & Johns, 319. Union Bank *v.* Jacobs, 6 Humph. R. 515. Mum. *v.* Commission Co., 15 Johns. R., 52. Hayward *v.* Pilgrim. 21 Pick. R., 270. Mott *v.* Hicks, 1 Cowen, R., 513. Bank *v.* Hammond, 1 Rich. L. R., 281.

When it is necessary to pursue the particular mode prescribed in making the contract, see Angell & Ames on Corporations, 188.

It could make the loan then, undoubtedly, by the particular directions of the 29th section, or by the general grant of powers contained in the 15th section—*quacunque via data*, it was the admitted exercise of an existing power.

A review of the cases cited by the counsel for the plaintiff in error on this point, will show that they were:

1. When the corporation transcended the bounds of its powers either expressly given, or arising by necessary implication.

2. When it acted in violation of some general law restrictive and prohibitory in its charter; or,

3. When the particular mode of contracting was made to constitute the very essence of the contract.

720 IV. The bond not being void for want of power in the corporation to make the contract, is it void for having exceeded the authority conferred?

And first it is well enough to inquire if it has exceeded the authority given. 1. The right to take interest in advance has already been discussed. Though it was formerly held that taking interest in advance by any other than a banker and on negotiable paper, was illegal—yet this restriction has, by later decisions, been removed. All natural persons, and all corporations who by charter have authority to discount, may do so. 2 Blyd. on Usury, 58, and the authorities cited. Union Bank *v.* Brown, in Court Appeals, January, 1844.

Next, as to the calculation by Rowlett's tables. I refer to the testimony on this point in the Record, p. 37—The interest for the year is calculated at 365 days, and the months as aliquot parts of the year, and give the interest correctly. For the sake of convenience the odd days less than a month are calculated at 30 days for a month. It depends on the mode of using the tables whether they will make any important gain. See Lyon *v.* the Bank, 2 Stew. Ala. R. 469. Bank *v.* Hunter, 1 Dev. R. 129. Bank *v.* Durkee, 1 Vermont R. Crump *v.* Nicholas, 5 Leigh R. 251. Planters Bank *v.* Snodgrass, 4 How. Miss. R. 629.

This point was also expressly decided in the case of the Union Bank *v.* Brown, before referred to in the Court of Appeals of Florida.

The corrupt intention is an essential ingredient in usury—the intent to violate the law and gain more than is allowed.

In addition to the above authorities, I cite, Bank U. S. *v.* Waggener, *et al.*, 9 Peters R. 378, 400, 401.

The question of the corrupt intention of the bank was expressly left to the jury in the charge No. 5 given, (Record p. 47.) The finding of the jury negative any such asumption.

2. But supposing it has exceeded the rate of interest fixed by the 28th section of the charter, would the contract for that reason be void?

The charter of the bank contains a restriction merely as to the amount of interest; it contains no penalty, neither does it declare the contract on which more interest than eight per cent. is reserved or taken, to be void.

Banks and other corporations are subject, like natural persons, to the general laws in force at the time of their creation; and if the charter does not provide any penalty for usury, or for excess of powers, it is to be regulated by such general law. If in making a con- 721
tract, a corporation should exceed its powers, and the excess can be separated from that part which is within the powers, the excess only is void, and the remainder valid. Such excess of power might be punished by the State as a malefeasance by forfeiture of the charter, yet it would not make the contract void. The following cases, it is believed, will cover the whole ground here assumed:

Fleckner *ads.* Bank U. S. *v.* Peters' Cond. R. 464. U. S. Bank *v.* Dandridge, 12 Wheat. 64. U. S. Bank *v.* Owens, et al., 9 Peters, 378, 403. Commercial Bank *v.* Nowlan, 7 How. Miss. R. 530. Planters' Bank *v.* Sharp, 4 Smedes and M. 75. Stribling *v.* Bank of Valley, 5 Rand. 140, 151. Louisville R. R. Co., *v.* Litson, 2 How. S. C. R. 127. Thornton *v.* Bank Washington, 3 Peters 42. Philadelphia Loan Co. *v.* Towner, 13 Conn. 249, 260. Bank *v.* Hammond, 1 Rich. L. R. 281. See also Vidal *v.* Girard's Ex'rs., 2 How. S. C. R.

It seems to me, however, that "it does not lie in the mouth" of a stockholder to set up as a defence in a case like this, the excess, or even unlawful assumption of power by the bank, when the result would be a loss of two millions of dollars of the capital of the bank to its creditors, and a gain of that amount by the stockholders, who would be participators in the unlawful act. Little *v.* O'Brien, 9 Mass. 423. Chester Glass Co. *v.* Dewey, 16, Mass. 94.

V. We contend, however, that if the obligation is not good and valid as a loan under the 29th section of the charter, it is good and valid at common law.

The Supreme Court have in several cases laid down with much accuracy, the law on this point. If this agreement is entered into by competent parties, and for a lawful purpose, not prohibited by law, and is founded upon a sufficient consideration, it is a valid contract at common law. See United States *v.* Tingley, 5 Peters, 115. United States *v.* Linn, 15 Peters, 311.

Are the parties to this contract competent to make it? The deceased, S. Parkhill, in his life time, was certainly able to contract,—and it remains to establish that the bank was equally so.

"In constituting a body corporate, a legal or artificial person is substituted for a natural person, and when a number of natural persons are concerned, there is given to them the property of individuality. The common law of every State or country annexed to this local or artificial person, when created, certain incidents and attributes, and 722
both by the laws of England and the United States there are several powers and capacities, which tacitly and without any express provision, are considered inseparable from every corporation." Angell & Ames on Corp., 95.

Its essence consists in part in the power to take and grant property, contract obligations, and to sue and be sued by its corporate name. Its incidental powers are such as are best calculated to effect the object of its creation. Ibid. 2 Kent's Comm., 224. 4 Wheat. R., 518.

As to mode of contracting &c., evidence of common consent of corporation sufficient. Angell & Ames, 167-'8, 174. 10 Mass. R., 401. 5 East R., 239, 292. 6 Viner's Ab., 137, pl. 29.

Whenever a corporation is acting within the scope of the legitimate purposes of its creation, all parol contracts made by its agents are express promises of the corporation. All duties imposed by law, and benefits conferred at their request, raise implied promises, which may be enforced. Bk. of Columbia *v.* Paterson, 7 Cranch R., 299. To lend money and take security for its repayment, was certainly a legitimate act of the Union Bank. See 15th section of Charter.

If a particular mode of contracting is specified, it is only imperative, when the direction *constitutes the terms* on which the power is granted. Angell & Ames on Corp., 6. 188. In the charter of the Union Bank, there is no particular form prescribed.

I refer to the decision of the court in the United States *v.* Linn, 15 Peters, 315, and the remarks of the court, as to the grounds which would authorize a court to declare an instrument void.

It follows from the positions and authorities, and the evidence in the record, that there were parties able to contract—that they did contract—that there was a sufficient consideration, and that it was for a lawful purpose. It is, therefore, a good contract at common law.

VI. As to the last ground assigned for error, that the judgment was improperly entered up for the plaintiff, the issue of *plene administravit* being found for defendants, the judgment should have been for the defendants generally, notwithstanding the other issues were found for the plaintiff below.

The law, as cited from 2 Lomax on Executors, 446, sec. 11, seems to be supported by 2 Saund. R., 217, (note 1,) which says

723 that if the plaintiff takes issue on the general or special plea of *plene administravit*, and it be found against him, he cannot have judgment of assets *quando acciderint*, and cites 1 Roll. Abr., 929, (B.) pl. 2. Bro. Abr., Executor, 18 S. C.

It is not easy to discover the reason for the difference between the result of a verdict, and the confession of the plea by the plaintiff. In the last case, all the authorities hold that the plaintiff may enter up judgment for assets *quando*. Ibid.

But this seems never to have been the doctrine in the United States. In New York, upon the verdict of no assets, the plaintiff is entitled to his judgment *quando*, &c. 19 Johns. R., 266. 4 Cowen's R., 447. 6. 6 Cowen R., 71.

So in Kentucky, if the plea be found against the plaintiff, he may yet have judgment assets *quando*. Burns *v.* Benton, 1 A. K. Mar., 349. It is error, if upon such a verdict, judgment be entered generally for defendant. Miller *v.* Towles, 4 J. J. Mar., 255.

As to the practice in Pennsylvania, see Wilson *v.* Hurst, Peters' C C. Rep., 441, n.

LANCASTER, Justice, delivered the opinion of the court:

This case comes by cross writs of error from Leon Circuit Court We shall, for the sake of convenience, embody our opinion and rulings in one decision.

The first question, to which we will turn our attention, is one raised in argument by the counsel of the administrators, earnestly argued and much insisted on. By 15th section of the act of incorporation, the bank is created, and declared a body corporate and politic for and during the term of 40 years from the passage of the act, viz: from 13th February, 1833.

By an act of Congress of 3d March, 1845, Florida was declared to be a State of the United States, and admitted into the Union on an equal footing with the original States in all respects whatsoever.

The question raised is, whether the corporation did not perish on the 3d of March, 1845, notwithstanding its grant of 40 years existence; and it is contended the charter must be subject to the implied limitation "provided the Territory shall so long continue."

This question is assumed in argument to arise under plaintiff's demurrer to the seventh and last plea of defendants. That plea in sub-
724 stance alleges, that the writing obligatory declared on is not the act and deed of defendant's intestate in his life time, but is and was wholly illegal, null and void, because made in consideration of a loan of money upon a pledge of stock, (he being a stockholder), and that the bank, the plaintiff, wilfully and knowingly reserved and took more than the lawful rate of interest allowed to said bank to take upon such loans by law and its charter. Upon argument in the Circuit Court, the demurrer was sustained, and no exception was taken to the ruling of the court.

The tenor of the plea does not appear to this court to put in issue the existence of the bank, but virtually admits its existence. This suit was commenced on the 31st of March 1846, and as the position taken is, that the admission of Florida as a State, into the Union, on the 3d of March 1845, by implied limitation, extinguished the charter on that day, no good reason is apparent, why a plea presenting that issue, if deemed necessary to the defence, was not prepared and filed during the preparation for trial of the case. This cause appears to have been elaborately investigated in the court below, and lengthy bills of exceptions have been filed to the decisions of that court by each of the parties, and this point is not raised by either bill of exceptions. It does not come by the pleadings before this court, and any opinion delivered on it, might justly be termed extra-judicial, or *coram non judice*.

To allow points not raised by the record to be adjudicated by this court, might, and probably would, result most inconveniently. Who could set limits to their number?

The case of Mumma vs. the Potomac Company referred to 8 Peters R. 281, does not appear to sustain the authority of this court to take jurisdiction of this point. That was a case in which the plaintiff, Mumma, sued out a *sciri facias* to revive a judgment against the Potomac Company. Upon that *sciri facias* the attorneys, by way of plea, shew and suggest to the court a state of facts, and among other recitals, that the Potomac Company had surrendered its charter to the Chesapeake and Ohio Canal Company, and an agreement to that effect was signed by the counsel for both parties, and made a part of the record. The question upon this agreement was, whether any judgment can be rendered against the Potomac Company upon the *sciri facias* to revive a judgment mentioned in the writ. Upon this question the Circuit Court of the District of Columbia gave judg-

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ment for the defendants, which was taken by writ of error to the Su- 725
preme Court of the United States, and the judgment of the Circuit Court was affirmed. The jurisdiction of the court was derived from the writ of *sciri facias* to revive, &c., and not from the agreement of counsel as to the facts; and the decision of the Supreme Court was upon the judgment properly brought before it, from the Circuit Court, and upon the point on which that judgment was rendered. In the case before this court, although the counsel for the bank did not decline the argument of the point now under consideration, yet there is no agreement of counsel on the record submitting it for adjudication; and if there was, the case before referred to, would not be an authority to justify this court, in proceeding to its adjudication. Without therefore, any disposition to avoid it, if properly before us, we must in this case decline its decision.

The question on the record in this case, arising from the decisions of the Circuit court, admitting on the trial testimony excepted to, refusing instructions asked, and giving instructions excepted to, as well as a refusal to admit testimony offered, and exceptions thereto taken, seems to this court to render a review of many provisions of the act of incorporation, as well as amendments thereto, necessary, in order to give a construction to the charter, applicable to the many questions presented on the trial below. We proceed to that review, first remarking that but little light is afforded us by the decisions either in England or the United States, upon the subjects involved. But few charters of incorporation, bearing much analogy to that of the Union Bank of Florida, have been passed by the States of the Union, and it is not known that any similar ones have been passed elsewhere. Neither is it known or believed, that any of those incorporated in any of the States, have undergone judicial investigation or construction, so as in any degree to aid this court in arriving at sound and just conclusions. There are, however, rules laid down in the books, by which to be guided in the construction of statutes, and to these we shall have recourse as occasion may seem to require.

The 1st section of the act of incorporation provides for the establishment of the "Union Bank of Florida with a capital of one million dollars, and with the privilege of increasing it to three millions of dollars, which capital shall be raised by means of a loan, on the faith of the Territory, by the Directors of the Bank." Of which only one million to be taken at the time of organizing the bank.

By the 2d section, books of subscription, towards constituting the 726
capital fund of said bank, were authorized to be opened at Tallahassee and other places therein named, for subscription to the stock.

By the 7th section, "The Board of Directors of the bank shall be the judges of the sufficiency of the mortgages offered for the stock, and shall have power to reject the same."

The 8th section enacts, "To secure the principal and interest of the bonds to be issued by the Territory, for the purpose of raising the capital of the bank, the subscribers shall be bound to give a bond and mortgage to the satisfaction of the Board of Directors, on property, &c."

The 9th section provides, "The bonds and mortgages given to secure the subscriptions to the capital stock of said bank, shall be deposited in the office of said institution, the said mortgages having been first recorded according to law; and whenever application shall be made by a stockholder to transfer his stock and be discharged, such transfer and discharge may take place, upon the new stockholder complying with the same requisitions stipulated in the foregoing (the 8th) section, in the case of an original subscriber, and in all such cases of transfer and discharge, the votes shall be taken by yeas and nays. But any stockholder may, at any time, release his property by paying the amount subscribed, and also such loans as may have been made on the faith of it.

The 10th section provides for issuing one thousand bonds of one thousand dollars each, made payable to the Union Bank of Florida, to be "signed by the Governor, and countersigned by the Treasurer, and under the seal of the Territory," for which bonds a form is given in said section; which bonds are made transferrable by the endorsement of the president and of the cashier of said bank by said section—for the payment of which, the faith of the Territory is pledged, "in order to facilitate the negotiations by said bank for the loan of one million of dollars."

The 11th section provides, that "both the capital and interest of the said bonds shall be paid by said bank, as the same shall become due."

The 14th section prescribes the form of mortgage to be given to the Union Bank by the stockholders, and begin by saying, "The mortgage to be given by the subscribers to the stock of the Union Bank, shall be in the following form:"

We will inquire, what constitutes a stockholder in the Union

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727 Bank, and what are the rights of the bank in the stock subscribed to it?

It may safely be assumed the act of subscribing for shares, as provided in sec. 2 of the charter, does not *per se* make a stockholder, any more than the mere subscribing for cash stock will make a stockholder in an ordinary banking incorporation. In the latter case, the shares subscribed must be paid for in money; in the former, according to the sections before recited, they were paid for by the bond and mortgage of the stockholder. The giving of a mortgage for the stock satisfactory to the Board of Directors, was the final act necessary to constitute a subscriber for shares a stockholder. See sec. 7; and that mortgages made and delivered to the Union Bank was the only consideration or payment of any nature given by the stockholder to the bank, for his shares of certificate of stock in it.

The bank, then, being, under the charter, the lawful possessor and owner of the mortgages, makes them available by the 8th and 10th sections for the procurement of territorial bonds. These bonds were by the 10th section of the charter, made payable to the bank, and transferrable by the endorsement of the president and cashier of the bank; and by the 11th section, after sold, both capital and interest payable or redeemable by the bank, as it becomes due. It appears, therefore, too plain to be questionable, the bonds, when procured, were the property of the bank, and when sold, the funds arising from the sale were the funds of the bank.

It is contended, in view of the 8th section, the object for which a bond and mortgage was given by the subscriber for stock, was to secure payment of the principal and interest of the bonds issued by the Territory, to the extent of his stock subscription. It is admitted they were given for that purpose, yet it seems to this court that was not the only purpose of the mortgage. The last clause of section 9th provides, "but any stockholder may, at any time, release his property (*mortgaged*) by paying the amount subscribed, (as stock,) and also (by paying) such loans as may have been made on the faith of it, (*the mortgaged property.*)

It (the last word of the sentence) must, on sound rules of grammatical construction, refer to its last antecedent noun, which is *property;* so that, supposing the stock to have been paid for in money, the stockholder, to have this property released from the mortgage lien on the bank, must also pay such loans as may have been made on the faith of the property specified in the mortgage.

728 Shares in this bank were not, as in banks usually, purchased by cash payments; and while a stockholder in a cash stock bank would, on a pledge of shares, pledge the very money he had paid for them, in this bank, unless he pledged the mortgage securities given for stock, he would pledge nothing valuable; so that, if contended loans were to be made on the faith of the subscription for stock, without reference to the mortgage security, then the gross absurdity will follow, that the bank was bound to loan to its stockholders, without any security whatever.

Suppose for a moment, the instant of time when, according to its charter, the Union Bank was first in a condition to discount—it was the holder and owner of mortgages on real estate and negroes, executed and delivered to it by its stockholders, to the value of one million of dollars. It was also the holder and owner of one million of dollars in money, produced by the sale of the bonds, and for the payment and redemption of the principal and interest of these bonds, as they might fall due, it was bound; and if the time we are considering occurred before any interest had accrued on the bonds after sale, yet the bank owed just as much money as it possessed, and the stockholders had no valuable interest in bank save their mortgages. The stock, for which nothing had been paid, if we exclude the idea of the mortgages, had not really appreciated, and was really worth nothing, save only such ideal appreciation as the right to a loan under the 29th section of the charter might induce those needing money to be willing to pay for that right of loan. If, at that time, a stockholder had a right to credit in bank, without other security than a pledge of his shares in the capital stock in the bank, and also a loan on a pledge of those shares for two-thirds their amount, still, excluding the idea that the mortgage had been given as payment for the shares, we must arrive at the conclusion that he, the stockholder, had a right to demand and have from the bank a stock loan, without any valuable security whatever; and thus, that the bank was compelled by its charter to loan to its stockholders two-thirds of its entire money capital, with a positive certainty that neither principal nor interest on that loan would ever be paid before the expiration of its charter, and almost with an equal certainty, not at that time or any other. Such we feel authorized from the wording of the charter, to declare was not the intention of the Legislature, and cannot be a sound construction of its provisions. We have shown, we think, that the mortgage given by the stockholder to the bank, was executed for the 729 double purpose—1. As provided by the 8th section, to secure payment by the bank of the principal and interest of the bonds issued by the Territory; and for this purpose, the Territory, the third party, in the charter of the bank is interested in the mortgages; 2. To secure payment from the stockholder to the bank of his stock note, or obligation, and interest, provided he fails to renew the note or obligation, and pay interest, as provided in the 29th section—and for this purpose, the bank and all its creditors are interested in the mortgages, as well as for the first purpose.

It has been alleged in argument, and indeed the court below virtually so instructed the jury, that the money raised by the sale of the bonds was, in the hands of the bank, the money of the stockholders—that the bonds sold by the bank were, *in form only,* the bonds of the Territorial government, and in *effect* and *actually were* the bonds of stockholders, and are in effect and contemplation of law, as if both bond and mortgage had been originally made and executed to the capitalist or holder of the territorial bonds by the stockholder—that, upon the sale of the bonds, the stockholder became debtor to the vendee of the bonds, and he, in turn, the creditor of the stockholder—that the bank was a mere agent or trustee of the stockholder, to see the principal and interest paid, agreeably to the terms of the bond and mortgage, without other rights in the premises, save the privilege of endorsing for its principal, the stockholder.

The 1st section of the charter incorporates a bank by the name of the "Union Bank of Florida," and says it shall have a capital of one million dollars, with the privilege of increasing to three millions.

The 15th section provides that "The subscribers to the stock of said Union Bank, their successors and assigns, shall be and they are by this present act created a *corporation* and *body politic,* for and during the term of forty years from the passage of this act, and shall be and are hereby made capable, under the name of the 'Union Bank of Florida,' to receive and possess all kinds of property, either movable or immovable, and to sell, grant, alienate, demise and to dispose of the same—to loan, negotiate, take mortgages and pledges, and to discount on such terms and such securities as they shall judge proper;" and after some provisos not necessary here to be considered, the section adds: "They may sue and be sued, plead and be pleaded, answer and receive answers in all courts having competent 730 jurisdiction, and to have a common seal, and the same to alter and renew at pleasure, and to ordain and establish such by-laws, rules and ordinances as they shall deem necessary and suitable for the government of the said corporation, not being contrary to this act, nor to the constitution and laws of the United States, or to the laws of the Territory of Florida."

The Union Bank of Florida, by these provisions of its charter, may justly be styled *a corporation,* and is a creature of the charter that constitutes and gives it being, and prescribes bounds and limits to its operations beyond which it cannot regularly proceed. See Bac. Abr. title corporation, letter D., and many authorities there cited. Its name is the very knot of the combination of its members, without which they could not perform their corporate acts, for it is nobody to plead and be impleaded, to take and give, until it hath gotten a name. Bac. Abr. Corporations, Letter C. Although a corporation aggregate is said to be invisible, and to exist only in supposition and intendment of law, yet such an artificial body is, by its creation, capable of purchasing or parting with its possessions. Bac. Abr. on Corporations, Letter E. The name of a corporation is as the name of baptism. 10 Co. 28. 2d Inst. 666.

We repeat, therefore, what we have before shewn, the mortgages belonged to the bank, for it had a right to take mortgages. The Territorial bonds, issued and made payable to the bank, were also the property of the bank, for they were issued on the faith and value of the mortgages held by and belonging to the bank; and the proceeds of the sales of those bonds belonged to the bank, for it, and it alone, by its officers, had the right to sell and transfer them.

It is said, on the sale of the Territorial bonds, the stockholder became debtor to the vendee of the bonds, and he in turn became creditor to the stockholder. Without remarking on the novelty and surprise with which this doctrine would strike the bondholder—let us see if it be so. Is every bond so marked that each bondholder can know what stockholder he must look to for its payment? Or must he look to all the stockholders, and has he any means of knowing them, or any of them, but through the courtesy of the bank? If a stockholder is the debtor of a bondholder, is it of all bondholders, or a particular one? And if a particular one, is it for all the bonds he may hold, or only for so many bonds, and parts of bonds as his stock

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731 may amount to? Should he transfer his stock, as by the charter he may, does he make his transferee the real debtor, and release himself without the knowledge or consent of *his* creditor, the bondholder? Answers to these inquiries will, in the opinion of this court, fully shew the fallacy of the position assigned the stockholder, and which they are intended to controvert.

The first clause of the 3d section of the act of incorporation is also invoked to shew the charter will not admit of the construction in this opinion indicated. That clause is in these words: "In all instances in which slaves shall be mortgaged, in virtue of this act, the possession thereof shall be and remain in the mortgagor, any law to the contrary notwithstanding, until by the covenant or covenants contained in said mortgage, it shall be lawful for the said bank to seize the same." Let us premise, if it was intended at all events to permit the stockholder to remain in possession of the slaves mortgaged, any law to the contrary notwithstanding, until the expiration of the charter of the bank, why did the Legislature not say so, instead of using the more doubtful and circumlocutory language adopted? If we adopt the construction that the language used (and such it is contended is its meaning) was intended to protect the mortgagor in possession of the slaves until the Territorial bonds shall become due, and the bank shall make default in their payment, we must destroy the plain intent of the 9th and 22d sections of the charter. If we understand the covenant or covenants contained in the mortgage to apply as well to the payment of the stock note, or obligation of the stockholder, as to securing payment of the Territorial bonds when due, and that on default of complying with the proviso in the 29th section, to give a note or obligation annually for repayment of the money, (loaned) and paying up the interest, the bank may seize the mortgaged negroes, then we save the 9th, 22d, 26th, and other sections of this charter, and make all stand together, and all bear in the rights and duties both of the bank and its stockholders, and all tend to advance the interest of the creditors of the bank; while the contrary construction would tend to make of the stockholders an irresponsible class with exclusive privileges, (and the greater the stockholder, the greater the privilege,) as well also as inflict on the bondholders and other creditors of the bank, the greatest injury and the most stupendous fraud. Can there be a doubt we should adopt a construction which makes the mortgage property responsible for the stock note due the bank.

732 In the case of the Commonwealth vs. Kimball, 24 Pick. 370, Ch. Justice Shaw says: "It is unquestionably a well settled rule of construction, applicable as well to penal statutes as to others, that when the words are not precise and clear, such construction will be adopted as shall appear most reasonable, and best suited to accomplish the objects of the statute; and where any particular construction would lead to absurd consequences, it will be presumed that some exception or qualification was intended by the Legislature to avoid such conclusion." In the case of Wales *v.* Stetson, 2 Mass. 146, Ch. Justice Parsons says: "In the consideration of the provisions of any statute they ought to receive such a reasonable construction, if the words and subject matter will admit it, as that the existing rights of the public, or of individuals, be not infringed."

In Bac. Abr. title statute, letter H. it is laid down, "The most natural and genuine way of construing a statute, is to construe one part by another part of the same statute, and this best expresseth the meaning of the makers, and such construction is *ex viceribus actus.*" And again, same title. "If the literal expressions of the law would lead to absurd, unjust or inconvenient consequences, such a construction should be given as to avoid such consequences, if from the whole purview of the law, and giving effect to the words used, it may be fairly done."

Impressed with the soundness and wisdom of the afore recited rules, and aiming to adjudicate by their spirit and true meaning, construing one part by another part of the whole charter of the bank, and in view of the verbal obscurity in some of the provisions, which render it difficult to arrive at the true meaning of the Legislature, but bound to presume it was never the intention of the Legislature, that absurd, or unjust, or even inconvenient consequences should flow from the enactments contained in the charter, we think in every instance where a stockholder fails to renew his note, and pay up the interest, if the bank shall file for cancellation, with any officer of the Government, whose duty it may be to receive them for that purpose, and in default of such an one, with the Clerk of the court in which suit may be depending, to be delivered to such officer for the same purpose, as many Territorial bonds as were issued on the faith and value of the mortgage securities of such defaulting stockholder—that then the bank, upon judgment rendered and execution issued, may of right and according to the law of its charter, levy upon and sell all the mortgaged premises of such defaulting stockholder to be applied to the extinguishment of the judgment rendered on his stock note debt, to- 733
gether with interest due and costs accrued, the residue, if any, to be first applied to liquidate his liabilities in bank, as endorser or security, and the remainder, if any, to be paid to him.

Two exceptions taken by the plaintiff below to the decisions of the Circuit Court, admitting testimony upon the plea of *plene administravit,* remain to be considered. 1st. Certain receipts of H. Manly, the present husband of the relict of S. Parkhill, deceased, the intestate of defendants, which receipts purport to have been given for sums in part of the dower of Mrs. Manly, rejected by the Court of Probate. 2. The admission of testimony upon an alleged liability of the administrators for counsel fees, and for which they claim the right of retainer of such sum as the witnesses supposes would be a reasonable aggregate compensation for services of counsel in this case, and some twenty cases of detenue brought by Parkhill's administrators, and also a suit for foreclosure brought by the bank against Mrs. Manly and her husband, which was carried to the Supreme Court.

The act of the Legislature of February 15, 1834, concerning the duties of Executors, Administrators and Guardians, (see Tho. Dig. p. 237), provides for the settlement annually of the accounts of Executors and Administrators by the Judge of Probates, and that they shall render full and correct accounts of the receipts and disbursements of the estates in their charge, and says, "if approved, or so much thereof as may be approved, it shall be entered on the record:" and the accounts filed. If it be not approved, the only proper course by which the Executor or administrator can attain redress, if injured, is by appeal or writ of error. But if rejected, as the order of the Court of Probates is conclusive until reversed, it is not seen how the administrators can be permitted to avail themselves of it as evidence on the plea of *plene administravit.* And this objection lies as well to the evidence to establish the value of the counsel fees, which, as well as the first, should have been audited and allowed, or if rejected, by appeal reversed, before a right to use them as evidence on the plea of *plene administravit* could attach. On the subject of counsel fees we will remark, it is laid down in the case of Sterrett's appeal, 2 Penn. Reps. 426, "Where an estate is so situated that legal advice is proper to direct the course of the Executors, or where they must bring suits to recover part of the estate, or defend suits brought against them, counsel must be employed, and where they are employed to obtain what is honestly supposed to be the rights of the es- 734
tate, the estate ought to pay the counsel fees. But where Executors neglect to settle and pay, and are sued by creditors or cited by heirs, and employ counsel to defend them in their iniquity, no counsel fees should come from the estate." And this doctrine, in our opinion, is correct.

On the trial of this cause, the Circuit Court gave ten instructions, numbered from one to six inclusive, and from eleven to fourteen inclusive—to all which, defendants by their counsel excepted, save the second, and also moved the court to give fifteen several instructions, which the court refused, except the third, which was granted, and the fourth, which was refused, and substituted by another—all which is contained in their bill of exceptions, and by reference to the record will fully and at large appear. To all which refusals, the defendants by counsel excepted, and prayed their bill of exceptions may be signed, sealed and made part of the record, which was done; and thereupon they obtained and sued out their cross writ of error to this court.

By reference to the instructions given and refused, and excepted to by the defendants below, it will be perceived the principal points they make are aimed at the rate of interest which the bank might lawfully demand and take from a stockholder who was its borrower, and the time at which that interest was payable to the bank.

To have a clear understanding of these questions, it is necessary to examine the 28th and 29th sections of the charter, which are as follows: "Sec. 28. Upon loans or discounts, the said bank shall not receive more than at the rate of eighteen per centum per annum—the interest may be paid or deducted in advance." "Sec. 29. Each and every stockholder shall be entitled to a credit or loan equal to two-thirds of the total amount of his shares: *Provided,* That notes or obligations for repayment of the money shall be annually received, and the interest paid up: *And provided, also,* that when the accumulated surplus profits shall have equalled the amount of the bonds issued by the Territory for obtaining the capital of the bank, the interest upon all loans shall be reduced to a rate not exceeding six per centum per annum."

We think it manifest, from the last proviso of the 29th section, the rate of interest which the bank was authorized by law to charge was more than six per centum per annum; otherwise, why did the

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735 legislature provide, upon the contingency therein named, that the rate of interest should be reduced, so as not to exceed that sum.

The true construction of the word *credit* in the 29th section, has been the source of much discussion, and it has been contended it is of such extensive import or signification as to entitle a stockholder, at all times and under all circumstances, to a loan from the bank, equal to two-thirds of the amount of his shares. The term is used in the connection, *"credit* or *loan,"* and was probably intended by the legislature for nothing more than equivalent for the word *"loan,"* or it may have been intended to invest the stockholder, on the faith and virtue of the mortgage securities he had given the bank, with a right to a loan, free of the endorsers which an ordinary borrower might be required to give. But whichsoever may be the true intent and meaning with which it was used, it was subject to the proviso, that notes or obligations for repayment of the money (borrowed) shall be annually received and the interest paid up. It was contended that this proviso did not create a condition precedent or subsequent to defeat the loan; and if a condition, could only be a condition subsequent to defeat the continuance of the loan

Will or can any one successfully contend that a stockholder, as such, was or could be entitled to any loans whatever, unless he first gave a note or obligation for repayment of the money borrowed, and if that was necessary, (as we think it was,) whether it was not a condition precedent to obtaining a loan? At the time of giving a note or obligation for repayment of the money, by the conjunction *and* he was also required to pay up the interest. So it seems the giving the note and paying the interest at the time of borrowing the money, are both conditions precedent, properly deducible from the 29th section of the charter.

It is objected the frame of words, *"and the interest paid up,"* are repugnant to this construction, and they must mean interest *in arrear,* but with equal propriety they may mean interest *in advance;* and this construction of the 29th section harmonizes with the only rational one of which the 28th is susceptible. It provides that the interest may be paid up or deducted *in advance* upon *loans* or discounts by the bank. The term, "may be paid or deducted in advance," are terms directory and enabling to the bank, as are all the provisions of that section; and if we understand that the bank, upon a loan or discount, may deduct the interest in advance, or upon a re-

736 newal, may require it to be paid in advance, we but understand these words according to their natural force and usual import. The proviso, therefore, in our opinion, contains two conditions precedent to a stockholder's obtaining or continuing a loan under the 29th section, for a failure to perform either, (to wit: renew the note, or pay the interest,) would determine the duration of the loan, divest the right to have it, and invest the bank with a right of action against such defaulting stockholder. The authority of the bank, under the 28th section, to deduct interest in advance, is an authority co-extensive with the loans or discounts it may make; and this *is a loan,* peculiar in nothing save the right of the stockholder to have it, so long as he complies with the precedent conditions prescribed for his observance.

The bank has, according to the 28th section, as much right to deduct interest in advance on such a loan as on any other. That section further provides, the bank shall not receive more than at the rate of eight per cent. per annum, but it may be deducted or paid in advance. The rate, therefore, of interest, which, by its charter, the bank may deduct upon a loan or discount, is eight dollars from one hundred for the use of the residue for one year, and at the same rate for any shorter time—the *obligation* of a borrowing stockholder being to renew his note and pay the interest once a year; but according to bank usage, his *privilege* to renew and pay interest, oftener, as might suit his convenience. And if there be error in this, as it benefits the stockholder, he cannot complain.

The construction of the 28th and 29th sections, above given, appears to the court to be strengthened by other provisions of the charter. The last proviso in the 29th section contemplates, during the existence of the charter, surplus profits equal in amount to the Territorial bonds issued.

The 23d section contemplates surplus profits, provides for their management, appropriates subsequent profits, assigns a share to the Territory, as well also as the mode, on the expiration of the charter, of a division of capital.

The 36th section directs the disposition which shall be made of the profits which shall accrue to the Territory, and in other sections of the charter, mention is made of the surplus profits.

Now, when it is recollected that two, out of its three millions of capital, must, if required, be loaned to its stockholders—that near that amount was in fact loaned them—that the bank itself has a 737 continually accruing interest debt, payable to its creditors, which amounts annually to $180,000, besides contingent expenses as they may occur—unless a rigid exaction of interest is demanded of the stockholders, it would seem to require unusual arithmetical powers to enable a financier to discover how those surplus profits could arise.

The bank is known to be in an embarrassed condition, from which it will hardly recover, and has no surplus profits to manage. The value of its stock has depreciated, and is far below par. Yet it is perhaps not too much to say, had the debtors (stockholders and others) *bona fide* and fully paid interest on their respective liabilities, as the same were due the bank, unless, indeed, it was otherwise very badly managed, or had met with great and unavoidable misfortunes, it would now have in possession large surplus profits—its stock would be much above par, and its creditors would hold its liabilities at their original cash value.

We think, then, the bank had and has a right to interest on stock loans, at the rate of eight per centum per annum, and also to deduct it or require its payment in advance. The giving a note and payment of interest are conditions precedent, and without the performance of both, the stockholder has no right to a loan; or at any renewal or failure to perform both, determines the stockholder's right to his loan, and unless he pays the whole amount borrowed, the bank has a right of action against him.

Some objections have been raised in this case upon the use of Rowlett's interest tables. We will remark, that, from the testimony, it seems abundantly clear, the officers of the bank, when computing for a year by those tables, computed for a solar year, or three hundred and sixty five days, and for a month or months as aliquot parts of a year; in all which there cannot be error. But when computing for less than a month, as for days of grace, they computed each day as the 1-30th of a month, instead of the 1.365th part of a year. In computing fractions of a month, it is not easy, as every practical arithmetician must know, to adopt any rule but the one adopted in the tables, to wit: of supposing the month to consist of thirty days, which is nearer the 12th part of the year than any other integral number. We think the rule for practical purposes, the most accurate which has yet been devised, and are not inclined to condemn it.

The subject of the sale of the stock of Samuel Parkhill, under the 738 amended charter passed in the year 1839, was also raised by the instructions asked by the defendants in the court below. By the 2d section of that amendatory act, the sale could only be perfected by the purchaser executing to the bank, within ten days thereafter, bonds and mortgages necessary to make him a stockholder to the amount of the stock purchased. If that was not done (as from the testimony in this case, it seems, was not), the sale would not be valid, and would not divest the liability or interest of the original stockholder.

The amendments contained in this law were only cumulative remedies by way of penalty to coerce stockholders to a more exact observance of renewing their notes, and paying up the interest, and we think a failure to effect and carry out its provisions, does not divest the bank of any other remedies given by the provisions of its charter and the law of the land against a defaulting stockholder.

Upon the subject of the rate of bank interest, the time when it is payable, the use of Rowlett's tables, and the time for which a stockholder's note is required by the charter to be given, we are fully sustained in the positions we assume, by a very able decision delivered by Judge Bronson, at the January term, 1844, of the late court of Appeals of the Territory of Florida, and we take pleasure in saying, that decision discusses the whole of the subjects with a perspicuity and clearness, alike honorable to the heads as the hearts of the very able court from which it emanated.

Having, as we think, fully reviewed all the points raised by the bill of exceptions in this case, which are deemed necessary to its proper determination, and having, we trust, given a reasonable, a just and correct construction to such provisions of the charter as seemed proper or necessary to examine, it now remains to pronounce the rulings of this court, based upon the record presented, and the exposition of the charter, and the legal rights of the parties, as hereinbefore set forth, explained and declared.

We are of opinion that the Circuit Court erred in permitting the receipts offered as evidence by the defendant, Moseley, as part of the dower of Mrs. Manly, to go in evidence before the jury, on the plea of *plene administravit* and also the evidence concerning the counsel fees—which decisions are hereby overruled and reversed. We are of opinion the Circuit Court erred in refusing to instruct the jury, as prayed by the plaintiff below in its bill of exceptions, and also in

739 each of the six instructions given by the court, and to which the plaintiff by its counsel excepted; which said decisions of the court, refusing to instruct as prayed, and instructions given and excepted to, are hereby overruled and reversed.

We are further of opinion, that on the nine instructions given by the court, and excepted to by defendants by their counsel, there is nothing to which defendants can take any legal exception, as the said instructions were fully as favorable to them as by law they had a right to require. And as to the instructions asked by defendants and refused by the court, and to which they by counsel excepted, upon a careful examination, we do not think they were by law entitled to the allowance of any of them, and therein have perceived no error.

Union Bank vs. Parkhill's Admr's—cross writs of error.—Opinion of Court.

It is, therefore, ordered, adjudged and decreed, upon the writ of error sued out by the "Union Bank of Florida" in this case, that the judgment of the court below be reversed, annulled and set aside—that a *venire facias de novo* be awarded, and a trial thereon had, according to the principles contained in this opinion—that the cross writ of error sued out by the defendants below in this cause be dismissed, and that they take nothing thereby, and that the plaintiff in error, the Union Bank of Florida, recover its costs, &c.

JANUARY TERM, 1850.

REPORTS OF CASES

Argued and Adjudged in the

Supreme Court of Florida

AT

JANUARY TERM,

1850.

BY

DAVID P. HOGUE,

REPORTER.

VOLUME III.

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JUDGES

OF THE

SUPREME COURT OF FLORIDA

DURING THE PERIOD OF THESE REPORTS.

Hon. THOMAS DOUGLASS, Chief Justice.

Hon. THOMAS BALTZELL,
Hon. GEORGE S. HAWKINS,
Hon. JOSEPH B. LANCASTER, } Associate Justices

DAVID P. HOGUE, Attorney-General.

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DECISIONS

OF THE

Supreme Court of Florida

AT

JANUARY TERM, 1850.

R. B. & D. W. Post, Plaintiffs in Error, vs. William S. Carpenter, et al.

Under the Attachment law of this State, there is no priority given in attaching creditors whose attachments have been first levied, if the judgments in the suits commenced by attachment obtained at the same term of Court.

The Statute which declares that the services of a writ of attachment shall bind the property attached except against pre-existing liens, is further qualified by the provision "that a judgment in a suit commenced by attachment shall be satisfied in the same manner as other judgments obtained at the same term of the Court are, or shall be satisfied out of the lands and tenements, goods and chattels generally of the defendant in attachment."

Error to the Circuit Court of Wakulla County.

The plaintiffs in error sued out a writ of attachment which was levied by the sheriff of Wakulla County upon about seventy bales of cotton as the property of Wm. S. Carpenter, an absconding debtor. On the same day, but after the levy of plaintiffs' attachment, several other creditors of Carpenter attached the same cotton. The cotton was sold by order of the Court, and the money, the proceeds of sale, was paid into the registry of the Court.

Judgments were obtained in the various suits thus commenced by attachment, at *the same* term of the Circuit Court of the County of Wakulla, Hon. Thomas Baltzell, Judge of the Middle Circuit presiding.

The proceeds of the sales of the cotton not being sufficient to pay the debts due all the attaching creditors who had thus obtained judgments, the plaintiffs in error claimed priority on the ground that their
2 attachment was first levied and bound the property, and was therefor entitled to be first satisfied. The question was argued in the Court below, on a rule upon the clerk (who had in his hands the proceeds of the sales of the cotton) to show cause why the same should not be applied first to the payment of the claim of plaintiffs in error, and after satisfying that, then to the claims of the other creditors in the order in which their attachments are levied.

The Court below decided that the moneys should be distributed *pro rata*. To reverse this decision the plaintiffs brought the case to this Court by writ of error.

Maxwell, Papy and *Hogue*, for plaintiffs in error.

Long & Walker and *Archer*, for defendants.

HAWKINS, J.

The case at bar depends upon the interpretation of the statutes governing attachments, and we are free to confess that, owing to their singular phraseology, we have found it not a very easy task to arrive at a satisfactory conclusion. We have given the subject proper reflection, and have endeavored to arive at what we deem to have been the intention of the Legislature which enacted the statutes. The question is, where there are several attaching creditors, who obtained judgments at the same term, do they participate *pro rata* in the proceeds of the property attached, or do they take according to the priority of the levy of the several attachments?

On page 368 of the Digest, Article 1, Section 2, is the following: "The service of a writ of attachment shall not operate to dispose ess the tenant of any lands or tenements, but such service shall bind the property attached, except against pre-existing liens; but the judgment in a suit commenced by attachment, shall be satisfied in the same manner as other judgments obtained at the same term of the Court are or shall be satisfied out of the lands and tenements, goods and chattels generally, of the defendant in attachment: *Provided, however*, That judgments rendered against any garnishee or garnishees in said suit shall be appropriated exclusively to the satisfaction of the judgment rendered against the defendant, commenced by attachment as aforesaid." If the section had ceased, after the words "pre-existing liens," there would be no difficulty, and it would be plain that the liens would be specific, subject to the general exception,
3 "pre-existing liens;" and the several attachments would take preference according to the maxim, *prior est tempore potior est jure*. But it goes on to say, "that a judgment in a suit commenced by attachment shall be satisfied in the same manner as other judgments obtained at the same term of the Court are, or shall be satisfied out of the lands and tenements, goods and chattels generally, of the defendant in attachment." Now, what is the fair import of these words? We are of opinion that they must be understood as further qualifying the lien contained in the first clause of the section, by the addition of another exception, to wit: judgments obtained at the same term of the Court, whether obtained after the service of attachment or of ordinary process. We think it was the intention of the Legislature to place judgments obtained at the same term, whether the suits in which they were obtained were instituted by attachment or ordinary summons, upon the same footing. We are fortified in these views by the words of the proviso. The words, "exclusively applied," certainly must have been introduced in it to show that the proceeds of judgments against garnishees were to have other and distinct application from those contained in the body of the section, to wit: a general application; whereas, in cases of garnishments, they were to be specifically applied.

We find further, in page 370 of Thompson's Digest, the following section: "If there be two or more suits commenced by attachment against the same person, and several judgments be obtained at the same term, they shall be satisfied *pro rata* out of the judgments which may have been obtained against the garnishee or garnishees in any such suits, unless the defendant or defendants in such suits have sufficient other property to satisfy the same." This section seems to be but an addition to the one already quoted, and declares a "*pro rata*" distribution out of the judgments obtained against garnishees at the same term. It seems intended to supply a defect in the proviso of the section first set forth, which only provided for one judgment against garnishees; whereas this section embraces any number of judgments obtained against garnishees at the same term, and declares, where there is more than one judgment, or several judgments, they shall be satisfied *pro rata*. This law of attachment being in derogation of the common law, we are not disposed to extend its provisions beyond the manifest meaning of its terms; and we should be loath so to extend them as to give a preference to attaching creditors over those who pursue the ordinary process of law, unless the statute contained clear and unequivocal words to that effect. We believe we have given what was the intention of the framers of the law, and by so doing, have avoided a construction likely to operate unjustly and unequally.

We think, therefore, that there was no error in the decision of the Court below, and the judgment of that Court stands affirmed.

Antonio Collins, Plaintiff in Error, vs. Nicholas H. Mitchell, Defendant in Error.

A bond conditioned for the forthcoming property "to abide the final order of the Court," varies from the condition of the bond provided by the statute which is "for the forthcoming of the property replevined, and to abide the final order of the Court."

In an action of debt on a bond given under attachment process, pursuing the form prescribed by the statute, the judgment being the final order of the Court in the attachment suit, would constitute the rule and measure of damages for a failure to deliver the property.

But where the condition of the obligation is "for the forthcoming of property," then upon the return of the officer that the property attached is not forthcoming, or that defendants in attachment have no property in his bailiwick to satisfy the execution, founded on the judgment in the attachment suit, the liability of the surety on the bond attaches, and the measure of damages in an action against him would be the value of the property at that time with interest.

Mitchell, the defendant in error, brought an action of debt in the Circuit Court of Escambia County, on a bond executed by the plaintiff in error, together with J. N. C. Stockton & Co. and Hanson Kelly, and dated the 13th of January, 1840. The bond sued on was delivered to the sheriff of Walton County, who had levied an attachment upon certain slaves as the property of J. N. C. Stockton & Co., and which attachment had been sued out of the late Superior Court of Walton County by Mitchell, for a debt claimed to be due him to the amount of nine hundred dollars. The bond is in the penal sum of

$1800, and the condition thereof is in these words—"Now if the said J. N. C. Stockton shall *cause said slaves to be forthcoming to abide the final order of the Court,* then this obligation to be void, else to remain in full force and virtue."

The declaration avers that the final order of said Court, that is to say, the judgment against J. N. C. Stockton, was rendered on the 27th day of April, 1842, for $1211 75-100, and that execution issued thereon and was returned "no property found."

The declaration then avers that the said J. N. C. Stockton & Co. did not nor did any other person or persons cause the said slaves to be forthcoming to abide the final order of the Court. By means whereof the plaintiff sustained damages to the amount of $1800.

The defendant (Collins) filed three pleas.

The first states that at the time of the institution of the suit against J. N. C. Stockton, as well as at the time of the rendition of the said supposed judgment against the said J. N. C. S., he the said J. N. C. Stockton had departed this life—without this that there was any other final order or judgment in said cause; and so the said defendant says there was no final order, judgment, or decision in said cause.

The second plea filed is *non est factum.*

And the third is the same as the first, except that it states the institution of the suit and the rendition of the judgment as against J. N. C. Stockton & Co., and not J. N. C. Stockton alone.

The plaintiff demurred to the first and third pleas, and the demurrer was sustained by the Court.

The cause was tried at the fall term, 1849, of the Circuit Court of the County of Escambia, Hon. GEORGE S. HAWKINS, presiding.

The jury found for the plaintiff and assessed his damages at one thousand four hundred and thirty-six dollars and twenty-six cents, and judgment was given accordingly. On the trial of this cause defendant's counsel moved the Court to instruct the jury, that the plaintiff could not recover other than a mere nominal sum, without showing the value of the slaves replevied by other evidence than that afforded by the replevin bond itself, which instruction the Court refused, and gave the following: "that the jury should assume the half of the penalty of the bond to be the true value of the slaves." To this refusal of the Court and to the charge given, the defendant excepted.

To reverse the judgment rendered in this case the defendant prosecuted this writ of error.

M. A. Long, for plaintiff in error.

This is an action of debt upon a replevy bond, executed by the defendant, as surety, on the 13th January, 1840, and delivered to the Sheriff of Walton County, who had levied an attachment upon "certain slaves, as the property of J. N. C. Stockton & Co.," as recited therein. The bond is in the penal sum of $1,800. The bond recites that the debt claimed in the attachment was $900. The declaration alleges for breach of the bond—that the said negro slaves were not delivered to abide the final order of the Court, to which the attachment was returned, and "that the final order of said Court, to wit, the judgment against the said J. N. C. Stockton, & Co., was rendered on the 27th day of April, 1842, for $1,211 75," and that execution was issued thereon, and returned "no property found," &c. Three pleas were filed, but no question is made upon the second, which is *non est factum.*

These pleas are demurred to, and the judgment of the Court sustained the demurrer, which we assign as error. Two questions are presented by this assignment of error. The first is, does the fact pleaded amount to a good defence in law, suposing the plaintiff's declaration to be good; and the second is, whether the declaration is not bad, the demurrer also raising that question.

The declaration is bad for several reasons:—

1. The condition of the bond sued on is void for uncertainty, in omitting to recite the number, names, ages, or sex of the slaves, which were "to be forthcoming to abide the final order of the Court." The surety is not bound to deliver any particular slaves, and, indeed, is not by the bond informed what slaves had "been levied upon." If his undertaking is not in the bond itself set forth with reasonable certainty, the Court cannot, upon demurrer, see that he has failed to comply therewith. For aught the Court can see, the endorsement of the levy on the writ of attachment was as vague and uncertain as the condition of the bond in this respect; wherefore, it is no answer to this objection to say, that a reference to the levy will cure the uncertainty.

2. The declaration alleges that the condition of the bond required J. N. C. Stockton to cause the said slaves to be forthcoming, whereas the bond itself requires J. N. C. Stockton & Co. to do so. This is a variance.

3. The declaration does not allege that any final order was ever rendered in the particular attachment suit mentioned in the condition of the bond. The averment is, "that the final order of said Court, to wit, the judgment against said J. N. C. Stockton & Co. was rendered on the 27th day of April, 1842," &c. "The judgment against said J. N. C. Stockton & Co." is too general, for it does not appear even that it was in favor of the plaintiff, much less that it was upon the particular attachment mentioned before.

4. The persons against whom the judgment was rendered are equally vague and uncertain, namely, J. N. C. Stockton (and company) & Co.

It is evidently intended to intimate that this final order or judgment was rendered against some one else besides J. N. C. Stockton, and yet no name is disclosed. No such judgment could legally have been rendered as that mentioned in the declaration, even if the person in whose favor it was rendered had been named. In a suit against a firm, you may serve process on one, but must declare and recover against all, and the name of each must appear, as well in the declaration as upon the record of judgment. "Partners cannot be individually sued for a partnership debt. Each partner is bound for the whole until the debt is paid; but payment can be enforced only by a joint action against all. Their responsibilities are joint only, and not joint and several, so as to subject each to a separate action." 1 Chit. Pl., 43, note 3. Robertson vs. Smith, 18 John. Rep., 459. Henry Van Tine vs. Crane, *et al.,* 1 Wend. R., 524.

Therefore, it follows that, as the judgment or "final order" set forth in the declaration is only against one person, it cannot be the judgment or final order which the defendant was bound to have the said slaves forthcoming to abide. The execution, says the declaration, which was returned no property found, was issued upon said judgment—that is, against J. N. C. Stockton alone, and not against the firm. It does not, therefore, appear but what the slaves would have been delivered, had a proper judgment and execution been rendered and issued, which being a condition precedent to any right to sue on the bond, must be distinctly averred. 1 Chit. Pl., 368.

The second question raised under the demurrer is, whether the judgment or final order is not shown to be void, by the existence of the fact thus mentioned in the pleas, namely, the death of J. N. C. Stockton, before the attachment suit was commenced. We have already seen that the judgment does not purport to be rendered against any other person; but we are prepared to show that, if it had been against his copartners by name, it would have been void as to them, if void as to the deceased. We understand that it is conceded on the other side, that a Court has no jurisdiction to render a judgment against a man who had no notice of the suit, actual or constructive, and that death before suit brought precludes the possibility of either. The authorities are full to this principle. In the case of Elliott and others vs. Pearson and others, 1 Peters, 341, the Supreme Court of the United States say: 'Where a Court has jurisdiction, it has a right to decide every question which occurs in a cause; and whether its judgment be correct or otherwise, its judgment, until reversed, is binding in every other Court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void." And in the same case, the Court remark that "the jurisdiction of any Court exercising authority over a subject, may be inquired into in every Court, when the proceedings of the former are relied on and brought before the latter, by the party claiming the benefit of such proceedings."

In the case of Hollingsworth vs. Barbour and others, 4 Peters R., 472, the same Court say: "By the general law of the land, no Court is authorized to render a judgment or decree against any one or his estate, until after due notice by service of process to appear and defend. This principal is dictated by natural justice," &c.

The same doctrine is held in the case of Rangeley vs. Webster, 11 N. H. Rep., 304. In Bissell vs. Briggs, 9 Mass. Rep., 462, Chief Justice Parsons remarks that "the Court must have had juridiction, not only of the cause, but of the parties." See also Hall vs. Williams, 6 Pick., 232, in which it is said, "the judgment being entire, if it is a nullity with respect to one, it is also in the whole." In Holbrook vs. Murray, *et al.,* 5 Wend., 161, the Court say: "The facts stated in the plea being admitted by the demurrer, the defence of want of jurisdiction as to the person of this defendant, (Murray,) is established; as to him the judgment is not conclusive, not even

9 evidence of a demand—it is a nullity. What effect has this on the other defendants, whose plea does not afford any defence? The judgment is entire, and if void as to one defendant, where there are several, it is void as to all." And this precise point was decided in the same way in Richard vs. Walton, 12 John. Rep., 434. Wes tervelt vs. Lewis, 2 McLean, 511. Smith vs. Russ., 1 Mis., 453. Armstrong vs. Horshaw, 1 Dev., 187. Lewis vs. Ash, 2 Miles, 110.

From a view of these authorities, I respectfully submit, that the judgment or final order, set forth in the declaration, was totally void, as to all against whom it was rendered, whether it be regarded as rendered against J. N. C. Stockton alone, or against him jointly with others not named, but included under the abbreviated epithet, "& Co.," and that the pleas constituted a good defence to the action. If the bond ever had any validity, therefore, there has not been any "final order of the Court," which it was the duty of the defendant "to abide by, causing the said slaves to be forthcoming." And if this be correct, it follows as a necessary conclusion, that the writ of attachment was void when sued out, and the levy on the slaves also. The bond taken to replevy the property was equally void, having been literally extorted upon false pretences, under mere color of law.

The second error assigned, arises upon the charge of the Court, set forth in the bill of exceptions, which is in these words: "The jury should assume the half of the penalty of the bond to be the true value of the said slaves," and the refusal of the Court to charge as requested by defendant below, "that the plaintiff could not recover other than a merely nominal sum, without showing the value of the slaves replevied, by other evidence than that afforded by the replevin bond ieself." The doctrine here advanced by the Court below is believed to be without any precedent, and in violation of a very old and familiar rule of law, that plaintiff must prove damages before he can recover therefor. The case cited on the other side, from 3 Conn. Reps., 248, and there was but one cited, is not at all in point. The question did not arise upon the trial before the jury, in the assessment of damages. The defendant in that case pleaded that the bond was void, because the property for which the bond had been given, under an embargo law of the United States, had been valued too high by
10 the officer to whom the bond had been executed and delivered. The plea was held to be no defence, and that the bond was not void.

C. C. Yonge, for denfendant in error:

Contended that the demurrer to first plea was well taken, because the count alleges a judgment against J. N. C. Stockton & Co., and the plea states that no final order was made in the case of John N. C. Stockton, and cited Chitty P., 521. 7 John, 402. Bacon's Ab. Pleas. Skinner vs. Bebow, 2 Strange 919.

The demurrer to third plea was also good, 1st, because the plea is argumentative. 2d, because, though Stockton was dead, it was competent for the survivors to continue the use of the name of the firm; and the bond furnishes the evidence that it was so used after the time at which according to the plea, Stockton died. The bond was a good common law bond, at least, made by the survivors of the firm and the sureties for the forthcoming of property.

The validity of the judgment against J. N. C. Stockton & Co., being a judgment of a Court of competent jurisdiction, cannot be inquired into in a collateral proceeding. Voorhees vs. Bank of U. S., 10 Peters, 473.

The instruction of the Court to the effect that the penalty of the bond furnished evidence on which to base a verdict as to the value of the property, was right. See 3 Cond. Rep., 248.

BALTZELL, J.

This was an action of debt instituted by defendant in error against plaintiff as one of the securities on a forthcoming bond given under attachment process. The defendant filed three pleas which were demurred to, and the demurrer sustained by the Court. Leave was given to plead anew within sixty days, which however seems not to have been done, and the case in this situation, was, as appears from the record, submitted to the jury.

On trial, the plaintiff gave in evidence the bond sued on, with other evidence, whereupon "defendant's counsel moved the Court to instruct the jury that the plaintiff could not recover other than a merely nominal sum, without showing the value of the slaves replevied by other evidence than that offered by the replevin bond itself, which instruction the Court refused to give, but instructed the jury that they should asume the half of the penalty of the bond to be 11
the true value of the said slaves." The propriety of this instruction is the only question presented by the record.

The bond in question is thus described in the condition: "whereas Nicholas H. Mitchell has sued out an attachment against J. N. C. Stockton & Co. for $900, which has been levied upon certain slaves as the property of J. N. C. S. & Co., and the said J. N. C. S. & Co. wishing to replevy the said, now if the said J. N. C. S. & Co. shall cause the said slaves *to be forthcoming to abide the final order of the Court*, then the obligation to be void, else to remain in full force and virtue." It will be perceived that this varies from the condition of the bond provided by the statute which is for "the forthcoming of the property replevied to abide the final order of the Court." If it had pursued the statute, the amount of the judgment being the final order of the Court, which the security had undertaken to abide by, would probably form the criterion and rule of the damages for a failure to deliver the property.

The defendant's engagement is not of this character, and he has a right to insist upon its very terms. He engages that the principals, the Stocktons, shall cause the said slaves to be forthcoming to abide the order of the Court. Now if the obligation had been complied with by delivery of the slaves, plaintiff would have been entitled to a sale of them under execution, and the appropriation of the proceeds to his debt. He is entitled to be placed in the same position by the failure which he would have occupied if the Stocktons had fulfilled their agreement, and this, in our opinion, constitutes the true measure of damages. Defendant's liability, as that of any other security to such an obligation, attaches upon the return of the officer that the property attached is not forthcoming to abide the order of the Court or that the defendants have no property in his bailwick to satisfy the execution. The value of the property at that time, with interest, would seem to be the appropriate measure of damages.

The case will then be reversed for this error, and the judgment set aside, and a *venire facias de novo* awarded, with leave to each party to amend his pleadings, and the cause remanded for further proceedings, not inconsistent with this opinion.

We add that in case of another appeal, a copy of the entire record in the suit of Mitchell vs. the Stocktons be sent up, that this Court may, if required to decide the farther points in the case, be possessed 12
of the entire facts necessary to a correct adjudication.

NATHANIEL P. BEMIS, ET AL., APPELLANTS, VS. THE STATE, APPELLEE.

There is no law authorizing the Comptroller to appropriate any money collected or received by him in his official capacity, to the payment of any claim held by himself against the late Territory of Florida.

Under the provisions of the law requiring the Comptroller to collect all the debts, dues and demands of the late Territory, money collected by him for such dues must be regarded as in the Treasury of the State when he receives it, from which it cannot be drawn, but in consequence of an appropriation by law.

Appeal from judgment of the Circuit Court of the County of Leon. This cause was tried before the Hon. THOMAS BALTZELL, Judge of the Middle Circuit at the spring term, 1849, of the Circuit Court of Leon County.

The pleadings, evidence and instructions given by the Judge in the Court below, are set forth in the opinion pronounced by Ch. Jus. Douglas sofully, that it is not deemed necessary to make any other statement of the case.

Thompson, for Appellant.

Hogue, for Appellee.

DOUGLAS, Ch. J.

This suit was instituted in the Circuit Court of Leon County against Nathaniel P. Bemis, late Comptroller of Public Accounts of the State of Florida, and his sureties upon his official bond. The declaration is in the usual form, assigning as a breach of the condition of said bond, that the said Nathaniel P. Bemis did not faithfully discharge all the duties of the said office of Comptroller of Public Accounts, &c., according to the condition of said bond, in this, that he the said Nathaniel P. Bemis, by virtue of the authority vested in him by law, and in the discharge of the duties of said office, &c., on the tenth day of December, 1847, received, collected and had in his

possession on account of the Territory of Florida, the amount of five hundred and seventy-nine dollars and fifty-three cents, in cash, of the debts, dues and demands of the late Territory of Florida, which he has neglected and refused to pay into the treasury of said State of Florida, as by law he was bound to do, &c. To this declaration the defendants pleaded, first *non est factum*. Second, *Nil debet*. Third, "That the plaintiff was indebted to the said defendant, Nathaniel P. Bemis in the sum of six hundred dollars for work and labour, care and diligence of the said Nathaniel, for the said plaintiff before that time done and performed and bestowed, and for compensation and commissions for diverse collections and other services before that time done, performed and bestowed for the plaintiff, and at his request, and for divers warrants on the treasury of the Territory of Florida, duly issued and owned and held by the said Nathaniel, which the said plaintiff was and is bound to pay and discharge, which said warrants are numbered 158, 317, 265, 147, 257 and 377, and for money by the said plaintiff before that time had and received for the use of the defendant Nathaniel, which said sum of money so due to the defendant Nathaniel from the plaintiff is wholly unpaid, and exceeds the sum so alleged to be due and owing to said plaintiff in the said declaration mentioned, by virtue of the said condition of the said supposed writing obligatory, and which said sum of money so due and owing from said plaintiff, or so much thereof as shall be necessary, in this behalf, the said defendants are ready and willing and offer to set off and allow against the sum of money so claimed to be due and payable under the condition of the said writing obligatory, and this &c. *Fourth*, that said Bemis did faithfully discharge all the duties of Comptroller, &c., and did faithfully account, &c., according to law; and *Fifth*, that the said Bemis did faithfully discharge all the duties of Comptroller of Public accounts of the State of Florida according to the conditions of the said writing obligatory, and he the said Nathaniel did not neglect or refuse to pay into the treasury of the State of Florida the debts, dues and demands of the late Territory of Florida received, collected and had by him, in manner and form as the said plaintiff hath thereof complained against him, but did on the 20th day of March, one thousand eight hundred and forty-eight, before the commencement of this suit, tender and offer to pay and did deposite in the treasury of the State the sum of five hundred and eighty six dollars and forty-eight cents in warrants on the treasury of the Territory of Florida then outstanding and unpaid, in the hands and possession of the said Nathaniel, which said sum is more than sufficient to pay, satisfy and discharge all the demands of the State of Florida, upon him the said Nathaniel for or by reason of the receipt and collection of the debts, dues and demands of the late Territory of Florida, and this, &c. To the *first* and *fourth* of these pleas, the plaintiff filed a *similiter*. The second seems not to have been noticed. To the *third*, the plaintiff replied by a general denial, and the defendant joined issue. To the fifth, the plaintiff put in a demurrer, alleging for cause, that the said defendants have not by their plea traversed or denied or attempted to put in issue any matter of fact alleged by plaintiff; that the said plea is double, in this, that the said defendants have thereby pleaded and alleged the performance of the duties of Comptroller by defendant Bemis, and also allege a tender and offer to pay as well as a deposit of Territorial warants in payment of the demands by the State against him, the said Bemis, wherefore, &c. And the said demurrer having been argued, was sustained by the Court. After which the issue of fact were submitted to a jury, who found a verdict for plaintiff and assessed the damages at five hundred and eighty 86-100 dollars. Whereupon judgment was entered for $5000, the penalty of the bond, and for the recovery of the damages so assessed as aforesaid, the judgment to stand, &c.

It appears by a bill of exceptions which constitutes part of the record in this case, that the plaintiff offered in evidence a treasury transcript containing an account current between the said Nathaniel P. Bemis and the State of Florida, commencing as follows, to wit: "Nathaniel P. Bemis, late Comptroller, &c., in account with the State of Florida, for dues to the late Territory of Florida, collected by him in pursuance of an act of the General Assembly approved 23rd July, 1845, and resolution approved 27th December, 1845," which contained two items specially referred to by one of the witnesses, viz: "specie funds rec'd S. Scarborough, fines, $15 20, and specie funds executors of T. P Chaires, escheat, $628 72," and exhibited a balance against the said Nathaniel P. Bemis, late Comptroller, &c., of five hundred and seventy-nine dollars and fifty-three cents, and that the plaintiff called Simon Towle, Esq., Comptroller

of Public Accounts, who being duly sworn, depose that the several items in the account stated by him against the said Bemis, in the column headed "current funds" were collected in specie or what was equivalent thereto, and the several items marked "Territorial Scrip" were collected and received in auditor's warrants of the late Territorial treasury, and this so appears from the book kept by the said Bemis in the Comptroller's office, and from said Bemis' explanation in relation to said entries."

And here the plaintiff closed its case. And thereupon the defendant introduceed the following paper writing purporting to be a receipt, viz: "Rec'd, Tallahassee, March 20th, 1848, of Nathaniel P. Bemis, late Comptroller, the following warrants on the Territorial Treasury, the same having been tendered in payment of the balance due the Territory on collections made by said Bemis, and refused by me, for the reason that the amount so claimed by the State was collected as current funds. No. 158, for $525, No. 317, for $9, No. 365, for $9, No. 147, for $3, No. 257, for $36 13, and 377, for $4 35.

And it was admitted by the Attorney General of the State, for the plaintiff, that the warrants were warrantts of the Auditors of the late Territorial Treasury, duly and legally issued, for demands upon the said Territory of Florida; and, further, that the same still remained in the possession of W. R. Hayward, Esq., State Treasurer. Defendants also introduced Richard T. Birchett, who, being duly sworn, proved the said Nathaniel P. Bemis was the owner and holder of said Territorial warrants, prior to his appointment to the office of Comptroller of Public Accounts. Also Hugh Archer, who being duly sworn, deposed that Nathaniel P. Bemis was, before the date of the collections in said accounts stated, as having been made from S. Scarborough, and executors of T. P. Chaires, in possession of Territorial Treasury warrants, and which he believes the same as those described in the Treasurer's receipt, given in evidence. And here the testimony closed. And thereupon the Court charged the jury as follows, viz: "That the Comptroller has no right by law to appropriate funds collected by him in good money to the payment of an individual debt held by him on the Territory of Florida, unless it is so expressly provided by law. That, in performing the duties enjoined upon him by law, it was the duty of the Comptroller to receive scrip of the Territory when tendered in payment; but, if payment is made in good funds, it is the duty of the Comptroller to pay the same to the State in good funds. That the rights of these parties depend upon the law as it exists, and in assuming the office of Comptroller, the defendant undertook to execute the law as it was enjoined upon him; that the Comptroller is not the judge to determine of the justice and propriety of claims for or against the State according to his own notions of right, but according to the directions of the State, whose agent he is. That, if the State Legislature had designed to allow to one of their officers the privilege contended for, they would have expressed their design in unambiguous language." And with such instruction and direction, left the case to the jury.

To which opinion of the Court, the said defendants excepted. The questions presented by the record are —

First. Whether the Court erred in sustaining the demurrer to the fifth plea above set forth?

Second. Whether the Court erred in its instructions to the jury?

The first question depends upon the fact, whether the said fifth plea is good, both in form and substance, or not. One cause assigned for the demurrer is that it is double, in this, that the defendants have thereby pleaded and alleged performance of the duties of Comptroller by defendant Bemis, and also allege a tender and offer to pay, as well as a deposit of Territorial warrants, in payment of the demands of the State against him, the said Bemis; and we think this cause well assigned. The allegation of performance had already been made the ground of distinct plea, the fourth on which issue was taken; and a tender, if well made, is, of itself, a good ground of defence.

It is one of the first rules of pleading, that "pleadings must not be double, and a plea that contains within itself several distinct answers is bad." Stephen on Pl., 258, 259. 1 Chitty Pl., 592, 257, 260, 564. But a more important objection to that plea is, the nature of the tender. We are not aware of any law that makes the Treasury warrants mentioned in it a legal tender in any case.

It was held by Mr. Justice Story, in Thorndike vs. the United States, 1 Mason, that Treasury notes, issued under the act of Congress of 1814, being by their terms receivable in the payment of duties, taxes and bond debts, due the United States for the principal

17 and interest due thereon, are good tenders, and may be pleaded as such to such debts. But it is apprehended that they are not a good tender, and they could not be well pleaded as such to any but *such debts*. A plea of tender is not supported by proof of a tender of a promissory note due from the plaintiff to the defendant. Carry vs. Bancroft, 14 Pick., 315. These Treasury warrants were not by their terms receivable for taxes or debts due to the late Territory, which issued them. No provision has been made by any law of the State for their liquidation, and if there had it would not make them a good tender in such case as this, unless it specially authorized their reception in payment in such a case. The fifth plea is, therefore, bad and the demurrer thereto properly sustained.

The next and only remaining question is, did the Court err in its instructions to the jury? And after a due and careful examination of them, and a due consideration of the arguments in relation thereto we are of opinion that it did not. The Comptroller certainly had no right by law to appropriate the funds collected by him in good money or, indeed, any money collected by him, to the payment of an individual debt held by him on the late Territory of Florida, unless it was so expressly provided by law; and so far from there being any express provision, the General Assembly have always hitherto carefully abstained from making any provision for the payment of such debts. How far it comports with propriety or sound moral principle, and with the character and dignity of a soverign State, to collect the debts due to the Territory, and apply the proceeds to the payment of its own debts, without making any provision to pay the duly acknowledged and admitted indebtedness of the late Territory for services rendered it by its own public officers and other citizens, is a question for the General Assembly, and not this Court, to determine. It is to be presumed, however, that provisions will be made to pay them so soon as the state of the treasury will permit it to be done.

Until, however, that shall be done by the properly constituted authority, the Comptroller has no right to audit them, or the Treasurer to pay them; for the Constitution expressly declares that no money will be drawn from the treasury, but in consequence of an appropriation by law. Con., art. 8, sec. 3; and the statute provides that no money shall be paid out of the treasury, except on a warrant from the Comptroller. Act July 26, 1845. Pamphlet Laws, page
18 19. Thompson's Digest, page 34, No. 6. And it is made the duty of said Comptroller to examine, state, audit and settle all accounts, claims and demands whatsoever against the State arising under any law or resolution of the General Assembly. Act of July 23d, 1845. Pamphlet Laws, 16. Thompson's Digest, page 31, No. 4; and we are unable to find any statute authorizing the Comptroller to audit any other claims than those which arise under some act of the General Assembly. Sec. 2 of the 17th Art. of the Con., (Schedule and Ordinance,) provides that "all fines, penalties and forfeitures, obligations and escheats, accruing to the Territory of Florida, shall accrue to the State of Florida;" and sec. 3, that "all recognizances taken, or which might be taken, before the organization of the judicial department, under this Constitution, shall remain valid, and shall pass over to and may be prosecuted in the name of the State.

And all bonds executed to the Governor of the Territory of Florida or any other officer in his official capacity, shall pass over to the Governor or other proper State authority, and to their successors in office, for the uses therein expressed, and may be sued for and recovered accordingly. It may be remarked that this article contains no provisions for paying the above specified debts of the Territory.

It was not thought necessary by the framers of the Constitution to enjoin upon the General Assembly by a special clause, what without any such special injunction, is a great Constitutional and moral duty. It would have been a reflection upon the intergrity of the General Assembly, to have inserted in that instrument a clause implying a doubt that the Legislature would discharge a duty required of them by every principle of honor and justice. The Act of July 23d, 1845, Thompson's Digest, page 38, No. 12—Pamphlet L. page, 18, provides that "it shall be the duty of the Comptroller forthwith upon entering upon the duties of his office to cause a strict inquiry and examination to be made either by himself or such person as he may appoint in each and every County of the State, into the records of every Court of this Territory as to all fines, forfeitures recognizances or costs, or other monies due to the Territory of Florida from any District Attorney, Clerk, Marshal, Sheriff or other officer, person, or corporation, and also to enquire and examine into all accounts, returns and reports of all officers of the Territory, or other persons or corporations indebted or accountable in anywise to the

Territory, and forthwith proceed to have such account settled and 19
paid according to law," And a Resolution of December 27th, 1845, Pamph. L. 157, Thompson's Digest, page 34, No. 17, directs "That the Comptroller of Public Accounts, be and he is hereby instructed to proceed forthwith to collect all debts, dues and demands of the late Territory of Florida, for which he shall be entitled to ten per centum upon all amounts so actually collected and paid into the Treasury." These, it is believed, are all the provisions which our laws contain on the subject under consideration, and none of them authorized the Comptroller to appropriate any monies by him collected to the payment of his individual debts, and especially to pay a claim, which no proof as the law stands would have authorized the Comptroller to audit or the Treasurer to pay.

The monies collected by the Comptroller under the act and resolution above cited, were, so soon as he received them, to all intents and purposes, the monies of the State, and so far as he was concerned at least, in the Treasury of the State, and he so considered and treated them, for by reference to his account current, it will be perceived that he charged his ten per cent. for collecting them, which he is not entitled to except upon the amount so actually collected and paid into the treasury. The judgment of the Court below is therefore affirmed with costs.

Per Curiam.

THE CITY OF TALLAHASSEE, APPELLANT, VS. JUSTICE R. FORTUNE, APPELLEE

Aggregate Corporations, receiving their corporate powers and bound by their corporate duties with their own consent, are liable for special damage occasioned by their nonfeasance, or breach of duty, in an action of trespass on the case.

The City of Tallahassee having full power and authority to remove and to prevent nuisances is liable in such an action for damage caused by the failure to remove them.

But a plaintiff claiming damages as the result of a nuisance, must show that he acted with common and ordinary care.

This case comes up by appeal from a judgment of the Circuit 20
Court of the County of Leon rendered at the spring term, 1849, Judge BARTZELL, presiding

The facts of the case and the pleadings are stated in the opinion delivered by the Court, affirming the judgment of the Court below.

Archer, for Appellant, contended

1st. That trespass for nonfeasance does not lies against a municipal corporation, and cited Edwards vs. Union Bank, 1 Flor. Rep. 136-147. 3 Peters, 398, 409. 11 Missouri, 59.

2d. If the action lies, the declaration in this case shows that the injury resulted from the negligence of the plaintiff in the Court below, and that therefore he was not entitled to recover. Smith vs. Smith, 2 Pick. 621.

Papy, for Appellee.

The question arising here is as to the liability of the City for neglecting to abate a nuisance whereby plaintiff suffered an injury in the loss of a horse.

By the third section of the act incorporating the City of Tallahassee, the City Council is invested with full power and authority "to prevent and remove nuisances," &c., and generally to provide for the interior police and good government of said City. See pamphlet laws, 1840, page 12.

The declaration alleges that a chasm existed in one of the streets, and that plaintiff's horse fell into it and was injured, so that he died, &c

That this chasm was a nuisance, is shown by the definition given to the terms by the book: "It is the doing a thing which tends to the annoyance of all the King's subjects, or the neglecting to do a thing which the common good requires," &c. 1 Hawk., 360. 4 Black. Com., 166.

There is no distinction between the powers and duties of a corporation. When the public good requires the exercise of their powers, it is their duty to exercise them. People vs. City of Albany, 11 Wendell, 542.

LANCASTER, J.

Fortune, the appellee in this Court, brought suit by action of trespass on the case, against the appellant, the "City of Tallahassee, in

21 Leon County Circuit Court, alleging that a certain street within the corporate limits of said city is, and for a long time has been, a common highway for the good citizens of Florida, and their horses and cattle, to go, return, pass and repass, at their will and pleasure, at all times. The plaintiff on, the 3d day of October, A. D., 1848, was possessed of a gray mare of great value, to-wit, of the value of one hundred and twenty-five dollars. That said mare was employed by the plaintiff on said 3d day of October, in a lawful manner, according to the common usage and custom. That the street aforesaid was in the other parts thereof, except the east end, in a good repair and condition, and passable for men and horses, that, at the east end of said street, there was a large ditch, gully or chasm, which obstructed the free passage for the same. That defendant, in no wise ignorant that said east end of said street was out of repair, and ruinous and impassable, permitted the same so to remain on the aforesaid 3d day of October, and for a long time before that time, and omitted contrary to the legal duty of said corporation, to fill up and repair the said ditch, gully or chasm, whereby the said mare of the plaintiff, then and there passing, by, along and over the said street, fell into the said ditch, gully or chasm, and thereby became so much injured and bruised, that she died of the injuries and bruises occasioned by her fall as aforesaid.

To which declaration, the defendant by its attorney filed a general demurrer; which demurrer was overruled by the Court, and an inquiry of damages awarded to the plaintiff.

Whereupon the defendant appealed to this Court, and assigned as grounds for its appeal the following, to-wit:

1st. Trespass does not lie against a municipal corporation.

2d. If the action lies, the declaration in this case shows that the injury resulted from the negligence of the plaintiff.

The first ground assigned will now be considered, to-wit: Whether tresspass lies against a municipal corporation; and it was urged in argument that actions for torts can only be maintained against money corporations. To understand the force of this objection, it may be necessary to look at the powers of the City of Tallahassee, as conferred by the act entitled "An act to incorporate the City of Tallahassee," approved 2d of March, 1840, Pamphlet Laws, page 42. This is a private act of the Legislature—was referred to as such by
22 both counsel in the argument before this Court; but we think may be noticed under the provision of the statute of November 12th, 1828, which renders it unnecessary to plead specially private acts. See Tho. Dig., 332.

The act of incorporation provides that, by their corporate name, (City of Tallahassee,) they may sue and be sued, plead and be impleaded, and do all other acts as natural persons—may purchase and hold, real, personal and mixed property, and dispose of the same for the benefit of the City. By the second section, the government is vested in a city council, composed of an intendant and eight council men, of prescribed qualifications. By the third section of the act of incorporation, very large power and authority are vested in the city council, and among others, the power and authority "to prevent and remove nuisances," and generally "to provide for the interior police and good government of the City." By this section, power is given to said city council to levy taxes for the purposes recited in the preceding section.

We were referred to several cases to show that this section will not lie; all of which will be noticed. The first is Towle vs. the Common Council of Alexandria. 3 Peters S. C. Rep., pages 398 to 410. In that case, the plaintiff brought his action on the case, against the defendant, for damages charged to have been sustained by him, by reason of their failing to take bond and security from an auctioneer, licensed by them for certain years, as alleged, contrary to the statutory duty of the said corporation. To the declaration, a general demurrer was filed; which was sustained. Whereupon, the plaintiff prosecuted a writ of error to the Supreme Court. Ch. J. Marshall, in delivering the opinion of that Court, said: "The common council had granted a license to carry on the trade of an auctioneer, which the law did not empower that body to grant." That "he is not the officer or agent of the corporation, but is understood to act entirely for himself, as a tavern keeper, or any other person, who may carry on business under a license from the corporate body. The injury alleged in the declaration as the foundation of the action, is the omission to take the bond required by law. Now, if the common council was not required or enabled by law to take a bond, the action cannot be sustained." And upon this reasoning, the demurrer was held good, and the judgment below affirmed. But the Court says in that case, "That corporations are bound by their contracts" is 23
admitted; that money corporations, or those carrying on business for themselves, are liable for torts, is well settled. But that a legislative corporation, established as a part of the government of the country, is liable for losses sustained by nonfeasance—by an omission of a corporate body to observe a law of its own, in which no penalty is provided, is a principle for which we can find no precedent. We are not prepared to make one in this case."

In the above case, the point as to the right of the plaintiff to have his action on the case against the corporation, does not appear to have been made or decided; but the case went off on the ground that defendants did not apply to be nonfeasors, by omitting to do any thing which, by act of their incorporation, they were authorized or required to do.

In the case of Hawthorn vs. the City of St. Louis, the only question is, whether the salary of an officer of the corporation can be subject to an execution against such officer, by a proceeding by garnishment against the City. The Court holds that it cannot, and in this particular distinguishes between its being a public municipal corporation and a private corporation, such as banks, insurance companies and similar incorporations. 11 Miss. R., 60. We do not see that this authority decides any thing touching the question in regard to the bringing of an action on the case against a corporation for nonfeasance, by which any one has sustained a special damage.

The case of Edwards vs. the Union Bank of Florida, 1 Florida Reps. 136 to 155, is an action of tresspass *"vi et armis,"* brought by the plaintiff vs. the corporation of the Union Bank. The question is there raised whether this action will lie against a corporation, and after an elaborate examination of the authorities, the Court hold the action well brought—but this was an action against a private money corporation. And we must now look to see whether trespass can be maintained against other corporations aggregate. In the case of Riddle vs. Proprietors of locks and canals on Merrimack river, 7 Mass., 189., Parsons, Ch. J., delivering the opinion of the Court, says: "It is one of the maxims of the common law, that a man specially injured by the breach of duty of another, shall have his remedy by action. If the breach of duty be by an individual, there is no question, and why should a corporation receiving its corporate powers, and obliged by its corporate duties with its own consent, be an ex- 24
ception, when it has, or must be supposed to have, an equivalent for its consent?" "We distinguish between proper aggregate corporations, and the inhabitants of any district, who are by statute invested with particular powers without their consent. These are in the books sometimes called *"quasi* corporations." Of this description are counties or hundreds in England, and counties, towns, &c., in this State, (Mass)." (and counties and townships in Florida). "Although *quasi* corporations are liable to information or indictment for the neglect of a public duty imposed on them by law, yet it is settled in the case of Russel *et al.* vs. Inhabitants of the county of Devon., 2 D. & E., 667, that no private action can be maintained against them for a breach of corporate duty, unless such action be given by statute And the sound reason is, that having no corporate fund, and no legal means of obtaining one, each corporator would be liable to satisfy any judgment rendered against the corporation. This burthen the common law will not impose—but in cases where the statute is an authority, to which every man must be considered as assenting. But in regular corporations, which have, or are supposed to have, a corporate fund, this reason does not apply. And he cites with approbation, the case of Mayor of Lynn vs. Turner Cowp. 86, where the principle is established that *"case* will lie against a corporation for neglect of a corporate duty, by which the plaintiff suffers." The doctrine of this last case appears to be sustained in New York. In the case of the People vs. corporation of Albany, at p. 543, 11 Wendell R., Nelson, J., delivering the opinion of the Court, says: "It is well settled that when a corporation or an individual is bound to repair a public highway or navigable river, they are liable to indictment for neglect of their duty. An indictment and an information are the only remedies to which the public can resort for a redress of their grievances in this respect. "If an individual has suffered a particular injury, he may recover his loss by an action on the case," for which position many authorities are there cited. The same doctrine is asserted 1 Coke on Lit., 56 a. "But the law for this common nuisance hath provided an apt remedy, and that is presentment in the Leete or in the Torne, unless any man hath a particular damage, as if he or his horse fell into the ditch, whereby he received hurt and losse, there for this special damage, which is not

common to others, he shall have an action upon his case. And all this was resolved by the Court in the King's Bench." And again in 3d Blackstone, 219, the same doctrine is recognized, as well also as the doctrine that a ditch dug across a common highway is a common nuisance. 4 Blackstone, 167, defines a common law nuisance thus: "The doing a thing to the annoyance of all the King's subjects, or the neglecting to do a thing which the public good requires." We can have little difficulty in asserting that the large ditch, gully or chasm, situated in the east end of the street, named in the declaration, which street was a common highway as asserted by the declaration and admitted by the demurrer, was a common nuisance: that the corporation of the City of Tallahassee is an aggregate corporation, which has or may be supposed to have a common fund, as it has the power of assessing and collecting taxes, and the power to purchase and hold personal, real, and mixed property. It has also the power to prevent and remove nuisances, and provide for the interior police and good government of the city. It was contended by appellee, in argument, (and not denied by appellant) as we think, with much propriety, that the legal power to remove nuisances, having been conferred on the corporation by statute, carried with it the implied legal obligation to remove them.

It is therefore the opinion of the Court, that the City of Tallahassee was guilty of a nonfeasance in permitting the nuisance mentioned in appellee's declaration to remain, and plaintiff having lost his mare by means of her falling into the said common nuisance, and being thereby bruised so that she died, he is entitled to have an action of trespass on the case against the said corporation, for said special damage, unless it occurred by his own gross negligence. And this brings us to consider the second objection of appellants.

The following statement was agreed by council to be a part of the averments in the declaration as demurred to: "On the 3d day of October, Geo. W. Hutchins, who had been using Fortune's mare, returned with her and hitched her near the place where Fortune's tin shop was kept. The mare got loose and nothing was seen or heard of her until next morning, although diligent search was made for her as soon as it was discovered she had got away. She was found next morning in the bottom of the chasm complained of, which was immediately opposite the lot in which she was usually kept. The mare was badly hurt and died on the day she was discovered." Parker, Ch. J., says, in the case of Smith vs. Smith, 2 Pick. 624, "to entitle the plaintiff to an action of damages resulting from a nuisance, he must show that he acted with common and ordinary care." And so we take the law to be; if a person should go headlong with his beast upon a nuisance, which (with ordinary care) he might have avoided, he ought not to have damages for his loss in consequence of his own recklessness. In effect this was decided in the case of Butterfield vs. Forrester, 11 East., 60. The facts of the present case show that Fortune's mare, after being used, was hitched before his tin shop, and where of course she could not remain long without notice. It is the custom of the people generally, when in the streets, to hitch their horses to a hook, peg, post, tree or rack, and leave them while the riders attend respectively to their own business. The thing is daily (and frequently every day) done by the most careful as well as by the careless persons, and cannot, in our opinion, form a ground of allegation of negligence or want of ordinary care, in the plaintiff; but horses so hitched often escape, and this is accident rather than negligence. The mare then having broken loose, or having accidentally escaped from her fastening, it is presumed sought to return to her accustomed enclosure or stall, as it was contiguous to the chasm complained of, and on her way thither fell in and was lost as the facts appear. Had not the chasm been in the street it is reasonable to suppose that the mare would have returned to her stable without damage. It was therefore, the direct cause of her death, and her owner's loss. It was there in consequence of the wrongful negligence of the defendant, and in our opinion it ought to pay the damages such nonfeasance occasioned.

The judgment of the Court below is affirmed with costs.

Per curiam.

GEORGE W. FERGUSON, APPELLANT, VS. MARY ANN PORTER, EXECUTRIX, &c., APPELLEE.

A bailee or factor is bound to follow such instructions as are given to him by his principal, unless the instructions are inconsistent with the special agreement between them; and is liable for any injury resulting from a departure from such instructions; and this liability is incurred, although the services undertaken were gratuitous.

It is erroneous to charge the jury, that they cannot find for plaintiff, because there is no good or valid consideration for the promise or undertaking alleged in his declaration proved.

The statute of the State requiring the judge presiding in the trial of common law cases, "to charge the jury only upon some point or points of law, or exceptions to evidence arising on the trial of the cause," is a positive prohibition against the statement of the facts as proved.

Appeal from a judgment rendered at the spring term, 1849, of the Circuit Court of the County of Monroe, the Hon. JOSEPH B. LANCASTER, Judge of the Southern Circuit, presiding, on the trial of the cause in the Court below.

The jury found a verdict for the appellee, under the instructions given by the Judge—a full statement of which, together with the pleadings in the case, and the evidence adduced at the trial, will be found in the opinion pronounced by Ch. J. Douglas in this Court.

Papy, for appellant.

Hogue, for appellee.

DOUGLAS, Ch. J.

This suit was instituted by George W. Ferguson against Mary Ann Porter, executrix of the last will and testament of Joseph Y. Porter, deceased, in the Circuit Court of Monroe County, to recover damages for an alleged breach of duty by the said Joseph Y. Porter, as the bailee and factor of the plaintiff in this suit. The declaration contains two counts. The first charges, that in the month of January, in the year 1846, the plaintiff and the said Joseph Y. Porter, (then living but since deceased) entered into an agreement, together, whereby the said plaintiff was to manufacture and make arrow-root, and from time to time send and deliver the same to the said Joseph Y. Porter, as his factor, as aforesaid, at the county aforesaid; and in consideration that the said plaintiff would purchase his supplies from the said Joseph Y. Porter, the latter undertook and agreed to receive and ship the same to the port of New Orleans and sell and cause to be sold on the said plaintiff's account. That in September, 1846, at the county aforesaid, in compliance with said agreement, and at the special instance and request of the said Joseph Y. Porter, the said plaintiff sent and delivered to the said Joseph Y. Porter 1725 lbs. of arrow-root, worth $140, which the said Joseph Y. Porter was bound by his said agreement to ship to the port of New Orleans for sale, which he neglected and refused to do, but shipped the said arrow-root to the port of Charleston, contrary to agreement and the wishes of the plaintiff, whereby the same was wholly lost to said plaintiff. Whereby he, the said Joseph Y. Porter, in his lifetime, became liable, &c., and undertook to pay, &c. The second is a general count, charging that the said Joseph Y. Porter was indebted to the plaintiff in the sum of $140 for 1725 pounds of arrow-root sold and delivered by the plaintiff to the said Joseph Y. Porter at his request, and the further sum of $140 for money had and received. To which declaration a plea of *non assumpsit* was put in by the defendant at Nov. term, 1848, and at the May term, 1849, the cause was submitted to a jury, who found for the defendant. Whereupon a judgment was entered that the said plaintiff take nothing by his bill, &c., from which judgment an appeal was taken to this Court.

It appears by a bill of exceptions set out in the record, that there was conflicting testimony as to the undertaking and agreement of the said Joseph Y. Porter, respecting the arrow-root; there was no dispute about the delivery of it, but one witness stated that in the latter part of the year 1845, or early part of 1846, the plaintiff, then in Key West, wanted to purchase goods of Joseph Y. Porter, and send him arrow-root at a stated price to pay for them; that Porter refused to sell plaintiff goods upon any other terms of taking arrow-root, than that he, Joseph Y. Porter, should sell it for the best price he could get at his own discretion, and after paying expenses of sale, credit the plaintiff with the balance of the amount of sales; that Joseph Y. Porter advised plaintiff to send arrow-root to New Orleans; that plaintiff agreed to said terms, bought goods and sent arrow-root several times; that Joseph Y. Porter made two shipments to New Orleans, and the price not continuing good, directed wit-

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29 ness, who was his clerk, to ship the next to Charleston, with the hope of getting a better price; that in October, 1846, he did ship the arrow-root in the declaration mentioned, towards Charleston, uninsured, and that it was lost at sea in the hurricane of that month. The other witness (for there appears to have been but two examined) stated that in the summer or fall of 1846, the plaintiff, who resided at Miami, wrote to said Porter at Key West, promising to make arrow-root to be sent to Porter for shipment, and inquiring of said Porter what advance he was willing to make on it, and on what charges and conditions he would receive it, and ship it to New Orleans; that in about six or eight weeks, plaintiff received a letter in answer to his from Porter, stating that he would receive the arrow-root and advance four cents per pound in goods on it; would ship it to New Orleans and pay over the balance on receiving account of sales; that upon receipt of this letter of Porter, plaintiff sent him 1700 pounds or more of arrow-root, in pursuance of the agreement between them in the said letter; that about the 1st of November, 1846, witness having been requested by plaintiff to do so, called at Porter's store in Key West to inquire about this 1725 pounds of arrow-root, and was informed that it had been shipped to Charleston in the mail boat, upon the ground that there had been no opportunity to ship it to New Orleans. That a few days afterwards, having heard of the loss of the mail boat, he, witness, called again at said store, where said Joseph Y. Porter spoke of the loss of the mail boat and the arrow-root; said it would be plaintiff's loss, and that he had shipped it at plaintiff's risk. Witness told said Porter that he had shipped it contrary to orders. Porter said he knew he had, but there had been no opportunity to ship it to New Orleans. This is all the testimony material in the question presented for consideration, which the record in this case discloses.

The plaintiff's council asked the Court to charge the jury "that if they believed from the testimony, J. Y. Porter accepted the consignment of arrow-root, he was bound to follow such instructions as he knew his principal to have given, and to have fulfilled to the letter any agreement that had been made between them, and that if he had given a different direction from the one understood and agreed upon between them, he is responsible, though he did it with good motive." The Court gave the instruction with the addition that
30 "it is good law where there is a good declaration." To which addition the plaintiff's council excepted. The plaintiff's council here moved for permission to amend his declaration to the effect that plaintiff did purchase said supplies, and to state the value of such purchases. The defendant's council objected, and the Court refused permission. To which refusal plaintiff's council excepted. The defendant's council asked the Court to instruct the jury that they cannot find for plaintiff, because no good or valid consideration for the promise and undertaking of Porter alleged in the declaration, is set up by plaintiff or proved. Which instruction the Court gave, and plaintiff's council excepted. The errors assigned are

First—The Court erred in not giving without qualification, the first instruction asked for by the plaintiff below.

Second—The Court erred in adding the qualification to the first instruction asked for by the plaintiff below, as appears by the bill of exceptions.

Ffourth—The Court erred in giving the instruction asked for by the declaration asked for by the plaintiff.

Fourth—The Court erred in giving the instruction asked for by the defendant below.

Fifth—The Court erred in giving judgment for defendant.

As to the first instruction asked, it may be proper to observe, that it is very inartificially drawn. It would have been proper for the Court to have instructed the jury, that if they believed from the testimony, that Joseph Y. Porter accepted the consignment of arrow-root as bailee or factor of the plaintiff, he was bound to follow such instructions as his principal had given him respecting it, if there was no special agreement between them on the subject, or if there was, and the instructions given were in accordance with it; but he would not have been bound to follow any instructions repugnant to the terms of any such agreement; nor would he have been liable for giving directions contrary to it, unless such directions had been followed. The plaintiff as well as the defendant, would have been bound to a substantial compliance with the terms of any special contract, that may have existed between them in relation to this matter. And we think the whole of this charge, from the manner in which it is drawn, might very properly have been withheld. But if given, it should have been without the qualification that was added. Because from the manner in which that qualification was coupled with the 31
instruction asked, it seemed (though doubtless not intended,) to leave to the jury the question whether the declaration was good or not, (a question exclusively for the determination of the Court) and might have tended to mislead them. But more especially, because such a question did not properly arise in the case. If it were necessary to have stated such a consideration in the declaration, and none was stated, then the declaration would have been bad on demurrer, and that would have been a proper mode of taking advantage of the error. If such a consideration were necessarily stated, it should have been met by a special plea.

There are two counts in the declaration—one special and the other a general *indebitatus assumpsit*. And it has not escaped our attention that in a note 1 Chitty's Pl., 55, a., it is said, that to a special count in *assumpsit*, the want of consideration should be pleaded specially, but in a common *indebitatus* count, the want of consideration for the promise, is inadmissible under the common plea of *non assumpsit*. But the 2d rule of practice adopted for the government of the Circuit Courts of this State, page 10, requires "in any species of *assumpsit* all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction either to be void or voidable in point of law, on the ground of fraud or otherwise, to be specially pleaded," and in the text of 1 Chitty's Pl., page 557, infancy, coverture, release, payment, performance, want of consideration and illegality of consideration, are all enumerated as matters that must be specially pleaded in every species of assumpsit. In the case of Papenger vs. Brooks, 7 Carr & P., 110, 32 Eng. C. L. Rep., 259, which was an action of *assumpsit* brought upon a special agreement, plea *non assumpsit*, and an attempt to set up as a defense a want of consideration, Tindall, Ch. Justice, said "the very object of the new rules was, that such a defence should be pleaded." Wild, Sergt. for plaintiff, said "if it had been pleaded, we should have come prepared to meet it." Talfourd, Sergt. for defendant, then submitted that the plaintiff could never recover nominal damages as the defendant was not to pay money, but to deliver timber at certain prices specified in an agreement that was not produced. Tindall, Ch. J., "it is no matter about that agreement: you are to deliver timber to the value of £350. I think you cannot get on. It seems to me that you have no answer to this record. If 32
you have any relief in equity that is another matter. I cannot deal with it here." Verdict for plaintiff £350. This is the only decision we have been able to find upon this question under the new rules in England, (from one of which, this of our's was copied,) but it is directly in point, if want of consideration is an appropriate defence in a case like this, but for reasons hereafter stated, we do not so consider it. This disposes of the first and second errors assigned.

As to the third, which was not relied upon at the argument of this case, it is sufficient to say, that the question in regard to amendments was so fully discussed and so well considered by this Court, in the case of Stewart vs. Fontaine & Bennett, 1 Florida Rep., 441 to 447, and in Britt vs. Ming, ibid, 447 to 455, that the question ought to be considered at rest in this State. In the first of these cases, at page 442, the Court said: "The doctrine of amendments as it stands at common law, independent of the statute of amendments and joefail, seems based upon the discretion of the Court;" and numerous authorities are cited in the first of these cases in support of this opinion, and the principle has been established by repeated decisions of the Supreme Court of the United States, that the exercise of discretion in the Court below, in granting or refusing amendments of pleading, affords no ground for a writ of error. See United States vs. Buford, 3 Peters S. C. Rep. This is the general common law rule—in addition to, or rather in accordance with which, our statute of November 23, 1828—Sec. 50, Duval's Compilation, 99. Thompson's Digest, 382—especially provides that "the Court may, in its discretion, give leave to either party to amend his declaration or other pleading in a cause at any time before the case is submitted to a jury;" and if it may, at its discretion, give leave, it follows as a matter of course, that it may, at its discretion, withhold it.

The fourth—that the Court erred in giving the instruction asked for by the defendant—we consider well assigned. The instruction asked and given was, that they (the jury) cannot find for the plaintiff, because no good or valid consideration for the promise and undertaking of Porter, alleged in the declaration, is set up by the plaintiff, or proved. We have said that no such question as that of consideration for the promise or undertaking of Porter arises in this case. The reason is that the undertaking itself raises the duty on which

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33 his liability (if he were liable at all) rests. So far as regards the first count in the declaration, (and as we have seen no question of consideration could have been raised upon either, without a special plea,) this charge, therefore, was inapplicable to the issue, and besides it took the facts from the jury, and contravenes the provisions of the 1st Section of the Act of the General Assembly, approved January 3d, 1848, to regulate judicial proceedings—acts of 1848, page 12, which declares that, "hereafter, in the trial of all common law cases in the several Circuit Courts of this State, it shall be the duty of the judge presiding on such trial, to charge only upon the law of the case, and in the manner following—that is to say, the said judge shall only charge the jury upon some point or points of law, or exceptions to evidence, arising on the trial of such cause, and such charge shall be wholly in writing." The complaint is, that the Court told the jury they could not find for the plaintiff. By reference to the testimony, it will be perceived that the only two witnesses examined differ very materially upon at least one very important point in the case. The facts should have been left to the jury, whose peculiar province it is to say what effect they shall have. 10 Peters S. C. Rep., 98.

It is the province of the jury to weigh and decide upon the sufficiency of the evidence. Greenleaf vs. Birth, 9 Peters S. C., Rep., 299. The case of Reel vs. Reel, 2d Hawk, N. C. cases, was upon a statute somewhat similar to ours. The opinion was delivered by Ch. J. Taylor, who said, "This is a motion for a new trial, on the ground that the Court intimated its opinion to the jury of the matter in issue." The Act of Assembly, relative to the duty of a judge in charging, (he said), forbids him "to give his opinion whether a fact is fully or sufficiently proved, such matter being the true office and province of a jury;" and it "directs him to state in a full and correct manner the facts given in evidence, and declare and explain the law arising thereon." Our statute does not impose the duty to state in a full and correct manner the facts given in evidence—whether it forbids it or not, is a question which it is unnecessary for us now to decide. It certainly requires that the judge charge the jury only upon the law of the case. Ch. J. Taylor, commenting upon the statute of his State, then under consideration, says: "The evident design was to preserve the purity of the trial by jury, and thus to secure
34 to every man whose rights were controverted a decision on the facts in issue, which should be the result of the jury's investigation of the evidence, uninfluenced and unbiased by the opinion of the judge, whose province it is to pronounce whether testimony is admissible, and to instruct the jury as to the law, accordingly as they shall believe the facts or otherwise. It is not (he added) for this Court to discuss the wisdom or expediency of this law, or to prevent its true construction, under a belief that no mischief can be produced thereby, or even that justice can be more substantially administered. It is the will of the Legislature, and we are bound to obey it; so that every man who conceives himself aggrieved by disobedience of the law, has a right to be heard here, and if he can establish his case, he has a right to a new trial, without any necessity on the part of the Court of inquiring into the merits of the verdict; for although it should appear to this Court, that the evidence spread upon the record is such, that, if believed by the jury, it well warranted the verdict, yet, if it appear that the judge in his charge gave an opinion whether a fact was fully or sufficiently proved, it cannot appear how far the verdict was produced by the testimony, since the jury were to judge of its credibility, or by an intimation of the opinion of the judge."

"The propriety of the verdict, then, or its conformity with the evidence, we leave out of the question, and desire to be understood as giving no opinion upon it; for if the motion for a new trial were overruled, because this Court approved of the verdict, and it should at the same time appear that the judge had departed from the direction of the law in charging the jury, it would be deciding in effect that disobedience to the law may be tolerated or not, according to the consequence which follows from it. If a verdict, contrary to or unsupported by evidence, has been produced by it, the party shall be entitled to a new trial; but if the evidence justifies the verdict, and the right of the cause has been duly administered, that the charge of the judge deviating from the law shall be overlooked, is not the rule prescribed by the Legislature. They have inhibited the declaration of the judge's opinion on the proof of facts in every case, presuming that in every case it encroaches on the proper functions of the jury. It imparts a bias to the judgment of the jury, which they are disposed to receive with confidence, and seldom make an effort to resist." And from the truth of this last proposition, we think no one who has been accustomed to attend jury trials, and witness the effect of a 35 judge's charge to them upon the facts, will be inclined to dissent. The Chief Justice, examining the charge complained of in that case, to ascertain whether it was conformable to the Act of Assembly, concluded as follows: "Upon considering the whole of the charge, it appears to me that its general tendency is to preclude that free and full inquiry into the facts which is contemplated by the law—with the purest intentions, however, on the part of the worthy judge, who, receiving a strong impression from the testimony adduced, was willing that what he believed to be the very right and justice of the case should be administered."

"I am not unaware (he said) of the difficulty of concealing all indications of the convictions wrought upon the mind by evidence throughout a long and complicated cause; but the law has spoken, and we have but to obey." We may with propriety say the same as to the intention of the judge who gave the charge, which we are now discussing. That the error was inadvertently committed, we have not the shadow of a doubt, but it is not the less, therefore, our duty to correct it. Without saying whether we should deem it to be our duty toward a *venire de novo* in all cases, where the verdict appears to us to be well sustained by the evidence, as shown by the record—where the judge, in his charge to the jury, had contravened the provisions of the act of our General Assembly above cited, we are ready to admit that there is much weight in the reasoning of the Court, in the case we have cited from North Carolina. How can an Appellate Court judge of the credibility of a witness? It can read his testimony, but how can it determine the weight or influence which it ought to have had on the minds of the jury in coming to a conclusion upon the evidence, as compared with the testimony of other witnesses, or other evidence in the cause—a question which must be decided upon matters which do not necessarily form a part of the record, and rarely, if ever, appear in it. An able writer upon the law of evidence says, "it frequently happens that a witness labors under some influence arising from natural affection, near connection, or mere expectation of contingent benefit or evil, which may afford a much stronger temptation to perjury, than that which would arise from any defined and legal interests, which yet would have absolutely excluded his testimony." This is a necessary consequence resulting from the consideration, that the law must operate by means 36 of certain, definite and peremptory rules, and the great mischief and inconvenience that would result from laying down rules too wide and extensive in their operation. When, therefore, the peremptory rules of law cease to operate, it is for the jury to estimate the degree of influence by which the testimony of a witness is likely to be corrupted, and to determine whether, under the circumstances, he be the witness of truth. 1 Starkie on Ev., 481.

In arriving at this conclusion, a consideration of the demeanor of the witness upon the trial, and upon the manner of giving his evidence, both in chief and upon his cross examination, is oftentimes not less material than the testimony itself. Sir W. Blackstone, 3 Com., 373, observes "In short, by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour and inclinations of the witness, in which points all persons must appear alike, when their depositions are reduced to writing, and read to the judge in the absence of those who made them, and yet, as much may frequently be collected from the *manner* in which the evidence is delivered as the *matter* of it."

The case of Ivey vs. Hodges, 4 Humphrey's Rep., 155, was decided upon the 9th sec. of the 6th art. of the Constitution of Tennessee, which provides "that Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." This provision (said the Court) arose out of the jealousy with which our ancestors always looked upon any attempt of the Court to interfere with the peculiar province of the jury, the right to determine when facts are proved in a cause and to put a stop to the practice of summing up as it was and is yet practiced in the Courts of Great Britain, and in all probability in the Colonies before the revolution, which consists in telling the jury not what is deposed to, but what is proved. This, the framers of our Constitution (say the Court) considered a dangerous infraction of the trial by jury, and have prohibited it by express terms. "Judges shall not charge with respect to matters of fact," that is, they shall not state to the jury the facts that are proved; to do so is error, for which a cause must be always reversed. But not being disposed to withdraw from the jury any proper aid which the Judges may be enabled to render them in their inves-

37 tigation, they have provided that they may *state* the testimony, that is, may, for the purpose of refreshing the memory of the jury, inform them what facts the different witnesses have deposed to, leaving them to judge of the truth thereof, and to draw their deductions therefrom. It will be observed that the prohibition is direct and positive, "shall not," the power permissive, "may state." From this phraseology that Court deduces the opinion that it is discretionary with their judges to inform the jury what facts the different witnesses have deposed to or to "declare the law." But the prohibition is positive, and extends to all cases. Our statute arose out of the same jealousy, and was intended to preserve the purity of the trial by jury, and surely if jury trial is worth having, it is worth preserving in all its integrity.

And here we might with propriety stop, but as an objection was taken at the trial, that no consideration of the promise and undertaking of the said Porter, alleged in the declaration, was set up by the plaintiff, or proved, we deem it proper to state our opinions more fully on the subject. It will be seen by reference to the declaration, that it charges that the said Joseph Y. Porter, (in his lifetime) undertook and agreed with the plaintiff to receive of him and ship to New Orleans, certain arrow-root, (alleged to be worth $140) and sell or cause it to be sold for and on said plaintiff's account, and that he received the arrow-root, but instead of shipping it to New Orleans, shipped it for Charleston, whereby it was wholly lost, &c. That he, (the said Porter,) received the arrow-root, does not seem to be controverted; indeed the testimony shews that he received it and shipped it for Charleston, and that it was lost in a gale of wind. As to the agreement, however, between the plaintiff and Porter, about the shipping and sale of arrow-root, the testimony is contradictory. The undertaking of the said Joseph Y. Porter to receive the arrow-root of the plaintiff, and sell it or cause it to be sold, and account to him for it, created a duty on the part of said Porter to act in regard to it comformably to the terms on which he received it, and if he failed to do so, and it was consequently lost, he was liable on that undertaking. Ever since the great case of Coggs vs. Bernard, decided by Lord Holt, 2 Lord Raymond's Reps., 909, it has been held that the undertaking is the gist of this kind of action. This case is one of the most celebrated ever decided in Westminster Hall, and justly so,
38 since the elaborate judgment of Lord Holt, contains the first well considered exposition of the English law of bailments. The points which the decision directly involves, viz: That if a man undertakes to carry goods safely, he is responsible for neglect, though he was not a common carrier, and was to have nothing for the carriage, is clear law, and forms part of a general proposition in the law of principal and agent, which may be stated in the following words, viz: "The confidence induced by undertaking any service for another, is a sufficient legal consideration, to create a duty in the performance of it." 1 Smith's Leading Cases, 169, (in note.) By this rule, a gratuitous and voluntary agent, who has given no specific undertaking, though the degree of his responsibility is greatly inferior to those of a hired agent, is yet bound not to be guilty of gross negligence. Wilkinson vs. Coverdale, 1 Esp. Rep., 74. Beauchamp vs. Powley M. & Rob. Rep., 38. Story on Bailments, sec. 165.

The liability of paid agents where there has been no conversion, differs from that of unpaid agents. As to the former, the obligation is not as in the case of a common carrier to carry, or as in the case of an innkeeper to keep; but the contract is for the services of employee, for diligence and skill in the agency or work undertaken, and the duty and liability of a paid agent to whom property is delivered, as a warehouse man, or a forwarding agent, is the same as that of a person employed about property in possession of the employee, 1 Smith L. Cases, 185-186. No man can compel another to render him acts of friendship of any kind, either gratuitous or with a view to remuneration, but if the person applied to, consents to render the services, and undertakes the business, he is bound to act in conformity to the terms on which the request was made. Walker, *et al.* vs. Smith, 1 Wash. C. C. Reps., 153. Loraine vs. Cartwright, 3 Wash. C. C. R., 153, 155. Story on Bailments, sec. 170, a., sec. 171, 171, b., 171, c., 171, d. section 455. Jones on Bailments, 98. Story on Agency, sections 182, 186. It is the duty of the agent in all cases to manage the business of the principal to the best advantage and the best of his ability. Story on Agency, sec. 228, 1. Livermore on Agency, p. 394. And he is bound to pursue the orders of his principal, and is liable for any injury consequent upon his departing from them, however fair may have been his motives for such departure. Manilla vs. Barry, 3 Cranch, 415. 2 Wash. C.

C. R., 203. 4 Wash. C. C. R., 559. Bell vs. Cunningham, 3 Pet. 39
S. C. R., 69.

An agent that does not comply with instructions, is liable for the loss incurred thereby, although the services were gratuitous. Walker vs. Smith, Wash. C. C. R., 152. French vs. Reid, 6. Burney's Rep., 308. A paid agent is liable if negligent and not liable if not negligent. Moore vs. the Mayor of Mobile, 2 Stewart's Rep. 81. Whenever an agent violates his duties, or obligations to his principal, and loss or damage thereby falls upon his principal, he is responsible therefor and bound to make a full indemnity. Story on Agency, sec. 217. Paley on Agency, 71, 74. Marzett vs. Williams, 1 B & Adolph, 415. 1 Livermore on Agency, Chap. 8, sec. 3, page 398. Dodge vs. Tileston, 12 Pic., 328. Holmes vs. Misroom, 3 Brevard's Rep., 209.

The declaration charges the undertaking of Joseph Y. Porter, (as before stated,) that he entered upon the business, that he failed to comply with the terms of the undertaking and that the property was consequently lost. The plea of *non assumpsit* denies the undertaking; this raises a sufficient issue to determine the rights of the contracting parties; no further consideration need to have been alleged; a plea of want of consideration would seem to be inapplicable to such a count, it would put in issue nothing more than the plea of *non assumpsit*. The only question arising in this case, or rather the only questions in contest, seem to be as to the undertaking of Joseph Y. Porter. Was the arrow-root in question received by him as the bailee or factor of the plaintiff? If it was, did he, (the said Porter,) act in relation thereto in conformity to the terms on which he received it?—these being mere questions of fact for the jury to decide upon the evidence adduced in the case, and that evidence which we have seen, was upon some points conflicting, having been withdrawn from the jury by the fourth instruction above cited. The judgment of the Court below is reversed, and the case remanded for further proceedings in accordance with this opinion.

Per curiam.

BALTZELL, J.,

Not concurring altogether in the views expressed by the Chief Justice, delivered the following:

I concur in the opinion expressed as to the instruction asked by plaintiff. The instruction given at the instance of defendant was, 40
"that no good or valid consideration for the undertaking of Porter, alleged in the declaration, was set up by plaintiff, or proved." The sufficiency of the pleadings was not matter proper to be submitted to the jury, nor is it to be inferred (although the instruction is somewhat ambiguous) that the council either asked, or the Court gave, an instruction referring it to them. The preferable construction is, that the consideration alleged in the declaration was not proved. If correct in this view, the instruction was erroneous, as being directly at variance with the evidence in the case. Such an instruction is against common law principles and the Constitution of the State securing the trial by jury; so that a reference to the law of the Legislature of the State is, in my opinion, not called for, as necessary to the elucidation of the case. I leave it entirely out of the question. According to the view I take of the subject, the only point in contest was, as to the compliance of Porter with his engagement. He had undertaken to sell arrow-root for the plaintiff, and forwarded it for sale to Charleston. Was the shipment to this particular port in pursuance of, or in conflict with, his engagement with his principal? In agencies of this kind, it is well settled that a factor should deviate as seldom as possible from the terms, and never from the spirit and tenor of the order he receives. His duty is to obey. If he sends commodities confided to him to a different place from that to which he was directed, they will be at his risk, unless the principal, on receiving advice of the transaction, acquiesce, and this whether the service was gratuitous, or for compensation. 1 Wash. C. C. R., 152, 453. 4 Wash., 551.

The evidence is contradictory. One of the witnesses deposing that the disposal of the arrow-root was to be at the discretion of the defendant; another that he was specially directed to send to New Orleans. According to the mode adopted by the English Courts, the jury would have been asked specially as to the facts, whether there was this discretion or not, and after ascertaining this, they would be directed to find accordingly in favor of defendant, or damager for plaintiff. The practice in America is different in some degree, though leading to like result. The course here would be to give instructions, having a distinct reference to this discrepancy in the statement of the witnesses. The instruction, according to my

41 view, should have been as follows: If the jury should be of opinion that the arrow-root was to be disposed of at the discretion of Porter, and acting upon that discretion, he sent it to Charleston, he is not responsible for the loss occasioned through the destruction of the vessel. If, on the contrary, they should find that the understanding between the parties was, that the arrow-root was to be shipped to New Orleans, or was to be subject to the instructions of plaintiff, and he directed it to be sent there, and defendant deviated by sending it to Charleston, the shipment was at his risk, and in case of loss, he is responsible for its value. Such is the view I have thought proper to express in reference to the case, coinciding in the conclusion announced in the opinion delivered by the Chief Justice, but not entirely in the views declared.

WILLIAM J. WOODS, APPELLANT, vs. WILLIAM BAILEY, ADMINISTRATOR, DE BONIS NON OF JOHN BELLAMY, DECEASED, APPELLEE.

R. sold land to W., and took his note for the purchas money—R., the vendor and payee of the note, assigned the note to B., and guaranteed the payment. Afterwards R. sold the same land to another person. B., the assignee of the note, pursued the endorser and guarantor, R., to the State of Alabama, (he having gone there with a number of slaves)—sued him upon his guaranty, obtained judgment, and then took a conveyance of personal property from him, to secure the payment of the judgment obtained upon said endorsement, as well as judgments upon other notes of R., and gave him time of payment. Held—That if B., as against the last purchaser of the land, ever had a lien upon it for the purchase money, he waived and abandoned it by these proceedings. Held, also—That if the vendor transfers the note of the vendee, and guarantees the payment, the person taking such guaranty does not acquire a lien upon the land for the purchase money. In such case, the taking of the guaranty is such an additional security as defeats the tacit lien.

The lien of the vendor on lands for the purchase money is lost in all cases, where any security is taken on the land, or otherwise, for the whole or any part of the money, unless there is an express agreement to the contrary.

This cause was brought up by appeal from a decree of the Circuit Court of Jefferson County, made November 8th, 1849, by the Hon. THOMAS BALTZELL, sitting in Chancery.

42 The facts of the case are so fully and clearly set out in the opinion of this Court, pronounced by Justice Lancaster, that any other statement is deemed unnecessary.

Hawkins, for appellant:

Woods, on the 5th day of November, 1844, purchased of Ransom J. Roberts a tract of land for $2,000, and paid the purchase money, partly in cash, and the balance in good negotiable promissory notes on third persons, without notice, as alleged in his answer, of any valid or subsisting lien on the land in favor of any one.

Bellamy claims to have a lien or equitable mortgage on the land in the hands of Woods, upon the following grounds, to-wit:

Roberts (as alleged in the bill) on the 26th day of March, 1840, executed a bond to one William H. Williams for titles to *some* land, not specifying the quantity, quality, locality or other description of the land contracted for—Williams on the same day executed to Roberts, his promissory note for $4,000, with interest at ten per cent. per annum, from 1st of January, 1841, and payable, 1st of January, 1845, which note Roberts assigned or guaranteed (as alleged in the bill) to Bellamy.

Bellamy, under this statement of the case, could have had no lien upon the land in the hands of Woods, or any body else, even if he had notice of the transfer of the Williams' note for the purchase money to Bellamy; for the endorsee of a note given for the purchase money of land is not, from the mere transfer of the note, entitled to the benefit of the assignor's or vendor's lien on the land for the purchase money. See White vs. Williams and others, 1st Paige's Chancery Reports, page 502. 3 Paige's Chancery Reports, p. 122.

But even admitting that Bellamy had the lien he contends for, Woods, claiming to be a *bona fide* purchaser of the lands from Roberts, (who still held the legal title,) for a valuable consideration, without notice (as alleged in his answer) of any valid or subsisting lien on the land in favor of Bellamy, or any one else, acquired a perfect title thereto, both in law and equity, and ought to be protected therein by the Court. See Sugden on Vendors, page 546-7.

Woods admits in his answer that he had heard, but from rumor only, that there had been a contract between Roberts and Williams for the sale of land, but that the contract had been abandoned on the part of Roberts, in consequence of the failure of Williams to com- 43
ply with his part of the contract. But the answer does not admit notice of the assignment of the Williams' note, nor is there any notice to Woods of this fact even alleged in the bill, or proof thereof in the cause. But even admitting that Woods had notice of the contract or bonds, as set forth in the bill, it could not be contended, by any pretence whatever, that it could have been any notice of the assignment of the Williams' note to Bellamy by Roberts. But there is no proof whatever in this cause, as against Woods, (the bill being taken *pro confesso*, as against Roberts only,) that the bond for title from Roberts to Williams, as set up in the bill, was ever executed by Roberts. The bond, as set forth, bears date 26th March, 1840, and was recorded June 19th, 1844, upwards of four years after its alleged execution, at the *bare request* of J. D. Westcott, Jr., without any proof of its execution whatever; and the bond set forth appears upon its face to be a mere copy from *this record*, made, as it would seem, for the *express purpose* of his cause, the original bond, if any, not having been produced or filed in this cause, and no excuse alleged or shown for its absence or omission. This, to say the least of it, must be considered by the Court to be a very suspicious circumstance in this cause. But even admitting that the bond had been duly recorded and proved without delay, it would not have been notice to any body—for there is no law requiring such bonds to be recorded, and consequently making them constructive notice; and even admitting that there was such law requiring bonds of this character to be recorded, the record could not be notice of any thing that was not specified in the bond itself. Consequently, in this case, there being no particular land described in the bond, either by metes and bounds, or number of acres, location or quality of the land agreed to be sold by Roberts to Williams, it could not be considered as notice to *any body of any thing;* but said bond, even if properly produced and proved in this cause, would have been considered as void for want of centainty, and could not be specifically enforced, either in favor of Williams or Bellamy. 1st Maddock's Chancery, pages 426-7.

Again: Even admitting, for the sake of argument, all the facts set up by Bellamy, as entitling him to a lien on the *land itself*, unless the title thereto had been actually conveyed to Williams, he could have no lien on the land in his hands—for Williams would have no land on which any such lien could attach, and the mere assignment 44
to Bellamy by Roberts of Williams' note for the purchase money, who still held the legal title, as there was no contract between Roberts who still held the legal title, ts there was no contract between Roberts and Bellamy about land. If Bellamy had any lien whatever, it must have been *through the equity* of Williams—a lien, not upon the land *itself*, but merely a lien upon the *equitable right* of Williams to call for a *specific performance* of the contract, upon payment of the entire purchase money—Roberts having retained the legal title to the land, until the purchase money should be paid; and the only way in which Bellamy could have enforced such lien, would have been to file a bill against Roberts and Williams for a specific performance of the contract between them, in order that the payment of the note might be enforced against the land in the hands of Williams, after the performance of the contract between Roberts and Williams; but the Court could not have decreed a conveyance of the land from Roberts, until the entire purchase money had been paid, with interest. If Williams would not or could not pay it, Bellamy, if he desired it, might have been subrogated to the *rights* and *equities* of Williams under his contract; but upon the conditions thereto attached—that is, upon the performance by Bellamy of the contract on the part of Williams, to wit: the payment of the $4,000 00, with interest, by Bellamy—Roberts would have been compelled to convey the land to him; but under no circumstances whatever, could Roberts, under his contract, have been compelled to part with his land, until the entire purchase money and interest had been paid, either by Bellamy or Williams; and if Bellamy took the land under the equity of Williams, he must have paid the same price for it that Williams had contracted to pay.

It is further alleged in the bill, after the assignment to Bellamy of the note on Williams, that Roberts ran off with some seventeen slaves, and some other articles of personal property, and was pursued by Bellamy into the State of Alabama, and the slaves and other property attached by Bellamy, to satisfy the liability of Roberts, as endorser on the Williams' note, and also three other notes, upon which Roberts was responsible to Bellamy, either as principal or endorser; that on the 22d of October, 1842, Roberts consented to judgments on all the notes sued on in Alabama, including the Williams' note, which judgment amounted in all to near $10,000, and on

Woods vs. Bailey, Administrator.—Argument of Counsel.

the same day, Roberts executed to Bellamy an absolute bill of sale for the seventeen slaves, in payment and full discharge of all the judgments so confessed by Roberts; and on the same day, Bellamy executed a deed or obligation to Roberts, in which he obliges himself to allow Roberts five years to redeem the slaves; and the hires of the slaves in the meantime to be applied to the payment of Bellamy's demand against Roberts. Bellamy also obliges himself to take the land contracted for by Williams, in full discharge of the liability of Roberts, as endorser of the Williams' note, to assist him in redeeming the slaves—upon condition that Roberts would discharge the incumbrance of the Union Bank on the land within ninety days from the date of Bellamy's deed.

From these subsequent transactions and statements of the case, it clearly appears, from Bellamy's own showing, that the bill of sale for the slaves was given by Roberts, and accepted by him, in full payment and discharge of all the judgments, debts and obligations due from Roberts to Bellamy, including his liability on the Williams' note; and that the deed or defeasance executed by Bellamy, and signed by him alone, was a mere privilege extended to Roberts, which Roberts could comply with or not at his option, and not at all binding upon Roberts, not being signed by him; and if Roberts failed to comply with the stipulations in the deed, the only consequence was, that Bellamy took the absolute property in the negroes, and the debts and obligations of Roberts would thereby have been paid and discharged, and Roberts would have kept his land.

And on the other hand, if we consider the bill of sale from Roberts and the deed of defeasance from Bellamy, as to be taken together and constituting a mortgage, it can only be considered a mortgage on the slaves, and not on the land, as there is no land mentioned in the bill of sale from Roberts, the land being mentioned only in the deed of defeasance executed by Bellamy alone, and consequently not binding on Roberts. Then, under this view of the case, considering these transactions as constituting a mortgage in favor of Bellamy on the slaves as insisted on in the bill, Bellamy must be considered as having waived his lien, if he had any on the land—on the well settled principle, that the taking of independent or other security for the payment of the purchase money of real estate, is considered as a waiver of the implied lien of the vendor. See Fish vs. Howland and others, 1st Paige's Chancery Reports, page 20; also Kent's Com., pages 151 to 153. Bradford vs. Marvin, Florida Reports 1849, page 463.

Bellamy could have been considered only as standing in the shoes of Roberts, in relation to the land, and any transaction that would have discharged the lien of Roberts, while he was the holder of the note on Williams, would equally have discharged Bellamy's lien, if he had any, after the assignment of the note to him. Consequently, taking the bill of sale or mortgage by Bellamy, to secure the payment of the Williams' note,, after it was assigned to him, must be considered as taking other and independent security for the purchase money by Bellamy, and a waiver of his lien, if he had any—the same as if Roberts had taken it from a third person in the first instance.

But, again: The bare consolidation of said note with other debts and notes, and taking a joint security or mortgage for the whole debt—or even the consolidation of the debt claimed in the bill to be a lien on the land, with other debts which were not a lien on it, even without any security—must be considered as a waiver of the lien—for all the debts became but one debt, and every portion of that debt must be of the same nature, and the entire debt, after consolidation, must have a lien on the land, or no portion of it can. Now, it would be absurd to contend for the first part of this proposition—that the holder of several independent claims, and having a lien for one of them only, could acquire a lien for all of them, by consolidating them.

But even if we consider the deed of defeasance from Bellamy to Roberts, as obligatory upon Roberts—then, it is clearly established, by the evidence of Woods and the proof in the cause, that Roberts did everything in his power on his part to comply with the stipulations in the deed in relation to the land, and did substantially perform the same; that he did discharge the incumbrance of the Union Bank within the ninety days specified in the deed, to wit: on the 17th day of February, 1843, thereby showing a readiness, ability and eagerness to perform the stipulations of the deed on his part; and in a short time after the expiration of the ninety days, Roberts made a formal tender of a deed to the land to Bellamy, in the presence of witnesses, to-wit: on the 25th day of May, 1843—which Bellamy refused to accept, and stated as his only reason for refusing it, that *"the land was not worth the money"* he had contracted to allow Roberts for it, and no objection was made on account of the deed not having been tendered within the time specified; thus clearly showing that he, Bellamy, did not consider that time was of the essence of the contract with Roberts—all of which clearly appears from the bill, answer and proof in the cause; and it is not proved, or even alleged in the bill, that Bellamy had ever requested Roberts to convey the land to him, but seemed to repose with content upon the bill of sale obtained from Roberts for his slaves, as a sufficient security or payment for all his demands against him. Therefore, if Bellamy seeks to enforce his demand against the land, on account of this agreement, he must take the land at the price he agreed in his deed to take it at, (in the event that the Court is of opinion that Bellamy's refusal to accept the deed was not an abandonment of his contract, which we insist upon)—that is, the Williams' note for $4,000 00 with interest; and permit Woods to go upon the other funds in the hands of Bellamy, to the amount thus over-paid by the land upon Bellamy's debt, after a readjustment of his accounts, to indemnify Woods for the loss of the land. But Bellamy can take no advantage of the failure of Roberts to tender him a deed for the land on the precise day agreed upon, as he has not shown that he has been injured thereby, and time, consequently, not considered as of the essence of the contract. See 2 Story's Com. equity, pages 85 to 88.

It also appears, from the allegations in the bill, that the Williams' note, assigned by Roberts to Bellamy, was not due at the time Bellamy filed his bill. The bill was filed 15th November, 1844, and the note not due until 1st of January, 1845—consequently, if Bellamy had any lien on the land for the payment of the note, he could not have enforced it, or have commenced any proceeding for its enforcement, either against Roberts or Williams, or any body else, until the note had become due, and was duly presented to Williams for payment, and refused by him, and notice of such refusal to pay given to Roberts. And even the confession by Roberts of the alleged judgments in Alabama, on his endorsement of the note on Williams, and afterwards executing a bill of sale for the slaves, to pay or secure the payment of his liability as endorser, could only have entitled Bellamy to have proceeded against the slaves in the bill of sale, or other property of Roberts, for payment of his debt, and not to have enforced any lien he might have had upon the land until the note became due. There is no allegation in the bill, or proof in the cause, that Bellamy ever demanded payment of the note from Williams—in fact, he could not legally have done so, until the note became due; and if he has not done so yet, he has lost his recourse upon Roberts.

But again, in conclusion: The bill of complaint having been taken *pro confesso*, as against Roberts only, (who it appears has left this State,) the *bare allegations* in the bill, so admitted by the default of Roberts, ought not to be binding on Woods, or prejudicial to him; and there is not a shadow of proof in this cause, except the *bare allegations* in the bill itself, that there ever was any contract whatever between Roberts and Williams for the sale of land, or any note given by Williams to Roberts, and assigned by Roberts to Bellamy, or any judgment obtained in Alabama, or in fact of any other allegation in the bill. Wherefore, upon this as well as the other grounds above relied upon, the decree of the Court below ought to be reversed, and the bill dismissed with costs, as against Woods, for want of equity; or if the Court is of opinion that Bellamy has any lien on the land, either under the original contract *attempted* to be set up between Roberts and Williams, or under the deed of defeasance from Bellamy to Roberts; then the decree of the Court below ought to be reversed, and the accounts re-adjusted, and Bellamy compelled to take the land, if at all, at the price Williams was to give for it, or at the price Bellamy agreed to take them at—which both amount to the same, to wit: $4,000 00, with ten per cent. interest from 1st of January, 1841; and the surplus, after the payment of Bellamy's debt, upon a re-adjustment of the account, to be decreed to Woods; or Woods permitted to go upon the funds already in the hands of Bellamy, for the amount over-paid by the land.

Papy, for Appellee.

The object in making Woods a party to this suit is to subject 600 acres of land purchased by him of R. J. Roberts, one of the defendants, to the payment of a debt due from Roberts to complainant.

This land was sold by Roberts to William H. Williams, in 1840, and he agreed to make out a good title to Williams, who was to pay Roberts $4000, and executed his promissory note for that sum. This note was endorsed by Roberts to Bellamy, and was guarantied by

49 Roberts. The consideration for this endorsement was cotton sold by Bellamy to Roberts. In 1842, Roberts absconded with all his property, and being pursued by Bellamy, was overtaken in Alabama, where, among other things, an agreement was made, by which Bellamy was to release Roberts from the Williams note, provided Roberts procured a release of the land from the Union Bank incumbrance, and conveyed it to Bellamy within ninety days from the date of the agreement, which was dated the 22d Oct., 1842. Roberts did procure a release but not till after the ninety days had elapsed, and did not tender a conveyance until the fifth day of June, 1843, long after the time limited for him to do so. Bellamy refused to accept it. On the fifth day of November, 1844, Roberts conveyed the land to defendant Woods, who acknowledged to have had knowledge of the agreement set out in the bill, but seeks to establish that they were rescinded.

The question, therefore, arises, is this land subject to the debt due Bellamy's estate on the Williams note? and this will depend upon whether the contract was binding between the parties—whether it was rescinded or not, and whether Woods had sufficient notice to charge him.

I. As to whether the contract was binding.

It is believed that no doubt can exist as to the binding force of this contract. Roberts agreed on one side to make a good title, and Williams, on the other, gave his note, which Roberts transferred to Bellamy. Indeed no objection was taken to this point in the Court below, and it is believed that none will be made here.

If the contract was binding, the thing to be done is considered as done, and the property converted in contemplation of Equity. Lacon vs. Mertins, 3 Atkins, 1. Attorney General vs. Day, 1 Ves., 218. The estate under such contracts of purchase as in this case, is in the vendee in contemplation of equity, and cannot be revoked by subsequent conveyance of the legal title by the vendor. 7 Vesey, 274. 11 Vesey, 554. 3 John Ch., 316. Livingston vs. Newkirk.

If Williams were here claiming to subject this land to sale for his benefit, his note having been assigned by the payee, admitting that the land was still in the possession of Roberts, a Court of Equity would decree that Williams had a lien upon the land upon the principle that where there is a payment of the money, or what is, as we
50 contend, the same thing, the delivery of negotiable notes, and an assignment of the same *in toto* to a *bona fide* holder, the vendor is a trustee for the purchaser, so as to oust judgment against the vendor intervening between the contract and conveyance.

A vendee who has paid the purchase money prematurely, has a lien against the vendor analagous to that of the vendor in the opposite case. 4 Mad., 503. 15 Vesey, 346. Lacon vs. Mertins, 3 Atkins, 1. Farmer vs. Samuel, 4 Litt., 190. Newman vs. Machin, 5 Hawyr., 241. Frink vs. McKeoun, 4 J. J. Marsh., 169. Bibb vs. Prather, 1 Bibb, 316. Finch vs. Earl of Winchelsea, 1 Pr. Wms., 278.

Although Williams had not, in fact, paid the purchase money, yet his note was assigned to a *bona fide* holder, and he was bound on it. He could not in the hands of Bellamy, make the same defence to it that he could in the hands of Roberts, unless received after it was due. There is, consequently, the soundest reason for holding that the transfer of the note to a *bona fide* holder, shall be considered as equivalent to the payment of the money so far as to fix the lien of the vendee prior and superior to a judgment between the contract and conveyance. And if this be so, *a fortiori*, a purchaser with notice should be ousted, since he does not occupy grounds as favorable as those upon which a creditor stands. It is believed to be a well settled principle that he who takes a conveyance of the legal title with notice of an outstanding equity, is in no better situation this his grantor was. McNitt vs. Logan, Littel's Selected Cases, 69. Mason vs. Sudam, 2 John, Ch., 181. Wadsworth vs. Wendall, 5 John. Ch., 229. Yoder vs. Smrope, 3 Bibb, 204. Simms vs. Richardson, 2 Litt., 276. Champion vs. Brown, 6 John Ch., 402.

Roberts having transferred the note given by Williams, stands in the position of a party who has been paid the purchase money, and Williams could come into a Court of Equity and establish his lien upon the land, notwithstanding its conveyance to Woods, who is a purchaser with notice, as will hereafter be shown. If Williams could do this, why may not Bellamy or his representative, who is the holder of the land note, be entitled to the same rights, and have the same equities enforced that Williams himself could? Instead of going immediately upon Williams, and Williams going upon the land, Bellamy or his representative, may reach the land through the equities of Williams. Riddle vs. Mandeville, 5 Cranch, 330. Russel 51
vs. Clark's Ex'rs., 7 Chanch. 69-97.

Roberts must be considered as a trustee for the purchaser, and Woods who took a conveyance with notice, stands in precisely the same condition, he not acquiring any greater or other rights than Roberts himself had. See cases above cited, Littel's Selected Cases, 69, &c.

II. The contract was not rescinded and could not have been rescinded unless both parties had agreed to it.

It is claimed in the answer of Woods, that Williams did not complete the contract—that he did not pay the money, and therefore Roberts had a right to consider the contract as rescinded. This could be done in the case between original parties where the rescision of the contract would leave them *in statu quo*.

No Court of Equity even, would upon the application of either party, rescind a contract where the parties could not be placed in their original position. Johnston's Heirs vs. Mitchell, 1 A. K. Marsh, 227. Turner vs. Clay, 3 Bibb, 53. Skinner vs. Dayton, 2 John. Ch., 533. Smith vs. Field, 5 Term. R., 403.

Now the parties here could not be placed in their original position. Williams' note was in the hands of an innocent holder, upon which he was bound. Roberts had received the amount of the purchase money, and if he desired to rescind the contract, he should have tendered this sum to Williams, or procured his note to be cancelled. It is not pretended that this was done or offered to be done.

III. Woods was a purchaser with notice.

He admits in his answer that he had knowledge of the contract with Williams, and of the subsequent agreement with Bellamy. He, however, insists that the contract was rescinded, &c.

The knowledge of the facts admitted by him was sufficient to charge him with notice. It was not necessary that he should have been fully acquainted with all the facts and circumstances. Whatever is sufficient to put a party on inquiry, is in equity held to be good notice to bind him. 1 Story Eq., S. 400. 4 Kent. Com., 179. 1 John. Ch., 261. Starry vs. Arden.

The admissions in the answer of Woods show that there was sufficient to put him on inquiry, and therefore, under the law, he is charged with notice, and he took the conveyance incumbered with all pre-existing equities.

There is, however, another and a very important aspect in which 52
this case is to be viewed.

Bellamy, when he took the Williams note, relied not only upon the responsibility of Williams, the maker, and Roberts, the endorser, but also upon the security which the land to be conveyed afforded. Roberts then may be regarded as a vendor to Bellamy, and one too, who had been paid the purchase money, for he had in point of fact received the purchase money from Bellamy. And if so, under the principles already cited, he was but a trustee to hold the legal title for Bellamy, and could not transfer it to any one. Woods, who took conveyance with notice of the facts, got nothing beyond the interest of Roberts in the land.

That Roberts himself looked upon the land as bound for the amount of the purchase money note, or that he regarded himself as a mere trustee, is obvious from the compromise agreement between himself and Bellamy, by which he agreed to release the land from the Bank and convey it to Bellamy within ninety days from its date.

It is, however, contended that this is a substantive agreement for a sale, and it having been proved that Roberts did procure a release and executed and tendered a conveyance to Bellamy, which was refused to be accepted, the contract should be considered as rescinded, and Roberts had a right to so consider it.

But it will be seen from the proofs that the release from the Bank was not procured within the time limited by the agreement, and the deed was not tendered—not even executed—until long after the time had elapsed.

The provision of the compromise agreement was gratuitous on the part of Bellamy, and was intended for the benefit of Roberts, who was to be finally released from all claims against him on the land note, provided he complied with the conditions attached. He failed in this respect, and Bellamy was consequently not in anywise bound to accept the conveyance which was tendered.

But it may be said that upon Bellamy's refusal to accept the deed, he virtually rescinded the contract, and Roberts had a right to convey to another. It is granted that the agreement of compromise was rescinded so far as this provision is concerned, but in that event, on what ground do the parties respectively stand? Why, they revert to their original position—they fall back upon their original rights, and

53 it is shown that Roberts, who had received the purchase money, was but a trustee for the purchaser. How could the rescision of the compromise agreement have the effect of enabling Roberts to convey to another? Were the parties left *in statu quo?* By no means. Roberts had received the purchase money and Bellamy and Williams had got nothing.

Woodward, on the same side.

PROPOSITIONS FOR APPELLEE.

I. The agreement between Roberts and Bellamy created *a trust,* which equity will preserve, either in a suit for *specific performance,* or for compensation in damages by vendee.

II. Equity will uphold a *lien* arising from an agreement in relation to land, maintaining between all parties the rights thereby acquired, and enforcing the obligations incurred.

III. Upon failure of vendor to perform an agreement in relation to land, equity will hold the land subject to the *reimbursement of* vendee, for the purchase price which he may have paid.

IV. Equity affords no indemnity or protection to a subsequent purchaser, *with notice.*

V. If an agreement in relation to land be *rescinded,* the purchase price having been prematurely paid, equity will, nevertheless, *subject the land,* in satisfaction to the superior prior lien of the *first vendee.*

As to *parties in chancery.*

All persons in *interest* must be parties to the suit, especially when their rights and interests are therein particularly complicated and involved, or their position an obstacle to its progress, and in conflict with a complainant's asserted claims.

Woods was a *subsequent purchaser* from Roberts, and in *possession of the land in controversy,* when the bill was filed; he is therefore, a proper party.

AUTHORITIES.

Specific performance.—2 Story's Eq. Jurisprudence, p. 96. Sec. 772, p. 105. Sec. 779, p. 113. Sec. 788-'89-'90. p. 131, Sec. 796, p. 135, Sec. 798.

Trusts and Liens.—P. 606, sec. 1195-'96, p. 638, Sec. 1213 to '22. p. 657, sec. 1230 and 31. p. 690, sec. 1254-'57.

54 Agreement.—1 Eq. Dig., p. 78, sec. 13.

Vendor and vendee.—2 Eq. Dig. p. 201, sec. 6, 8 and 10. p. 515, sec. 1. p. 517, sec. 19. p. 521, sec. 59. 4 Eq. Dig. p. 693, sec. 10, 11, and 13. p. 694, sec. 25. p. 697, sec. 8. p. 698, sec. 17.

Reports.—5 Munf. 507. Littell's Select Cases, 407. 1 Bibb 313-'15-'16 and 438. 3 J. J. Mar., 40-42. 4 J. J. Mar., 16-'69. 1 Monro, 43-44.

Brockenbrough, for appellant, replied at length to the argument of council for appellee.

LANCASTER, J.

On the 15th day of November, 1844, John Bellamy, the intestate of complainant, filed his bill of complaint in the then Superior Court for Jefferson County, alleging the indebtedness to him of the defendant, Ransom J. Roberts, for large sums of money, on four several notes, as in his said bill is mentioned, amounting together to about $9,717 54. One of which said notes, he describes thus: "On a note dated Aucilla, 26th March, 1840, for $4,000, payable on the 1st of January, 1845, with interest at ten per cent. per annum from 1st of January, 1841, to the order of said Roberts, made by one W. H. Williams, as expressed in said note, for value received in land;" and endorsed on the 26th day of March, 1840, by said Roberts to said Bellamy, for value received, as expressed in said endorsement, and the payment of which Roberts guarantied to said Bellamy, and was responsible for and assigned said note as a security for cotton sold by Bellamy to him, said Roberts, and for which amount he was bound to Bellamy. The bill alleges that the defendant, Ransom J. Roberts, made a fraudulent disposition of his property on the 14th day of September, 1840, by making a fraudulent bill of sale of seventeen negroes in the bill named, to his brother, Elijah Roberts, who on the same day, gave to David Emanuel, a brother-in-law of said Ransom, a power of attorney to take charge of said negroes, and defend them against any other claimant; and that a few days thereafter, the said Ransom J. Roberts and the said Emanuel absconded secretly from Jefferson County, and from the Territory of Florida, taking with them all said negroes and other property mentioned in the bill. And the bill charges that all these fraudulent actings and

doings were done with the fraudulent intent and purpose of de- 55
frauding the said Bellamy.

The bill further charges that the complainant gave chase after the said Roberts and the said Emanuel, and overtook them in the State of Alabama, where he caused said slaves and other property to be levied upon, arrested, attached and seized by the proper officer, as the property of said Ransom J. Roberts, and as liable for and bound for said debts; that a claim was interposed by said Emanuel, for and on behalf of Elijah Roberts, which was tried and found by a jury in favor of said Bellamy; that, thereafter, on the 2d day of October, 1842, an agreement of compromise was entered into by said Bellamy, and the said Ransom J. Roberts and Elijah Roberts, (the latter acting by his agent and attorney in fact,) by which the said Roberts acquiesced in the claim, as established in favor of said Bellamy, and also agreed that judgment should be rendered in favor of said Bellamy, in the suit he had instituted against Ransom J. Roberts, without defence, for the amount of the four several notes sued on, with legal taxed costs, together with other matters therein stated as agreed to, and which may be referred to hereafter.

The bill then says, the foregoing agreement was on the same 22d of October, 1842, "annulled and abrogated, and a conveyance of said slaves and other property was made, executed and delivered by said Ransom and said Elijah, (by his agent and attorney aforesaid,) in the words and figures following, viz:

"The State of Alabama. } Ss.
County of Covington, }

"This indenture made this twenty-second day of October, in the year of our Lord one thousand eight hundred and forty-two, between Ransom J. Roberts and Elijah Roberts, (said Elijah by David Emanuel, his agent and attorney in fact,) of the first part, and John Bellamy, of Jefferson County, Territory of Florida, of the second part, witnesseth: that the said Ransom and Elijah, for and in consideration of the sum of ten thousand dollars to them in hand paid by the said John, at and before the ensealing and delivery hereof, and the receipt whereof is hereby acknowledged, and the said Ransom and Elijah therewith fully satisfied, content and paid, and also for and in consideration of divers other matters and things relating to the past transactions and business of and between said parties, have granted, bargained, sold, 56
assigned, aliened, transferred, released, conveyed and confirmed, and by these presents do grant, bargain, sell, assign, alien, transfer, release, convey and confirm unto the said John, all the following described slaves and property, now in said County of Covington, State of Alabama, namely, seventeen slaves: Watkins, aged about 28 years; Amos, aged about 20 years; Doctor, aged about 17 years; Celia, aged about 30 years, (sometimes called Seany;) Rosa, aged about 25 years; Eliza, aged about 14 years; Toby, aged about 12 years; Tony, aged about 8 years; Phoebe, aged about 6 years; Nancy, aged about 4 years; Crecy, aged about 2 years: Winny, aged about 1 year; Lucinda, aged about 8 years; Little Cely, aged about 4 years: Stephen or Stephney, aged 2 years; Betty or Elizabeth, aged about 1 year, and Mary, aged about 1 month, and the future increase of the female slaves; also, one road wagon and four mules—all of which slaves and property, the said Ransom and Elijah have herewith on this day delivered to said John and into his possession, at the County of Covington aforesaid—To have and to hold the said above described slaves and property and the future increase of the said female slaves, to him, the said John, his heirs and assigns, forever, in full, perfect, complete and unincumbered title, estate and possession forever. And the said Ransom and Elijah, jointly and severally for themselves, and for their and each and every of their heirs, executors and administrators, do covenant and agree to and with the said John, his heirs, executors, administrators and assigns, that they, the said Ransom and Elijah, and each of them, and their and each and every of their heirs, executors and administrators, the full, perfect, complete and unincumbered title, estate and possession and property, of, in and to the said slaves and property, and the future increase of the said female slaves, and each and every part, portion and parcel thereof, and without let, molestation or hindrance from any person or persons whatever, and the peaceable and quiet enjoyment of the use and the said possession thereof, unto and by the said John, his heirs, executors, administrators or assigns forever, they and each and every of them will forever warrant and defend, and sustain the claim or claims of any and all persons whatsoever.

"In witness whereof, the said Ransom and Elijah have hereunto set their hands and seals, (said Elijah by said David Emanuel, his

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57 agent and attorney in fact,) on the day and year first above written, at Montezuma, in the County of Covington aforesaid.

"RANSOM J. ROBERTS, [SEAL.]
"ELIJAH ROBERTS, by
"DAVID EMANUEL, [SEAL.]
"*His Agent and Attorney in Fact.*

"Signed, sealed and delivered in the presence of us—

"JAMES D. WESTCOTT, JR.,
"JAMES P. STEEDLY,
"LEMUEL S. HARRELL."

"The bill further states, that "on the same day a final agreement of compromise in lieu of the above mentioned, was made between said Ransom and said Bellamy, which was signed and sealed by said Bellamy, and delivered by him to said Ransom, as follows, viz:

"State of Alabama, } Ss.
"County of Covington, }

"This indenture made this twenty-second day of October, Anno Domini 1842, between John Bellamy of the County of Jefferson, in the Territory of Florida, of the first part, and Ransom J. Roberts late of the same place, of the second part, witnesseth: Whereas said John, executor of Abram Bellamy, deceased, hath heretofore instituted three several suits by attachment in Dale County Circuit Court in said State, against said Ransom, *et al.*, as by reference thereto will appear; and whereas said attachments were levied on seventeen slaves, and a road wagon and four mules, as the property of said Ranson, and claimed by Elijah Roberts, (by his agent and attorney in fact, David Emanuel,) and by consent, the claim was tried before the County Court of said County of Covington, and a verdict this day rendered, that the property was subject to said attachment, and a compromise and agreement made in said case, signed and sealed by said Ransom, and said Elijah, (by his agent,) and by said John, as by reference thereto, bearing even date herewith, and a copy whereof is in possession of the said parties to this indenture, will appear; and, whereas, in pursuance of said agreement, said Ransom and said Elijah have this day executed a conveyance of said slaves and other property to said John, which bears even date herewith, and is recorded in the Clerk's office of said County of Covington, and who delivered said
58 slaves and property to the said John; and whereas said Ransom hath also filed his written consent to judgment being entered in each of the said suits, at the next term of the Covington County Circuit Court, said suits being by consent transferred from Dale Court to Covington, in case a Court is held at Covington next week, and if not, the judgment to be entered at the next term of Dale Circuit Court, said judgments being entered with full release of errors, as by reference to the written consent filed in each of said cases will appear, which judgments all amount in the aggregate, besides costs, to about $9,717 54:

"Now, in order to carry out and fulfill the residue of the conditions and terms of said compromise, with such modifications as the parties thereto have since agreed upon, the said John binds himself to said Ransom J. Roberts, to transport and convey said slaves and property forthwith back to Jefferson County, Florida, and to keep the same in said County of Jefferson, according to the terms of said compromise, until otherwise agreed; and said John further binds himself to said Ransom to extend to said Ransom indulgence on said debts for five years from this date, he the said Ransom, paying the interest thereon at eight per cent. per annum, and payable annually, on the 22d of October in each year, to said John, and said slaves and their increase in the meantime remaining in the possession of said John, and as his property, under and by virtue of said conveyance; and said John binds himself, on full payment and satisfaction of said judgment debt, interest and costs at anytime within said five years, to sell, or assign, and reconvey to said Ransom, or to such person as he may appoint in writing, such of said slaves and their increase as may be then living; and said John binds himself to hire out said negroes at just and reasonable prices in Jefferson County, or if he uses them himself, to allow just and reasonable prices or hire for them, and which hire is to be annually, as the same hire becomes due, to be faithfully applied and appropriated to the discharge and payment of the interest and principal and costs of said judgments; and said John further agrees to give said Ransom the privilege and preference of hiring and taking said negroes on equal, reasonable terms with others, if said Ransom desires the same, the hire to be so appropriated and applied as aforesaid. And in order to aid in enabling said Ransom to pay said debts, said John further agrees that he will lease or sell to said Ransom, on fair and reasonable terms, sufficient lands in the 59 County of Jefferson aforesaid, whereon to reside and work the said slaves during said term, if said Ransom so desires; and said John further agrees that, on said Ransom giving a full, perfect and complete title to six hunderd acres of land in Jefferson County, sold by said Ransom to William H. Williams, to release said Ransom from his liability as endorser of said Williams' note, and upon the debt and interest of said judgment thereon entered—the incumbrance, of the Union Bank, and all others, to be however first discharged satisfied and taken off by said Ransom, and said conveyance by said Ransom for said lands to be either to said John, or to said Williams, in pursuance of said agreement between said Ransom and said Williams, dated March 26th, 1840, or otherwise, as said John may direct, so that said Wiliams may be compelled to pay said note, and said Ransom to make said conveyance, and discharge all incumbrances on said land, within ninety (90) days from the date hereof. At the expiration of said term of five years from this date, if any portion of said debt and costs are still unpaid, or any of said interest shall not be paid, sufficient of said slaves to pay the same are to be sold by said John at public auction in Monticello, Jefferson County, on thirty days' notice, and the proceeds taken to pay and satisfy the same; and if, after payment of all said debts, interest and costs, any of said slaves remain unsold, they are forthwith to be reconveyed and redelivered by said John, as hereinbefore stated; and if after such sale, there should be a portion of said debts, interests and costs remaining unpaid, said Ransom shall be still liable for the deficiency. The said John is to sell the said wagon and mules at fair prices, and credit the proceeds, after deducting reasonable expenses of transporing said slaves and property back to Jefferson County, Florida, on said judgments.

"In witness whereof, the said John Bellamy hath hereunto set his hand and affixed his seal, the day and year first above written, at Montezuma, Alabama.

"JOHN BELLAMY, [SEAL.]

"Signed, sealed and delivered in the presence of us—

"JAMES D. WESTCOTT, JR.,
"JAMES P. STEEDLY,
"LEMUEL S. HARRELL."

The bill also charges that the note above mentioned, given by 60 William H. Williams to said Ransom, and by him assigned to said Bellamy, was given and made, as expressed on the face thereof, in consideration of certain lands in said County of Jefferson, containing six hundred acres; that said Ransom did not make any conveyance to said Williams of said lands, but made and delivered a written agreement or contract to said Williams, in the following words, viz: "I hereby agree to dispose of and deliver, on or before the 1st of December next to William H. Williams, Esq., fifty head of cattle, more or less, at five dollars per head, and fifty hogs, more or less, at one dollar each, five hundred bushels of corn, and some fodder of the crop, at market value, the delivery of the latter to be optional with William Williams. I hereby further agree to make out a clear title to the lands, and to hold myself responsible for all claims against it. (Signed,) Ransom J. Roberts, and dated Aucilla River, 26th March, 1840. Witnessed by John Walsh, and recorded the 19th of June, 1844."

The bill further alleges, that the time of ninety days mentioned in the agreement executed by said Bellamy to said Ransom J. Roberts, in which the said Ransom was to execute a conveyance and discharge all incumbrances on the land, was agreed upon and specified as a material and essential condition of said agreement, and to be part of the essence of the contract, because it was believed said Williams would come to Tallahassee about the first of January, 1843, as a member of the Legislature Council, and remain in said Middle District that month, and afford thereby an opportunity to said Bellamy, if the same was done in ninety days, of applying to Williams respecting the business, and inducing him to accept such conveyance and take the lands, and if he refused, of instituting proceedings in equity against him in said District to compel him to do so, and enforce the payment of said note by him, or effect a compromise with him.

The bill further charges that Bellamy requested said Ransom J. Roberts, after discharging all the incumbrances aforesaid, within the ninety days aforesaid, to make a title to said Williams and deliver it to said Bellamy or his counsel at Tallahassee, to tender it to Williams, and if he would accept, to deliver the same to him, and thereby make him liable and bound for said note, but that the said

61 Ransom entirely neglected and refused so to do within said time, or subsequently, and has not yet done the same according to his agreement. The bill further charges, that said agreement of Oct. 22d 1842, and Ransom's agreement with Williams of 26th March, 1840 were duly recorded, and all said premises were public and notorious in Jefferson County, and William J. Woods had due and legal notice thereof. Yet said Woods, on the 6th day of Nov., 1844, in consideration, as it is pretended by said Ransom and said Woods, of $2000 lawful money paid by said Woods to said Ransom for said land, took and received a conveyance of said 600 acres of land from said Roberts, and caused the same to be recorded in Jefferson County. And the bill charges that the deed was taken by Woods with full knowledge of all the premises, and was made and executed for the purpose and with the intent of defrauding said Bellamy and said Williams, and that the said deed is fraudulent, null and void, and should be set aside and declared null and void, and said Woods and said Ransom compelled to convey the same so as to fulfill the terms of the agreement between the said Ransom and Williams and Ransom and Bellamy.

The bill further charges, that Williams disputes and contests his liability on said note, especially since the conveyance to Woods, thereby destroying the ability of said Roberts to make him a title, and causing a failure of the consideration of said note; and the bill contends that both Williams and Roberts are bound and liable to said Bellamy to pay the amount of said note, principal and interest, when due; and notwithstanding said fraudulent conveyance by said Roberts to said Woods, the said Bellamy has a lien, and charge and equitable mortgage upon said lands, prior and superior to, and above and before said fraudulent conveyance. And the bill charges, that said land should be sold to satisfy said note and interest and costs and expenses, and if insufficient, that Williams and Roberts should both be held and bound to Bellamy for the deficiency.

John Bellamy, the complainant, died, and William Bailey, Adm'r *de bonis non* of said Bellamy deceased, filed his bill of revivor praying to be admitted as complainant, and was made a complainant, as the legal representative of John Bellamy, deceased. And none of the defendants having appeared or answered said bill except William J. Woods, an order for publication was obtained against them
62 and satisfactory proof being made to the Court, that a notice to appear and answer had been published against all the defendants except William J. Woods, according to the terms of the order for publication and agreeably to law, it was ordered, adjudged and decreed, that the original bill be taken as confessed against the said Ransom J. Roberts, Elijah Roberts, David Emanuel and Frances Williams, adm'rx of W. H. Williams, deceased, they having failed to appear and answer said original bill or to plead or demur thereto. The defendant William J. Wood answered, and admitted his purchase of the land mentioned in complainant's bill at the day, and for the sum named in the bill, and which was recorded as stated in the bill, but he says he purchased in good faith, for the legal and valuable consideration of $2000, which he actually and in good faith paid to said Roberts, partly in money and partly in good negotiable promissory notes, on good and solvent persons, which he considered equal to money—that at the time of the execution of said deed by said Roberts, before the filing of complainant's bill of complaint, this defendant in good faith, and without any knowledge on his part, of any legal or equitable claim in favor of any person or persons whatsoever in, to, or upon said land, paid as above stated for the same.

The defendant further states that he had heard from rumor only, that there had been an old contract in regard to the purchase of said lands by Wm. H. Williams, from said Roberts, but upon inquiry, he was informed and believed, and so charges, that at the time of his said purchase, it was null and void to all intents and purposes. That it was a notorious fact that Roberts had tendered Williams a deed, which Williams refused to accept, and Williams being insolvent, Roberts elected to abandon the contract with Williams, and did abandon it.

And further answering, this defendant saith, he had also heard from rumor only, before he purchased from Roberts, of the contract or agreement in complainant's bill mentioned, between said Roberts and complainant in regard to said land, but at the same time he was informed and believed, and so charges, that said agreement was also rescinded, and at the time of the purchase of said land by this defendant, was null and void. That said Roberts had done everything necessary on his part to be done, to complete said contract, and had at great costs and charges, sacrifice and trouble, paid off and discharged all
63 the incumbrances and liens on said land, and tendered in the presence of witnesses, a good and sufficient legal title to said land to said complainant Bellamy, clear of all incumbrances and liens, in pursuance of the agreement between said Roberts and said Bellamy, and that said Bellamy refused to accept said title so tendered to him, and refused to have anything further to do with said lands, and disclaimed repeatedly, in the presence of divers good citizens of Jefferson County, that he had any claim, title, interest, or lien, in, to, or upon said land, and that he never intended to have anything more to do with it, and said Roberts did then elect to abandon said contract with said Bellamy, as he had a right to do under the circumstances. This defendant denies positively that the deed of said land made by Roberts to him, was made and received for the purpose and with the intent, to defraud said Bellamy and said Williams, or any body else, but avers it was made in good faith, and for the valuable consideration aforesaid. And he denies all the charges and imputations contained in said bill against him, of combination on the part of this defendant, with said Roberts or any one else, for the purpose of defrauding, injuring, or vexing the said complainant or any one else. And afterwards a decree was entered by consent of complainant's solicitor and the solicitor of said Woods, and it was ordered, among other things, that said defendant Woods have leave to file his amended answer. And in pursuance of said consent decree, said defendant Wood filed his amended answer, by way of demurrer, in short, relying upon the statute which allows defendants to insist upon any matter of demurrer in their answer, and insisting among other things, that said bill should be dismissed, because the same wants equity apparent upon the face of it, and because the same does not set up any claim, right, title or interest in equity, or any equitable lien to the land of this defendant bought of said Roberts.

And by way of plea under said statute this defendant insists that said Roberts offered to said Bellamy a deed of conveyance in fee simple, a copy of which is filed with this answer, and which deed convey a good and valid fee simple, unincumbered title to said Bellamy, which he refused to accept before the purchase of said lands by this defendant.

There are many other matters contained in the original bill of complaint, not herein set down or noticed, but all is contained in the
64 foregoing statement, which is believed to have relation to the controversy between complainant and the defendant W. J. Woods, who are the only parties litigant before the Court.

It is in proof by two witnesses in this cause, that on the 1st day of June, 1843, they tendered and read to John Bellamy, the original complainant in this suit, a deed of conveyance from Ransom J. Roberts to said Bellamy for a certain tract of land, containing 600 acres —that the said Bellamy refused to accept said deed, saying he would take the land for its worth, and that the land was not worth the money mentioned in the deed, say $4000. It is also in proof that R. J. Roberts filed with the clerk of Jefferson County Court on the 17th February, 1843, for record, a deed of release from the Union Bank to said Roberts, which deed bears date the same day it was received and filed. The cause came on afterwards to be heard, so far as the defendant William J. Woods is concerned, upon the bill, answer and exhibits, and after argument of counsel and time for consideration taken by the Court, "it was ordered and decreed that the said complainant has a lien and charge upon the land mentioned in said bill of complaint, and that the same is in equity prior and superior to, and above and before the conveyance by said Roberts to said Woods, to the extent of the balance due to said complainant from Ransom J. Roberts, on the note given by said Williams to said Ransom, and by him transferred to complainant's intestate, amounting, in the aggregate, with interest, to the present term, to $3,809 77-100.

"And it is further ordered and decreed, that the said conveyance from said Ransom J. Roberts to said William J. Woods for said land, dated the fifth day of November, 1844, mentioned in said bill, though valid between the parties, be, and the same is hereby set aside, as far as claim of complainant is concerned.

"And it is further ordered and decreed, that the land described in said deed, to wit: The southwest quarter of the northeast quarter, the northwest quarter of the southwest quarter, the southwest quarter of the northwest quarter, the southwest quarter of the southwest quarter, the northwest quarter of the northeast quarter, the east half of the northeast quarter, the east half of the northwest quarter, the east half of the southwest quarter, the west half of the southeast quarter, and the east half of the southeast quarter, all in section two, of township two, range five, north and east, in the district of land subject to

sale at Tallahassee, containing about six hundred acres, more or less, be sold by the sheriff of Jefferson County, after giving public notice of the time and place of sale, said notice to be, as in cases of sales under execution at law, the proceeds of which sale to be applied to the amount so ascertained to be due as aforesaid.

"And it is further ordered and decreed, that defendant Woods, pay the costs of the said sale and of this decree, and the depositions and other proceedings connected therewith.

THOMAS BALTZELL, *Judge.*

"November 8th, 1849."

From which decree the defendant, Woods, appealed to this Court, And here contends that the complainant's intestate, John Bellamy, does not in this bill, set up any claim, right, title or interest in equity or any equitable lien to the land, which he, defendant, bought of Ransom J. Roberts, and that the decree of the Court below is erroneous. The agreement for the conveyance of land by the defendant Ransom J. Roberts to W. H. Williams, whose legal representative is also sought to be made a defendant, evpresses no time at which the conveyance was to be made, and the vendee, Williams, had a right to have a title at any time on demand. As Roberts ought, therefore, to have made him the title, equity will consider it as done, 2 Story Eq. Jur., Sec. 792. The agreement for title bears date 26th March, 1840, and on that day Williams executed his note to Roberts, or order, for the sum of $4000, payable on the 1st January, 1846, with interest at ten per cent. per annum from 1st January, 1841, for value received in land. As no other security but the note of Williams was taken for payment of the purchase money, according to all the authorities except in the case reported in Ambler, page 724, and a few others following its lead, and which have been repeatedly overruled, the vendor's lien attached in favor of Roberts and that lien in equity is said by Chancellor Wallworth to be admitted to exist everywhere in England and the United States, where there is a Court of Chancery to give effect to such a lien. 1 Paige Ch. R., 24.

On the day of the date of said note it was, as the bill alleges, endorsed, for value received by Roberts, the payee, to John Bellamy, the original complainant in this suit, who the bill alleges, guarantied and held himself responsible for payment thereof to Bellamy, the endorsee or assignee; whereby the said Bellamy claims in his said bill to have a lien, charge, and equitable mortgage upon said lands, prior and superior to the title of Woods, derived through his conveyance from Roberts. Whether the vendor's lien under any circumstances is transferred to the assignee of the vendor, is a question which, though much discussed up to a comparatively late period, appears not to have been settled in England. See 1 Page Ch. R., 26-7. It may be here observed, however, that by the endorsement of the note to Bellamy, and the guarantee alleged in the bill to have been taken by him of Robert's individual responsibility, to say the least, a disposition on his, Bellamy's part, to rely on the vendor's lien, if in contemplation of equity assigned to him, does not appear very manifest, but it seems to have been his intention to have the personal responsibility both of vendor and vendee, as well as the tacit, equitable lien on the lands, with which to secure himself in the payment of the note—whether he can do this, remains to be seen,

The bill sets up, that afterwards, Roberts, with others, fled and absconded from Florida, with all his negroes and other enumerated property; that he was pursued by Bellamy, who overtook him in the State of Alabama, and instituted legal proceedings against him, on the note asigned to him by Roberts, as well as other notes; that proceedings were thereon had, by which he brought Roberts to a compromise on the 22d October, 1842, by which compromise Roberts agreed to confess judgment in the State of Alabama, on all the demands which Bellamy had against him, and that judgments were actually rendered in favor of said Bellamy in said State against said Roberts in three several suits—one of which was on his endorsement of the note, in this opinion referred to, and was for the sum of $4,722 19, with interest thereon at eight per cent. per annum from the 22d October, 1842, till paid, and costs. And that on the same day, a final agreement or compromise was made between the parties Bellamy and Roberts, by which Roberts conveyed to him seventeen negroes, &c., for and in consideration of ten thousand dollars, admitted to have been received by said Roberts from said Bellamy, which conveyance was signed by the said Roberts, and on the same day Bellamy executed to said Roberts an indenture which recognizes that the conveyance of the slaves, &c., as above, was made in consideration of the judgments so by consent to be given to said Bellamy—one of which is on Roberts's endorsement on the note of Williams to him—and all of which judgments, together besides costs, amount to the sum of about $9,717 54. That indenture binds said John Bellamy to extend time for payment to said Roberts, for all said debts for five years from its date, and making further provision for the transportation of the slaves and other property back to Florida, and for disposition of it by hire, sale, &c., it says, in order to enable said Ransom to pay said debts, said Bellamy agrees that he will lease him lands, &c., and further agrees that on said Roberts giving a full, perfect and complete title to the 600 acres land in Jefferson County, sold by him to Williams, to release said Roberts from his liability as endorser of said Williams' note, and upon the debt and interest of said judgment entered thereon, "incumbrances first to be removed, and the conveyance to be either to Bellamy or to Williams, or otherwise as Bellamy may direct," so that said Williams may be compelled to pay said note; and said Roberts to make said conveyance, and discharge all incumbrance on said land within ninety days from the date of the indenture. The indenture further provides, that at the expiration of five years from its date, if any portion of said debt, interest, and costs remains unpaid, negroes shall be sold to pay it; if any remain unsold, they are to be reconveyed to Roberts, but if all are sold and there remains a portion of said debts, interests, costs unpaid, the said Ransom J. Roberts shall be still liable for the deficiency.

We think the plain, unequivocal effect and result of these proceedings is, that by taking judgments on these claims in the State of Alabama, and the conveyance of the slaves, &c., thereon, in the nature of a mortgage, (the indenture of Bellamy to Roberts giving to the transaction that effect,) Bellamy thereby plainly indicated his intention to rely on that mortgage as a security for the whole of his debts, &c., and in the event that was insufficient, then to rely on the personal responsibility of Roberts for the residue. That this was intended, seemes inevitable—or else why extend the time of payment on the Williams note, which would be due on the 1st of January, 1845, as in favor of Roberts' endorsement thereon, for the term of almost three years longer? or why consolidate the judgments obtained on Roberts' endorsement of that note with the judgments obtained on other notes, and take a joint security by mortgage for the whole? In order to enable Roberts to pay these debts, it was stipulated, if Roberts would discharge the incumbrances on the lands sold to Williams, and make a good title thereof to Bellamy or Williams, or otherwise as Bellamy might direct, within ninety days from the date. that Bellamy would release him from his endorsement on the Williams note, and from the debt and interest of the judgment entered thereon. It appears by the proofs in this case, that on the 17th of January, 1843, less than ninety days after the 22d October, 1842, Roberts filed in the Union Bank, in substitution for the mortgage which the Bank held on the lands in controversy in the suit, a security which was deemed satisfactory to the Bank, and it thereafter executed a release to him of his mortgage, which was filed for record in the Clerk's office for Jefferson County on the 17th February, 1843, and that thereafter he tendered a deed of said land to said Bellamy on the 1st day of June, 1843, who declined taking it, and refused to accept it, saying he would not give the consideration therein of $4000, but was willing to give what it was worth. No objection was here raised that the incumbrances was not removed, or any defect suggested as to the tenor or execution of the deed, nor yet was any thing said as to the time being too late, but only the price was too much.

Bellamy, in his bill, alleges, that time was of the essence of his contract with Roberts, in regard to this conveyance, because about the 1st of January, 1743, Williams was expected at Tallahassee to attend the Legislative Council, and he could then see him and compel him to take land, or sue him in Middle Florida if he refused, or compromise with him. It is not alleged that Williams did come at the expected time, or that Bellamy was injured by the delay; no damage is stated in the bill, but only it is urged that time was of the essence of the contract. In Story Eq. Jur., Sec. 776, it is laid down as true, that Courts of Equity have regard to time so far as it respects the good faith and dilligence of the parties. But if circumstances of a reasonable nature have disabled the party from a strict compliance, or he comes *recenti facto*, to ask for a specific performance, the suit is treated with indulgence and generally with favor by the Court.

We cannot see in this, bad faith on the part of Roberts; he did, as soon as he reasonably could, all that was necessary, to invest Bellamy with an unincumbered, legal, valid title to these 600 acres of land in

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controversy, which title Bellamy refused to accept, and he, Roberts, might, thereupon, with propriety, perhaps, have gone into a Court of Equity, and tendering the conveyance, might have compelled Bellamy to release to him the whole amount of the judgment and interest obtained by Bellamy in the State of Alabama, on and by reason of his, Roberts' endorsement on the Williams note. Or he might as he appears to have done, have abandoned that contract and obligation of Bellamy to him, in which last event no objection is perceived, so far as Bellamy's interest is concerned, to his selling to any purchaser he might meet.

To return to the consideration of the security by mortgage taken by Bellamy from Roberts in the State of Alabama on the 22d of October, 1842. It seems proper to remark, that the lands are not mortgaged or named or recognized as under lien to Bellamy, nor does the transaction which there took place, in the direct conveyance by Roberts to Bellamy, or in his indenture explanatory of the transaction given to Ransom J. Roberts, state or shew, that the conveyance or mortgage was given by Roberts or received by Bellamy, as an additional or further security for the whole or any part of said judgment debts, but on their face appear to be the entire security taken to secure payment of the whole debt. Whether by the endorsement of vendor, and his guarantee of payment of Williams' note, he gave or transferred to Bellamy the vendor's tacit or equitable lien, comes now to be more particularly considered.

In the case of Francis vs. Hazleriggs, Executor, it was held, where the vendor gave a conveyance and took a bond for the purchase money, in which a third person joined as security, there was no lien upon the land. Hardin's R., 48. And in the case of Bradford, administrator, *et al.* vs. Marvin and Martin, 2 Flor. R., 463, this Court expressly recognize the same doctrine. Authorities to the same effect might be multiplied. Now what, let it be asked, supposing Bellamy invested with the vendor's lien, by virtue of the endorsement of Roberts' is Roberts guarantee to him, but an agreement of Roberts to become security for the payment of the amount of the note by Williams to Bellamy? Bellamy being supposed then in the position to claim the vendor's lien, as against Williams, takes the additional security of Roberts' responsibility—but this in equity, as we have seen, defeats the tacit lien. In the case of White vs.
70 Williams, 1 Paige Chancery Reports, 506, Chancellor Wallworth says, "The claim of a complainant for a specific lien on the premises, upon the ground that his judgment was obtained on a note given for a part of the purchase money, cannot be sustained. At the time he bought the note of Kingsbury, the latter had unquestionably such a lien, but it is not pretended that there was any agreement that such lien should be transferred to the complainant." And again: "But I am not aware of any case, where the assignee of the note, or other security, has been permitted to sustain such a claim, on an implied agreement to assign the lien." Again: "I am satisfied that the sale and prosecution of the note to judgment, in the name of the endorsee, must be considered as a waiver of the original implied lien for the purchase money on the land." This authority of high respectability appears much in point and we might, with great safety, rely on it as precedent conclusive of this case. But we feel inclined to enquire, supposing we are mistaken, and that the vendor's lien may be transferred tacitly to his assignee, whether in this case there has not been a waiver, or abandonment of it. The rule, as laid down in Fish vs. Howland, 1 Paige Ch. R., 30, is "to sustain the equitable or implied lien, whenever the vendor has taken the mere personal security of the purchaser only, and to consider any bond, note or covenant given by the vendee alone, as intended only to countervail the receipt of the purchase money contained in the deed, or to show the time and manner in which the payment is to be made, unless there is an express agreement between the parties to waive the equitable lien. And on the other hand, to consider the lien as waived, whenever any security is taken on the land or otherwise, for the whole or any part of the purchase money; unless there is an express agreement that the equitable lien on the land shall be retained, the lien is lost." The Chancellor says: "This constitutes a safe rule, easily understood, and which I consider established by weight of authority in this country is not easily shaken." This Court, in the case before referred to, 2 Florida R., 471, say, quoting from 4th Kent's Commentaries, 152-3—"Taking a note, bill or bond, with distinct security, or taking the distinct security by itself, either in the shape of real personal property from the vendee, or taking the responsibility of the third person, is evidence that the seller did not repose on the lien, but upon independent security; and it discharges the lien. 71
and taking deposit of stock discharges the lien."

If, therefore, we were to consider that, by the assignment of Williams' note to Bellamy, he became tacitly invested with the implied lien, which Roberts, the original vendor, had upon the lands sold by him to Williams, the vendee, yet it would be no stronger in his hands, than in the hands of Roberts; and we have seen that the taking a distinct, seperate security discharges the lien. And there was no express agreement originally to transfer the lien to Bellamy, nor yet, any agreement when Bellamy took the separate security, that he should either have or retain any equitable lien on the lands.

Nor will the complainant's case be better, by considering that Roberts held the legal title, to secure the payment of the purchase money; for if so, then Bellamy, as assignee, to have that lien, ought to have had the title conveyed to himself; for equity will not force it out of the vendor, (the purchase money being due,) for less than the sum it secured. But we have seen when that was offered him, he refused it; and he shows, both by his bill and his statement at the time the deed was tendered him, that he did not consider the lands a sufficient security for the amount of Williams' note; for he says in the bill $2,000 are as much as they are worth, and at the tender he says that they were not worth $4,000; and yet at that time the note, with its interest, was worth near $5,000. He, Bellamy, has shown by his bill, that he took a distinct, seperate, substantive security from Roberts for the amount of the judment which he had obtained against him in Alabama, on his, Roberts', endorsement of said note, for its full amount, with the interest then due; and unless there had been (which is not alleged) a distinct agreement he should keep that note as collateral security, the property of it was no longer in him, and Roberts, the endorser, was entitled to the possession, and it ought to have been restored to him. There is also reason to suppose that Bellamy himself either never thought of, or did not rely on the vendor's lien, until a short period before he filed his bill in this case; for Roberts' agreement to convey to Williams was never recorded until the 19th day of June, 1844, and then by the request of Bellamy's counsel, and without proof of its execution.

The opinion of the Court is, that the demurrer of the defendant. William J. Woods, to the bill of complaint filed in this cause, is well taken, that the bill on its face sets up no right, title, or interest in 72
equity, or an equitable lien to the land in controversy, in favor of the complainant and appellee, and that the judgment and decree rendered therein, as against the defendant, William J. Woods, is erroneous:

It is therefore, considered, ordered, adjudged and decreed, that the decre of the Circuit Court, rendered on the 8th of November, 1849, and entered of record on the 23d day of November, in the year last aforesaid, be, and the same is hereby, reversed, annulled and set aside, in all things therein contained; and it is further ordered and decreed, that the said bill, so far as the same relates to the defendant, William J. Woods, be dismissed, and that he go thereof without delay, and that he recover his costs, &c.

Per Curiam.

OSCAR FILLYAU, AND ADNA, HIS WIFE, APPELLANTS, VS. HENRY LAVERTY, APPELLEE.

When a bill is filed by a creditor of a partnership against the representatives of a deceased partner, the surviving partned being interested in taking an account, should be made a party.

In equity, partnership debts are joint and several, and the creditors of a partnership may proceed at law against a surviving partner; and in equity, against the estate of the deceased partner, whether the survivor is insolvent, or not; and they may, at their option, do the one or the other.

The statute which bars all debts and demands of whatsoever nature against the estate of any testator or intestate, unless the same shall be exhibited within two years to the executor or administrator, provided the executor or administrator gives the notice required by said statute, prescribes a rule which must be rigidly observed. It is, in effect, a statute of limitations passed for the security of the personal representative—for the benefit of the heirs and distributees, and intended to effect a speedy and final settlement of estates. This statute requiring the exhibition by a creditor of his debt or demand within two years from the time of the granting of letters of testamentary or of administration, is as obligatory in a Court of Chancery as at law.

There should be actual presentation of the claim within the time prescribed, or something done equivalent to it; but the presentation need not be in any particular form. The object is to give notice of the existence of the demand. The bringing of a suit would be sufficient.

Debts not due, as well as those due, are required to be presented.

73 Appeal from decree of the Circuit Court of the County of Gadsden, pronounced by the Hon. THOMAS BALTZELL, Judge of the Middle Circuit, at the Fall Term, 1849.

Henry Laverty, who was complainant in the Court below, on the 3d day of June, 1844, filed his bill against Banks Meacham, administrator, and Oscar Fillyau and Adna his wife, heirs and distributees of William D. Harrison, deceased, to recover of his estate the amount of a partnership debt of the said Harrison and one Wilder, who were in the life-time of Harrison, partners in trade. This partnership debt was evidenced by the following note, viz:

"New York, March 23, 1836.

"$1,975 22-100. Twelve months after date, we promise to pay to the order of Laverty, Cutter & Co., nineteen hundred and seventy-five twenty-two one-hundredths dollars, Value received.

(Signed.) HARRISON & WILDER."

This note was endorsed by Laverty, Cutter & Co., the payees, to the appellee.

Wilder, the surviving partner of the firm of Harrison & Wilder, was sued at law on the note, and judgment was recovered against him on the 8th day of December, 1840, for the sum of $2,487 89-100, in the Superior Court of Franklin County.

The bill represents that writs of execution were sued out by complainant against William H. Wilder, to obtain satisfaction for said judgment, but that neither complainant nor the ministerial officers of said Court had been able to find any effects of the said Wilder, or of the said firm of Harrison & Wilder, in the hands of the said Wilder, or any other person, with which to satisfy said judgment in whole or in part, and that said writs had been returned "No property found."

On the 14th of September, 1844, the defendant, Meacham, filed his plea of discharge from his said administration, which was, on the 19th July, 1847, after argument, overruled, and the case ordered to stand over for his answer, which was subsequently filed.

Fillyau and wife filed their answer on the 13th of September, 1844.

This cause was argued in July, and the decree was pronounced at the last Fall Term of Gadsden Circuit Court, ordering the payment by the defendants, Fillyau and wife, of the appellee's demand, and dismissing the bill as to defendant, Meacham.

74 The answer of Meacham insists that Wm. H. Wilder, named in complainant's bill as survivor of the firm of Harrison & Wilder, should have been made a defendant, and the answers of all the defendants admit the existence of said firm at the time of the date of the note. March the 23d, 1836, and that Harrison died in May of the same year. But they set up as a defence to the claim of complainants against the estate of Harrison, that letters of administration were granted to defendant, Meacham, on the 16th day of July, 1836, and that he did, in accordance with the requisitions of the statute in such case made and provided, entitled an "Act concerning wills, letters testamentary, letters of administration, and the duties of executors, administrators, &c.," by advertisement, dated July 23d, 1836, published in a newspaper, give notice to all persons having any claims against the estate of Wiliam D. Harrison, deceased, to present the same within the time prescribed by law, or that the recovery of the same would be forever barred; that this notice was duly published for the time required by law, and that no claim or demand was ever presented to the administrator by complainant, or by the said Laverty, Cutter & Co., or by any other person for them, or either of them, against the estate of said Harrison, at any time within two years (the time required by law) from the taking out of said letters of administration. Several other matters of defence were also set up and relied upon by defendants in the Court below; but those already stated are believed to be the points presented for the consideration and judgment of this Court.

Thompson, for appellant:

As to the first point, William H. Wilder, the surviving partner, is a necessary party, who should have been joined as interested in taking the account, although no decree could be had against him. It is believed there is no conflict of authority on this point. It is in conformity with the general rule of equity pleading, that all persons who are or may be interested should be joined. Story on Partnership, 515. Story Eq. Pl., 157. Wilkinson vs. Henderson, 1 Mylne & K., 582, 588. Holland vs. Prior, ibid, 237, 340. Devaynes vs. Noble, 1 Meri., 539, 572. Pierson vs. Robertson, 3 Swanst., 139. Nelson vs. Hill, 5 How. S. C. R., 127.

But the other and most important point we present, is, the statute

of non-claim for two years provided by the 39th section of the act of 75
November 20, 1828.

The provisoin os, "that all debts and demands of whatsoever nature against the estate of any testator or intestate which shall not be exhibited within the said two years shall forever afterwards be barred." The only saving is as to *femes covert,* infants, persons of unsound mind, or without the United States, in the military or naval service thereof during war. Thomp. Dig., 206.

The condition on which the bar is made to depend is, that the Executor or Administrator give notice in some Gazette for four weeks, that the bar will be enforced unless the claim or demand be exhibited within the period of two years limited. Idem.

The notice in this case was published in strict conformity with the statute.

Administration was granted to the defendant, Meacham, on the 16th July, 1836, and the first publication of the notice to creditors was on the 23d July, 1836.

The first notice of the present claim is alleged by the complainant in his bill to have been made after the return of *nulla bona* on the *fieri facias* issued against Wilder upon the judgment in Franklin County, which appears from the record filed to have been in December, 1841; then he charges, that "he made known to defendant, Meacham, the existence of the claim and demanded payment."

If this had been done immediately upon the return of the *fieri facias,* it would have been more than five years after the grant of administration, and therefore, too late; but we contend that there was no legal notice of the claim until the 3d June, 1844, when the present bill was filed.

The statute requires the "exhibition" of the debt or demand, and it is conceived means something more than saying to an administrator: "I have a claim against the estate you represent, and demand payment."

To *exhibit,* in ordinary parlance, means to *produce, show offer to view;* and I am not aware of any technical signification different from this. It would, therefore, seem, that something more than the mere assertion of a claim or demand is requisite; the evidence of the debt or demand, or some specific statement of the character, origin, and extent of the claimant's demand, should have been presented to the administrator. This, we say, there is no evidence of, save by 76
the filing of this bill nearly eight years after the grant of administration

The letter of Meacham produced in evidence by the complainant, in answer to the alleged demand, shews, that the demand so called, contained no notice of the character of the claim made upon him.

It being conceded that the notice to creditors was duly given, and the complainant not alleging a presentment or exhibtion of the demand within the time limited, and not bringing himself within the protection of the saving clause, the question is, can this claim or demand be now enforced in this suit?

Our statute acts upon *"all debts and demands,"* against the estate of the deceased; more comprehensive terms, it is conceived, could not well be employed to express the intention of the Legislature.

"Debt" is a word of known signification, and is used in law to express a sum of money due upon any contract, express or implied—*'Demand"* is a term still more comprehensive, and embraces a right of action beyond those which can be properly called debts. *In re* Denny vs. Manhattan Co., 2 Hill N. Y., 228.

As a release of *suits* is more large than *quarrels* or *actions;* so, a release of *demands* is more large and beneficial than either of them. 2 Jacob Law Dict., 238.

But the class of debts and demands intended to be covered by the statute is still further described by the addition of the phrase *"of whatsoever nature"*—words of still more comprehensive import; as if the Legislature intended, as no doubt they did, to exclude the idea that there did, or should exist, any debts or demands which should form exceptions to the general rule laid down.

This section of the act of 1828, has never been directly before this Court for adjudication, but in the case of Gilchrist, Judge, &c., vs. Fillyau, it was incidently considered in the determination of the question of the right of a bond creditor to sue the heir at law, and with which it seemed to be entirely connected, and to that case we refer for a portion of our argument. 2 Florida Rep., 98.

The statute is considered by this Court to be one of *repose,* and to be as equally available to the heir or distributee, to the executor or administrator. And in this view, the decision is in accordance with the decisions of all the State Courts in which similar statutes have been adopted, and to which reference will hereafter be made.

77 This view, in our opinion, is fortified by reference to the 38th section of the act of November 20th, 1828, which immediately precedes, and seems to be intimately connected with, the one under discussion.

The 38th section allows the executor or administrator the period of six months within which to arrange the trust fund committed to his charge, and to ascertain the claims upon it, without let or hindrance from legatee or distributee. After that time he may be *compelled* to pay legacies and make distribution of the estate, provided the legatees or distributees shall give bond and security to refund a due portion of any debt or demand which may afterwards appear against the estate, and all costs which may be awarded on the same: *Provided, that such debt or demand appear within two years from the grant of letters.*

Now, suppose the estate distributed immediately after the lapse of six months, and the distributees had given bonds to refund according to the requisition of the statute, and no debt or demand should be exhibited until after the two years had elapsed—could any recovery be had upon the bond according to the provision of the 38th section, unless the creditor should bring himself within some one of the clauses of the saving?

Clearly not, for the undertaking of the distributee was to pay a due proportion only of such debts or demands as might be exhibited within the two years, and none were so exhibited. So, it would seem, if the legatee or distributee is unwilling or unable to give the bond and security provided for, he may leave his legacy or distributive share in the hands of the executor till the period of limitation elapses, and then demand and receive it—for all claims not then exhibited, are barred by the statute.

From this, it would appear, that the protection of those entitled to the estate as legatees or distributees is one of the principal objects of the statute; and it also serves to make the creditor vigilant, and by early exhibition and prosecution of his claim insure a faithful and diligent action of the representative. *Vigilantibus non dormientibus, leges subveniunt.*

It was argued for the complainant in the Circuit Court, that the statute did not include a debt or demand of the character of that sued upon here, because, as it was alleged, the claim was a mere equitable one, and did not arise, or accrue, until after the surviving part-
78 ner had been pursued at law, and until after the expiration of the limitation of two years.

To this we reply: 1. We contend, that the right of suit or action, as well as claim, accrued on the maturity of the note against the estate of William D. Harrison, deceased.

We hold it to be the law, settled by weight of authority, that a partnership debt is, in equity, joint and several; and that on the death of one partner, his executors or administrators may be sued without resorting to the survivor, and without the allegation of his insolvency. Collyer on Part., (new ed.,) 526, Book 3, Ch. 3, Sec. 4, § 576. Story on Part., 513, 514, 515. Bissett on part., 150, 151. 3 Kent. Comm., (4th ed.,) 65. Braithwaite vs. Britain, 1 Keen R., 206. Thorp vs. Jackson, 2 You. and Coll., 553. Nelson vs. Hill, 5 Hon. S. C. Rep., 127.

We admit there are American cases which seem to support the views of the counsel opposed to us, and which influenced the Judge below in his decision; but it will be seen that a majority of these cases were decided upon what was then understood to be the doctrine of the English Courts of Equity. And when we advert to the fact that the establishment of the right of a creditor to resort to the estate of a deceased partner is one of, comparatively, modern date, we may expect contrariety of opinion during the progress of formation, and until finally settled.

An examination of the English cases will show some diversity of opinion both as to the principle and the reason upon which it was placed.

The first case is that of Lane vs. Williams, decided in Trin. T., 1693, and we presume from the date, by Ld. Keeper Somers. In this case the Court declared the joint debt to be a charge, in equity against both partners and their separate estates; nothing is said about the *necessity* of the surviving partner being insolvent, although it appears that he was so. 2 Vern. R., 292.

The same case is reported as having been decided by the Ld. Commrs. Rawlinson and Hutchins, in Mich. T., 1692; and from Mr. Raithby's note it appears that the executor of the deceased partner had taken a bond of idemnity from the survivor against all demands arising from the partnership, and which seems from the decree to have influenced the decision of the Court. 2 Vernon R., 277.

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The next case is that of Heath vs. Percival, decided in 1720 by 79
Ld. Cr. Macclesfield, where, although the surviving partner was insolvent, that circumstance did not seen to enter into the reason of the Court for the judgment that the debt should be paid out of the estate of the deceased partner. 1 Peere., Willm., 682.

In Bishop vs. Church, decided by Ld. Hardwick in 1751, the survivor had never been sued at all, although the creditor had been desired to sue him and get in his money. The Court held he was not bound to do so, although in this case the learned Chancellor held that the right to resort to the estate of the deceased was an equity which may be rebutted by circumstances, such as laches or collision 2 Vesey Sr., 100, 371.

In Hoare vs. Contencin, which was decided by Lord Thurlow in 1779; he *doubted* the equitable right to proceed against the property of a deceased partner. 1 Bro. Ch. Ca., 27.

In Ex parte Kendall, decided in 1811, Lord Eldon expresses his surprise that where parties think proper to enter into a joint, instead of a joint and several contract, that Courts of Equity have not left that to its fate as a joint contract, and says it is an equity, subject, however, to many considerations. 17 Vesey, Jr., 518.

But in the case of Devaynes vs. Noble, the Master of the Rolls, (Sir Wm. Grant,) reviews all the preceding cases, and deduces the doctrine from them, that in equity, all joint contracts are joint and several. And he scouts the idea that the previous pursuit by all possible diligence to obtain payment from the survivors, was the condition upon which a resort to the estate of the deceased partner was allowed—and this for obvious reasons stated by him. Decided in 1816. 1 Merivale R., 562, 569.

This case was affirmed on appeal by Lord Brougham in 1831, who takes a distinction between mercantile and other joint contracts. 13 Eng. Chan. R., 114, 115.

The case of Devaynes and Noble was afterwards in 1833 fully recognized and acted upon in Wilkinson vs. Henderson, by Sir John Leach, M. R. In this case the defence was, that there had been no effort to recover the sum due from the surviving partner—the Court held, he was not compelled to pursue him in the first instance, but might at once resort to the estate of the deceased. 7 Eng. Ch'y R., 176, 177.

This case was followed by that of Thorp vs. Jackson, decided by 80
the very able bench of the Court of Exchequer, sitting in equity, M. Baron Alderson pronouncing the judgment of the Court, fully sustaining the previous cases of Devaynes vs. Noble, and Wilkinson vs. Henderson. 2 Young & Collyer R., 553.

The late Justice Story, in the case of Van Reimsdyk vs. Kane, 1 Gallison R., 371, which was decided in 1812, held that such a suit must expressly charge the insolvency of the survivor, but we find his more recent opinion in his Comm. on the Law of Partnership. He says very decidedly, that the doctrine that the joint creditor had no claim in equity, except when the survivor is insolvent, has been overturned; and is now held that partnership debts are joint and several in equity, and that creditors may at once proceed against the representatives of the deceased partner, whether the survivors are, or are not, solvent. Story Comm. on Part, 514.

This doctrine has been fully recognized and acted upon in the Supreme Court of the United States, in the case of Nelson et al. vs. Hill. 5 How. S. C. Reps., 127.

Some of the cases decided in New York determine that a creditor may come into equity upon the insolvency of the survivor, but do not hold that the insolvency is essential. Jenkins vs. Degroot, 1 Caines' Cases in Error, 122. Hammersley vs. Lambert, 2 John. Ch. R. 508.

In the late case of Laurence vs. The Leake Orphan House, decided by the Court of Errors of that State it is held that the insolvency is essential, but it will be seen, upon examination, that it was a case of fraud of peculiar character, and it was necessary so to determine, to avoid the general act of limitations. The Court held it an equitable right, and which would only be barred by the statute of limitations, as to equitable rights of ten years. The decision professes to be based upon the earlier English cases, but if we are not mistaken as to the effect of those decisions, the learned Court in New York certainly was. 2 Denio R., 577.

It may be as well to remark here, that there is no statute in New York similar to our statute of non-claim.

In the discussion of the case at bar before the Court below, this statute (39th section act of November 20, 1828,) so shocked the sense of propriety of the learned judge, that he declared his very great indisposition to give any effect to it, if it could be avoided.

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81 His honor compared it with the statute of Missouri, from which he was of the opinion it had been copied, with some alterations; and which alterations, by shortening the period for exhibitions of claims, had disturbed the harmony of the general system of limitations, and had deviated from the correct policy of the law in this particular, and ought not to have been passed.

Entertaining these views, it is not surprising that the learned judge below adopted the decision of the Supreme Court of Connecticut, in the case of Pendleton vs. Phelps, a note of which in the Digest fell under the observation of the judge in the course of his examination, as decisive of the present controversy. This case from the note cited, seems to have been decided upon what was understood to be the English decisions on the subject of the liability of a deceased partner's estate, as affected by the Connecticut statute of non-claim. 4 Day's R., 481.

It is most respectfully urged, that it cannot and ought not to be considered as authoritative precedent in our Courts, and under our statutes.

2dly. We insist—That if the right of action did not accrue until after the lapse of the two years limited, yet the liability or cause of action did exist before the intestate's death. It was *debitum in praesenti, solvendum in futuro.*

Our statute is broad enough to cover it, regarding it as a debt or demand, due presently, or in future—absolute, or contingent and conditional. It includes *al debts and demands of whatsoever nature.*

Under the Alabama statute of non-claim, it was held by the Supreme Court of that State, that there was no difference between an absolute and conditional liability, as to the necessity of a presentment to the executor, to prevent the operation of the statute of non-claim. King vs. Moseley, 5 Ala. Reps., 610. And to the same point is the decision of the Supreme Court of Connecticut, under the statute of non-claim of that State. Paine vs. Smith, 2 Root, 142.

3dly. We insist—That if the counsel for the appellee are correct in their position, that the cause of action did not accrue, as against the estate of William D. Harrison, until after pursuit of the survivor at law to insolvency, it then results, as a principle of equity, that the creditor should pursue the survivor with all possible diligence, and if there be any laches in this respect, the creditor should bear the bur-
82 den of the loss consequent upon it. The creditor should commence his suit immediately upon the accruing of the right of action, and should, with good faith and diligence, pursue it against the survivor.

We refer here to the record exhibited by complainant with his bill, and show the negligence of complainant in pursuing his remedy at law against the survivor.

But we do not in any wise admit by this position, that we have any want of faith in our other points.

Similar statutes having been passed by several of the States of the Union, it is proposed to refer to them, and the adjudication of the Courts respectively, not as authoritative precedents, but in the hope that the view taken by the Courts of those States in the exposition and effect given to these laws, may afford some light to this Court in the interpretation and application of our own statute. Massachusetts, New Hampshire, Connecticut, North Carolina, Missouri and Alabama, have all provided statutes of *non-claim*, as they are termed; and the judiciaries of those States have ever held them to be statutes of *repose*, designed to enforce a speedy settlement of the estates of deceased persons, and to quiet the possession of the residum by the heirs and distributees. Angell on Lim., (2d Ed.,) 167.

The statute of *Massachusetts*, provides that no executor or administrator shall be held to answer any suit, unless commenced within four years after undertaking the trust. Under this statute, it has been held that the administrator cannot waive the *bar* by a new promise, and so bind the estate. Brown vs. Anderson, 13 Mass. R., 201. Thayer vs. Hollis, 3 Met. R., 369. Emerson vs. Thompson, 16 Mass., 429.

So, a license to sell real estate to pay a debt, barred by this statute, will not be granted to the administrator. Scott vs. Hancock, 13 Mass. R., 162. Ex parte Allen, 15 Mass. R., 57. Heath vs. Wills, 5 Pick. R., 140.

So, infancy of claimant or creditor will not save the bar. Hall vs. Bumstead, 20 Pick. R., 2.

So, it may be pleaded in equity as well as in law. In a suit in equity brought by a surviving partner to be relieved from a promissory note given to the executor of a deceased partner, for the supposed value of the share of the deceased in the joint estate, and which was afterwards discovered to be erroneous from mistakes, and from the acts of the deceased in his life time in relation to the joint fund; 83
held, the bar was effectual. Burditt vs. Grew, 8 Pick. R., 108.

In New Hampshire, it is provided, that in case any creditor shall neglect to *exhibit* his or her demand against any estate to the executor or administrator within the term of two years next after proof of the will, or grant of administration, "such demand shall be extinguished, and the creditor totally barred from recovery of the same."

Under this statute the Courts of New Hampshire have held the statute a bar which can be waived by the administrator only at his peril; it does not bind the estate. The statute, says the Court, was intended for the benefit of all interested in the estate of deceased persons. Gookin vs. Sanborn, 3 N. H. Rep., 491. Hodgdon vs. White, 11 N. H. Rep., 208.

Upon the subject of exhibition of demand, and when actual presentation of the claim, or its evidence will be waived—see Mathes vs. Jackson, 7 N. H. Rep., 260.

In Connecticut, the Court of Probate is authorized to fix a time for presentment of claims against the estate of a deceased person, not less than six, nor more than eighteen months. And if claim be presented and disallowed, suit must be brought within six months after notice of disallowance, or it will be barred. Rev. Stat. of Conn., 354.

It has been held that this statute is a *positive bar*, not removable like other statutes of limitation by a new promise, or a recognition of a subsisting debt. The object of the Legislature was to compel early settlement of estates. Spalding vs. Butts, 6 Conn. R., 28.

And it has been held also, that there is no difference between a *conditional* and *absolute liability* as to the necessity for presentment to the executor to prevent the operation of the statute of non-claim. Painter vs. Smith, 2 Root R., 142.

Opposed to the case last cited is that of Pendleton vs. Phelps before mentioned, which we think is not entitled to the importance claimed for it in the Court below.

In Alabama, the provision of the statute is, that all claims shall be presented to the executor within eighteen months after the same shall have accrued, or within eighteen months after the grant of letters testamentary, or of administration, or they will be forever barred; with a saving in favor of infants, *femes coverts*, persons insane, or *non compotes*, and to debts contracted out of the State, and to heirs 84
and legatees claiming as such. Clay's Digest, 195, Sec. 17.

We have collected the following notes of decisions of the Supreme Court of Alabama upon this statute:

As to presentation.—A writ issued and afterwards abandoned, is not a presentation within the meaning of the statute. Bigger vs. Hutchins, 2 Stewart, 448.

So, knowledge of the existence of the claim is not sufficient—nothing short of actual presentation will satisfy the statute. Jones vs. Lightfoot, 10 Ala. R., 24.

As to character of claim.—Held to include judgments rendered in life time of deceased. Ready vs. Thompson, 4 Stew. & Port, 52.

The statute runs from "the time the claim has accrued," not from the time the cause of action has accrued. It has never been its construction that a claim which does not become one within eighteen months after the grant of letters shall not be presented within that time. Such a construction would go far to defeat the beneficial purposes for which it was intended. King & Barnes vs. Moseley, 5 Ala. R., 610. Jones vs. Lightfoot, 10 Ala. R., 26.

As to who may take advantage of it.—A creditor or any other person interested in the distribution, has an equal right with the executor to insist on the plea. McBroom vs. The Governor, 6 Porter 32. Jones vs. Lightfoot, 10 Ala., 24. Thrash vs. Sumwalt, 5 Ala., 20.

The statute of North Carolina on this subject was enacted in 1789—for its terms and an exposition of it, see the opinion of Gaston, Judge, in Goodman vs. Smith. 4 Dev. Law R., 454.

The statute of Missouri, from which it is supposed by the learned judge in the Court below that our statute was copied, will be found in Geyer's Digest, 51.

If the surmise be correct that our statute had its origin from this act, upon a comparison of the two statutes, it will be evident that the Legislature of Florida was not satisfied with the provisions of the Missouri act, and were determined to advance the remedy which it proposed for the mischief of the common law, and therefore made important alterations.

1. To the terms, debts and demands, the phrase is added, "of *whatsoever nature*," so as to include every species of claim.

2. It abridges the limitation from five to two years.

3. It excludes from the saving, all those without the limits of the United States, unless they be in the military or naval service during war.

Under this statute, it has been held that a person having a claim against the estate of a decedent, and wishing to give notice to the administrator of such claim, must state in his notice its nature, and whether he claims in his own right, or that of his wife. This case was that of a distributee. Dorsey vs. Burns, 5 Missouri, 334.

Where *cause of action* did not accrue until atfer the limitation expired, held not within the statute. Miller vs. Woodward, 8 Missouri, 176.

We take it, there is a difference between the *accrual* of the *right of action*, and that of the *cause of action*. In the case at bar, the cause of action accrued in the life-time of Harrison.

Again: The Missouri statute does not contain the important description to the debt or demand, *"of whatsoever nature,"* which is in our statute.

The limitation of three years is not for the personal convenience of the administrator, but for the benefit of those interested in the estate, hence it cannot be waived by the administrator. Wiggins vs. Lovering, 9 Missouri, 266.

S. J. Douglas, for appellee:

It is attempted to reverse the decree of the Court below, on two grounds:

1st. It is said that Wilder, the surviving partner of the firm of Harrison & Wilder, was a necessary party.

2d. That, under the act of 20th November, 1828, the claim of Laverty should have been presented to the administrator of Harrison, within two years after administration granted.

It is answered to the first objection, that all the cases cited on the other side to sustain the position assumed, were English cases, in which proceedings were had in the first instance against the estate of the deceased partner, and it was necessary to make the survivor a party, to bind him by the decree—to ascertain his liability, and that he might be present at the taking of the account, to defend and protect the interest of the joint effects. He is supposed to have a know-
86 ledge of the transactions, and the estate of the deceased partner is entitled to the benefit of his answer. But no case it is believed can be found, where the survivor is deemed a necessary party, after his liability has been fixed by a judgment at law. No decree could be rendered against him, and he would not be allowed to contest the judgment. The case in 2 Denio, 585, is in point. Butts & Havens vs. Geming and others, 5 Paige's Ch. Rep., 154.

The most important question to be considered is, whether the heirs and distributees of Harrison's estate are discharged from the payment of the complainant's demand, by reason of the provisions of the act of the 20th November, 1828, usually known as the act of non-claim.

It will be remembered that the complainant is seeking to recover the amount of his debt from the distributees of Harrison, who are in equity trustees for this purpose, and are not entitled to the enjoyment of the estate of the ancestor, *except* the surplus of the assets, after the payment of all the debts. 2 Story's Equity Com., 498, section 1251.

The note given by the firm of Harrison & *Wilder* to complainant, is dated the 23d March, 1836, and payable twelve months from date. The death of Harrison took place some time in the month of May, 1836. In the month of November, 1838, the complainant, Laverty, instituted suit against Wilder, the surviving partner, and in December, 1841, there was a return of his execution, endorsed *"No property found."*

The complainant then filed his bill in Gadsden Superior Court, against the administrator of Harrison, and the distributees of his estate, to recover the amount of his demand.

The first point to be considered and determined is, was the complainant right, in first resorting to the surviving partner and the joint assets, for the payment of his debt, or should he have proceeded in equity against the estate of Harrison, the deceased partner, before suing Wilder, the survivor, to insolvency? Until recently this question, both in England and this country, would have met with but one response, and that is, that the surviving partner must be sued to insolvency, before the estate of the deceased partner could be called upon to discharge partnership debts. On this point, see the opinion of the Court in Pendleton vs. Phelps, 4 Day, 477. Lawrence vs. Trustees of the Leake and Watts Orphan House, 2 Denio's Rep., 87
585. Sale vs. Dishmon's Executors, 3 Leigh, 553. Jenkins vs. Degroot, 1 Caines' Cases in Error, 122. Edbert vs. Woods, &c., 3 Paige's Chancery Reports, 517. Higginson, &c. vs. Air, 1 Desau., 427. 2 Robinson's Prac., 129, and, indeed, every case decided in this country.

It seems, however, that, by recent adjudications in England, the Courts have *permitted the creditor,* at his *option, and for his benefit,* and the more speedy recovery of his debt, to unite the representative of the estate of the deceased partner in the same chancery suit with the surviving partner, and have proceeded to take an account of the partnership effects, and settle the rights of parties. In these proceedings, the Courts still continue to keep the partnership funds separate and distinct from those of the separate partners. Let it be also observed that, even in the English Courts, this right on behalf of creditors to restore to the estate of the deceased partner in the first instance, is only *permissive,* and not *compulsory,* and in every reported case it was for his *benefit;* and that the creditor may still, in the English Courts, *if he so elects,* pursue the surviving partner to insolvency, and then proceed against the estate of the deceased partner in the hands of the heir, and that he may adopt this course, without incurring the hazard of the statute of limitations, while pursuing the joint effects of the survivor. Winter vs. Innes, 4 Myl. and Craig, 111.

It will be seen from a careful examination of the decisions made by the Courts of the several States of the Union, that they have *uniformly held, without exception,* that in order to justify a creditor's filing a bill against the estate of a deceased partner, he must first follow the joint effects in the hands of the survivor, and only upon his insolvency do they allow the estate of the deceased partner to be resorted to. The question is now before this Court for the first time, and it is with it to determine whether they will adopt the recent English decisions, or follow the uniform current of decisions made in the United States. It is a matter for its consideration whether the *ultimate good* will outweigh the *hardship* in this individual case. Should the rule as established by the English Courts, be held to be more consonant with reason and the principles of equity, still it will be seen that there it is *only permissive* to the creditor for his benefit, and not *compulsory to his injury,* and that being permitted to elect 88
between remedies, it has never been held to defeat his debt under the stringent statute of limitations. It is hoped that the very first application of the English rule in this country will not be to defeat the collection of a just debt by the creditor.

The case cited on the other side, of Nelson et al., vs. Hill et al., 5 Howard S. C. Rep., 127, was a bill against the survivors of *one* of the firms, and the estate of the deceased partners, without first having resorted to the legal remedy against the survivor. In that case the Circuit Court sustained a demurrer to the bill, on the ground that the suit in the first instance should have been at law and against the survivor. The Supreme Court of the United States reversed the decision, and decided that the creditor has his *option.* It will be seen that in this case, the *only* one decided in this country, the decision was to advance the rights of the creditor. There were other circumstances and facts in this case that made it one peculiarly proper to resort to a Court of Equity in the first instance. If it be true, as it doubtless is, that a suit against the surviving partner will keep alive the claim against the estate of the deceased partner, so as to defeat the general statute of limitations, will it not also apply to the act of non-claim, which it is conceded is a special statute of limitations? It is said in the books that the equities between the partners, of which the creditors may have the benefit, will defeat the statute of limitations. Will not the same equities apply to the act of non-claim? See the case of Winter vs. Innes, 4 Myl. & Craig, 111.

I shall next endeavor to show that whether the Court shall be of the opinion that the recent English decisions are the most reasonable, and are to be adopted in this State; or whether they shall adhere to the decisions of the Courts of this country; still the claim of Laverty against the estate of Harrison, was not of that character and description of *debt and demand,* which, by our statute, should have been exhibited to the personal representative.

It would seem from the general law on the subject of the administration of estates, that this act of non-claim was not so much designed as a new act of limitations, as it was intended for one of repose to the personal representative. It was desirable to appoint by law some time beyond which the personal representative, and those who signed his official bond, should not be liable to suit by creditors. The terms

used in the act of the 20th November, 1828, showed most conclusively, that this two year's act was not designed so much to *release the estate of* the deceased, as it was to release the representative from suit. It will be seen on examination, that this act differs materially in its provision from similar acts in the other States, and more nearly resembles that of Missouri. In other States, their acts of non-claim apply only to creditors, while our's include not only creditors, but legatees and *persons entitled to distribution.* Now persons entitled to distribution are those entitled to the estate of the deceased, after the payment of his debts. Does this act design to *protect* the estate from those entitled to it? Why protect it if they are not to enjoy the benefit of the protection? Why protect their rights in order to defeat them? Is it the object of the act to create a fund at the expense of creditors, to the enjoyment of which those entitled to it *may* never succeed? Should those entitled to distribution not appear and claim within the two years, will the representative succeed to the estate, or will it escheat to the Commonwealth? Should it be distributed to some of those entitled to distribution, will others, who are equally the objects of the ancestor's love and care but who did not claim within the two years, be barred and excluded from its benefits, or rather would not a Court of Equity cause those who had received it to refund a just proportion to their co-distributees? It would seem from these views that the object of the act of 20th November, 1828, was especially intended for the benefit and protection of the personal representative, and not designed to protect the estate by defeating such debts and demands as could not properly be exhibited to the representative, and paid by him. When a claim is of such a nature that it cannot be adjusted and settled by the administrator, then it is not such a debt and demand as the act designed should be exhibited within the two years, or be forever barred of recovery. Vide 6 Connecticut Rep., 258.

It is contended for the appellants that the act of the 20th November, 1828, is a statute of limitations. It is granted that it is a statute *limiting* the time in which the personal representative may be sued by the creditors of the deceased, but it is denied that it is a statute of limitations for the *estate itself*, against the claims of distributees, who in fact are the persons entitled to its enjoyment; and, if not a statute of limitations as to them, with what propriety can it
90 oe said to extend to *creditors*, seeing they are by the express terms of the statute placed on the same footing?

All statutes of limitations are looked upon with jealousy and distrust when invoked to defeat a meritorious claim, and the Courts will never extend their provisions by *implication and construction*, but require parties relying on them to bring themselves most clearly within the benefit of their provisions; and, indeed, where the Court can see that a statute of limitations will defeat a just demand, it will usually require a party to come within its very letter. No *latitude of construction* will be adopted in aid of such a statute. In the case now under consideration, the judgment and the return of insolvency against Wilder, the surviving partner, is the foundation of the bill. *No debt and demand* could properly be said to exist against the estate of Harrison, the deceased partner, until the survivor was sued to insolvency. Previous to that time, Laverty was the creditor of Wilder, the surviving partner, who, if he paid the debt, became, to that extent, a creditor of Harrison's estate for his *pro rata* proportion, and might maintain his action for contribution. West vs. Skip. 1 Vesey, Sr., 251.

This, at least, is the rule of proceedings as laid down by the Courts of this country without exception, and if a different one exists in England, it was only adopted, after much hesitation, and repeated conflicting decisions, and this Court will hardly, I presume, require a party to nicely balance the weight of authority, in order to escape the consequences of the statute of limitations. Courts have uniformly held that it was much better to adhere to decisions once made, even if erroneous, than by reversing individual cases to unsettle the law which had been long acquiesced in. In Devaynes vs. Noble, a case much relied upon at bar, Lord Chancellor Brougham says, "It is not upon slight grounds, certainly, that any Court, either of law or of equity, ought to loosen and unsettle that which has stood for so long a period as nineteen years. If it be true that even a prevailing error—what has been called a common or universal error—may be said to make the law, this at least may be allowed to be a sound foundation of the doctrine I am referring to, namely, that, unless a great and manifest deviation from principle shall have been committed, it may create much further mischief to reverse an individual case by way of correcting a slight error, *if that error has been acted upon for a long series of years*, than to leave it as it stands; more 91
especially, if the opinion of lawyers and the decisions of Judges have been ruled by it, and if, upon the analogies of that case, the same principle has been recognized and adopted in other cases, connected with and relating to it." Devaynes vs. Noble, 2 Rus. & Mylne, 495. 13 Cond. Eng. Ch. Rep., 144. It is believed that the language held by the Lord Chancellor in this case, is entirely applicable to the case before the Court.

The next question for consideration is, the nature and character of Laverty's demand against the estate of Harrison, the deceased partner. It is contended on behalf of the complainant, that in the case at bar, the debt and demand against the estate of Harrison, was *uncertain and contingent*, depending on the solvency of Wilder, the surviving partner, for had the surviving partner proved solvent, there never could have arisen any *debt or demand* against the estate of Harrison in favor of Laverty. In England, the true and legal test of insolvency is, 1st, By the party becoming a bankrupt, and 2nd, By a judgment and execution, and a return of *nulla bona*. See 2 Robinson's Practice, 130. Up to the time of the return of the execution against Wilder, Laverty had no debt or demand against the estate of Harrison. His *debt and demand* was against the surviving partner and the partnership effects, and not until he proved insolvent, did the right of action accrue to him against Harrison's estate. At that *instant of time, his contingent claim* against the estate of Harrison was converted into a debt and demand. His right to *exhibit* his claim and to *demand* payment from Harrison's personal representative, then for the first time *sprung into existence*. As against Harrison's estate it was *suspended and in abeyance* until Wilder, the survivor, proved insolvent—a mere *contingency* which might never happen. It remained *dormant* against the estate of Harrison until this period of time, and until the happening of the contingency; and then and not until then, could the statute of non-claim begin to run. Vide Backus vs. Cleveland, Kirby, 36. Adams vs. same, do. 38 6 Connecticut Rep., 258. Pendleton vs. Phelps, 4 Day, 477. Nëil vs. Cunningham, 2 Porter, 171. 10 Alabama Rep., 24. 2 Denio's Rep., 585.

If, in the case under consideration, Wilder, the survivor, had been solvent, the firm being insolvent, and from his separate and private fortune had satisfied and discharged the demand of Laverty against 92
the partnership, could he not have maintained his action against Harrison's representative for contribution; and would not the defence of the act of non-claim have been well answered, by replying that he had no debt or demand against Harrison's estate until satisfaction to Laverty, and until after the two years had expired? In a case of this nature, the surviving partner, with full knowledge of the partnership effects and its liabilities, might well know that ultimately he would have to resort to the estate of the deceased partner for contribution; and yet it would seem he might, notwithstanding the act of two years, maintain his action for this purpose. The cases stated in the books show most clearly that it is not every *debt and demand* that may *ultimately* come against an estate, that must be exhibited and made known to the personal representative within the two years, or be "forever barred of recovery." Take the common one of a surety on the bond of a guardian, or other fiduciary. A. as surety for B, makes good by suit or otherwise the deficiency of his principal. B, has been dead for many years before this deficiency is ascertained, and his estate has been distributed to those in interest. It cannot be that B.'s estate is discharged from the claim of the surety. True it is that B.'s personal representative is discharged from suit, but the estate in the hands of distributees is still liable.

This will serve to illustrate the position before taken, that the statute of two years was for the benefit and repose of the personal representative, and was not intended to discharge the estate in the hands of heirs and distributees from the payment of such debts of the ancestor as could not be exhibited to the representative. One of the most cherished principles upon which courts of equity act is, "that a man shall be *just before he is generous,*" and they will exercise all power in their hands to compel payment of debts, before enriching heirs and distributees.

I have presented the various questions involved in this case, as if the personal representative of Harrison had complied with the act of 20th November, 1828, and had given the notice required by its provisions. I shall now proceed to show that those who are seeking to avoid the payment of this claim, and are most *clamorous for rigid and stringent technicalities*, have not so complied with the statute as to entitle themselves to the benefits of its provisions. It will be seen

93 on reference to the act, Thomp. Dig., 206, that it contemplates two notices to be published by the administrator. The one, *required* by the 2d section, is to be published for the space of eight weeks, calling upon all persons having claims against the estate of the deceased to present them without delay to the executor or administrator. The other, under the 6th section of the act, leaves it *optional* with the representative, but provides, *if* the representative *shall make* the publication for the space of four weeks, directed to *creditors, legatees and persons entitled to distribution*, then their claims and demands will be barred at the expiration of two years, unless exhibited within the same.

The only notice given by the representative of Harrison is a *general one*, to be found on the twentieth page of the printed record, which, he says, in his answer, was published for the space of four weeks, *and longer*. On examination, it will be found that this notice cannot be held to be a compliance with the 6th section of the act of 20th November, 1828; it is manifest from its terms that it was not intended to be. It bears on its face the evidence that it was designed as a *general notice* to persons having claims against the estate of Harrison to make them known to the representative, preparatory to so arranging the affairs of the estate that it might be speedily settled. It is most apparent that the 6th section of the act was not in the mind of the representative at the time of giving the notice. It is much more like the notice *required* by the 2d section of the act, than that required by the 6th section. The first notice is *obligatory* on the representative, and may be general—while that under the 6th section is *optional* with the representative, and must be special. It wants the most essential requisite of a notice under the 6th section. It is not *directed to the persons* that the act declares shall be notified, and *legatees and persons entitled to distribution*, are wholly omitted to be notified. It may be observed that this act is but one of many for the administration of estates in this State, and that, in order to give it a just construction, regard should be had to the entire legislation on this subject. The law requires that, in the event of the insolvency of an estate, a *pro rata* distribution shall be made among the creditors. Now, examine the notice given by Meacham, the administrator of Harrison, and it is most obvious that it was for the purpose of enabling him to ascertain the *condition* of the estate to meet this
94 requirement of law. True it is, that all persons are warned that their claims will be barred of recovery unless presented within two years; yet it is apparent, from the character and terms of the notice, that the representative had not in view the 6th section of the act, but his notice was designed to *quicken* debtors in paying, and creditors in presenting their debts, that the *condition* of the estate might be ascertained.

In conclusion, it may be observed that, if all the benefit claimed for the estate from the act of November, 20th, 1828, was conceded, still, this being purely an equitable demand, the statute does not apply. The right to pursue the estate of the deceased partner arises from the equities between the parties. The estate is a trust fund in the hands of the heirs and distributees for the payment of debts, and it is contended that nothing but *laches* will defeat the creditor in pursuing it in their hands, and subjecting it to the payment of the debts of the ancestor. His debt is a lien on the fund, which he can lose by his laches and neglect, and no statute of limitations will impair his rights. See Story's Eq., 498, § 1251. Hammersley vs. Lamb, 2 John. Ch. Rep., 508. Sale vs. Dishmon's Executors, 3 Leigh, 560.

In this last case, the Court say, the defendant having made no charge of *laches* in the answer, or any part of the pleadings, the question could not be examined by the appellate court. See also 2 Robinson's Practice, 11.

Archer, on the same side.

The appellants seek a reversal of the decree on two grounds:

1st. They say that Wilder, the survivor, should have been made a party.

2d. They say the claim in this case should have been presented to the administrator within two years after administration granted on Harrison's estate.

In answer to the first objection, it is sufficient to say, that the cases cited on the other side are English cases, where there had been no judgment recovered against the survivors. The only object in making the survivor a party is, that he may be present at the taking of the account of the amount due to complainant. Such account in this case was taken by the recovery at law against Wilder. The case in 5 Howard was the case of a creditors bill, where only part of the claims had been reduced to judgment against the survivor of *one* of 95 the firms. To have joined Wilder could have answered no useful purpose. The debt as to him, had been already ascertained, and no decree could be rendered against him.

Again: No such objection was taken by demurrer, or is insisted upon in the answer of the appellants. The objection comes too late.

As to the second objection.—The question is, how far the statutes of this State have cut off the right of a creditor to follow in equity the estate of a deceased debtor, as a trust in the hands of the administrator, or legatees, and distributees.

The statute of five years, it is admitted, does not apply in this case, and indeed is never applied in equity, unless there be a concurrent remedy at law. See cases cited by Hoffman, Vice Chancellor, in 2 Denio, 577.

But it is said the statute of two years, or of non-claim, amounts to a flat bar.

I say the statute of two years does not bar equities (where there is no concurrent remedy at law,) any more than the statute of five years.

The statute requires "all *debts and demands* of whatsoever nature," to be presented, &c., and also by implication from the proviso, the claims of distributees and legatees.

The terms *debts and demand*, mean, as I contend, money demands, on which an action at law may be sustained.

The term *debt* and *demand* are used in our attachment laws, and also in the statute of set-off. It is true in one of the attachment statutes, debts and demands *not due* are spoken of, but this does not prove a different construction, independent of the qualifying words *whether due or not*. But could the claim in question against Harrison's estate be the *basis of* an attachment under either of the statutes, or could it be the subject of a set-off? Certainly not.

The claim against Harrison was not a debt or demand within the meaning of either of these statutes of attachment or set-off. Why then should these identical words in the statute of non-claim, be construed to extend to Laverty's *contingent equitable* claim against Harrison's estate?

The object of the statute undoubtedly is, to effect a speedy payment of debts to creditors, and a speedy distribution to the next of kin, to terminate the office of administrator within two years, so 96 that he may be protected.

The administrator cannot be protected except by providing against two classes of persons—*creditors* and *distributees*. He is effectually protected after distribution against any suit by creditors who do not exhibit their demands within two years from the date of his administration—for, when he distributes before the two years expires, he takes a bond of indemnity to protect him against all creditors who present their demands within the *two years;* and this indemnity is as broad as his responsibility under such circumstances. And when he distributes after the two years, he is protected against all claims demanded after the *distribution*, for the distribution he may give in evidence against *subsequent* claims, under the plea of *plene administravit*. He is also protected against distributees, because although he may distribute to the wrong persons, the right persons cannot maintain a suit against him, unless they have brought their claims to the knowledge of the administrator before the two years expire, so as to enable the administrator to put the *surplus* in proper hands.

But because creditors, whose demands accrue after the two years, cannot compel the administrator to pay them, when he has previously parted with the fund; or because the right persons entitled to distribution cannot have redress against the administrator, when they did not notify him of their claim—is it to be inferred that they have no remedy in equity against the *funds or assets?*

The persons properly entitled to distribution, I take it, notwithstanding the want of notice to the administrator, and certainly the future *creditor*, could follow the fund in any hands, except those of a purchaser. 2 Story's Eq., 498, § 1251.

Now, if our statute required or authorized the administrator to take a bond from the distributees to refund for *any* future claims which might accrue, it might be inferred that all future suits were to be enforced against the administrator, (if any one could be found to take the office under such provisions,)—for the refunding bond in his hands might be construed, to be assets, and thus create a continuing and indefinite liability. But the administrator is not required or authorized to take such refunding bond, and, consequently, is not held to such continuing libility. I maintain that while the administrator, who has parted with the fund by a distribution, is protected from suits on claims accruing subsequently, the *fund* is not protected.

Fillyau and wife *vs.* Laverty.—Argument of Counsel.

97 Hence I say, that Laverty's claim is not within the operation of the statute of non-claim.

But it is said that a bill in equity might have been sustained against Harrison's administrator and Wilder immediately after the note became due, and therefore that there was such a demand as should have been presented within two years after administration granted. The note was not due until some nine months of the two years had expired, and there is no statute to meet such a case. 4 Day, 476. To argue that Laverty's claim against Harrison's estate must, under these circumstances, be presented within the two years, is to argue that he must also present any other claim accruing within that time, even within five days of the expiration of the time, and though the note be payable in New York, and it be necessary to present it *there*, in order to bind endorsers. The appellant's position in this respect cannot be correct—for a creditor is not bound to act upon the presumption that his claim will not be paid at maturity.

The more reasonable construction of our statute is, that debts and demands on which suits at law may be brought, must be presented within the two years—a period of time allowed to such creditors to come in. But that in reference to creditors whose claims accrue in such manner, or at such time, as not to allow them the full two years for presentation, there is no limitation, except such as may exist independent of the statute of non-claim. Our statute does not, like those of some of the other States, appoint a time for the presentation of *future* claims, contingent or otherwise.

But did *any right* to sue or claim, legal or equitable, accrue to Laverty, prior to the return of *nulla bona* on the execution against Wilder—or in other words, was not Laverty's claim against Harrison's estate dependent upon the result of the suit at law against Wilder?

Recent English authorities, and one American, have been cited upon the other side, to show that Laverty had a remedy in the first instance in equity against Harrison's estate, by joining Wilder, the survivor; but these cases do not show that it is *necessary* to resort to such remedy, to preserve the ulterior liability of the deceased partner's estate. Indeed, in every decision authorizing this resort to equity in the first instance, the *creditor* has been the party invoking that remedy. No decision can be found, even in England, where
98 the election of a different remedy is held to prejudice the rights of the creditor.

I understand the English decisions to amount to this, that, out of great consideration for the *creditor*, the Courts will *permit* a resort to equity in the first instance against the estate of the deceased partner, leaving his representatives to pursue the survivor; *or* will permit the creditor to pursue the survivor to recover the amount of the claim, leaving him to settle his accounts afterwards with the representatives of the deceased partner. In other words, there are two remedies—the one at law, the other in equity—and the creditor may elect either at his option, but cannot pursue both. Such certainly is the view taken by the Supreme Court in 5 Howard, cited on the other side. The Court say—the creditor "may, at his *option*, proceed at law against the surviving partner, or go in the first instance into equity against the representatives of the deceased." To harrass the survivor by a suit at law and a suit in equity at the same time, on the same cause of action, would certainly seem to be contrary to principle. Besides, the suit at law against the survivor is virtually a proceeding against the estate of both parties, for the judgment and execution bind the joint property—at least, so it is considered in England—so far as to *preserve* the ulterior equity against the estate of the deceased partner. Winter vs. Innes, 4 Myl. and Craig, 111, cited in Collyer on Part., (N. E.,) p. 542.

But in equity, as well as in cases in bankruptcy, the English Courts recognize the prior lien of joint creditors on joint assets, and separate creditors on separate assets—principles which would seem to be *inconsistent* with the equitable remedy against the deceased partner in the first instance. Gray vs. Chiswell, 9 Ves., Jr., 118.

That the English doctrine is an invasion upon correct principles, is apparent from the language of Lord Brougham, in Devaynes vs. Noble. (13 Cond. Eng. Chy. Rep., 144.) Lord Thurlow and Lord Eldon would not have recognized the rule as an original question. The latter, indeed, expressed *surprise* at its introduction, and his *ignorance* of its origin! It is apparent also that Lord Brougham had misgivings as to the correctness *upon principle* of his decision in Devaynes vs. Noble, and yet it is remarkable that in that case the *insolvency* of the survivors appeared upon the record. Lord Brougham seems to have made his decision upon the authority of *precedent*, rather than upon the authority of principle, and certainly there was 99
sufficient precedent to authorize the decision upon the *facts of that case*. But whatever may be the English rule, and its applicability to a case like this, in England, there can be no doubt that the doctrine of the American Courts fully sustains the complainant in the course he has pursued. 2 Denio, 577. 4 Day, 476. 2 Porter, 171. 6 Conn., 258.

The American rule is, that the deceased partner's estate cannot be resorted to until the remedy at law against the survivor is exhausted, or until the survivor *becomes insolvent*. This rule is consistent with the English and American doctrine governing the marshalling of joint and separate estates of partners, and is supported by irresistible reasoning. Besides, it has prevailed in the State where the contract was made, and also in our State where the contract is sought to be enforced. Lord Brougham says, in Devaynes vs. Noble, "unless a great and manifest deviation from principle shall have been committed, it may create much further mischief to reverse an individual case by way of correcting a slight error, if that error has been acted upon for a long series of years, than to leave it as it stands."

It is peculiarly the policy of the slave States to adopt the American rule, for generally the separate estate of the deceased partner in this country consists principally of slave property, the value of which to the family of the deceased cannot be replaced out of the partnership moneys.

It cannot be doubted that Laverty's claim in any of the States of the Union would not be considered within the statutes of non-claim, but as a contingent claim arising upon the insolvency of Wilder, which appears by the return of *nulla bona*. Even in Alabama, where the statutes of non-claim are most rigid, the case in 4 Day is approved, and such a claim as our's held not to be within the statute of non-claim.

As to the laches of Laverty complained of, see cases cited on the other side—and particularly 2 John. Ch., 508, Hammersley vs. Lambert—also the rulings of the Master of the Rolls, in Devaynes vs. Noble, 1 Merivale, 539, 572. Besides, no such objection is made in the answer of appellants, and no proof could have been taken to rebut any unfavorable presumptions.

As to the time of demanding payment from Harrison's estate, see 4 Day, 476.

As to what is a *presentation* under the statute of non-claims, see 8 100
Smedes and Marshall, 552. 8 Missouri, 176.

HAWKINS, J.

The case before us has been argued very elaborately and ably, and we have given it the consideration due to the importance of the questions involved in the discussion, an importance much enhanced from the likelihood of their frequent recurrence in practice in the Courts of our State.

The main points presented for decision are these:

1st. Whether on a bill filed by a creditor of a partnership against the representatives of a deceased partner, it is necessary that the surviving partner should be made a party to the bill after judgment against him at law.

2d. Can a creditor of a partnership, upon its dissolution by the death of one of its members, proceed, at once, in equity, against the estate of the deceased partner, without first showing the insolvency of the surviving partner?

Besides these, there are other questions as to the forms of notices, to be given by executors or administrators to persons having debts or demands against the estate of their testator or intestate—the effect of the statute of non-claims in cases like the present; the mode of exhibition of debts or demands against estates of decedents; and the effect of the statute of non-claim where equitable rights are involved, or trusts actual or implied.

As to the first point, there can be no doubt that the surviving partner should be made a party to the bill filed against the estate of the deceased partner, for the reason that he is interested in taking an account. Story on Part., 515. Story's Eq., Pl., 157. Wilkinson vs. Henderson, 1 Mylne & Keen, 582, 589. Burwell vs. Mandeville, Ex. 2 Howard S. C. R., 560, 575. In the latter case, Judge Story remarks, "In general, the surviving partner is liable at law only, and no decree can be made against him, although he may be made a proper party to the suit in equity, as being interested to contest the plaintiff's demands, unless some other equity intervenes."

It is true, there had been a judgment at law in this case against the surviving partner and a return of *nulla bona* upon the execution, still he may have had effects of the firm in his possession not amena-

101 ble to the execution, such as liabilities and evidences of debts due the concern. It was moreover a new proceeding, and he might have had an interest in taking the accounts correctly, inasmuch as there might be a remedy over against him by the representatives of the estate by their being substituted in the place of the creditors.

The question whether the creditor of a partnership must in the first place pursue the surviving partner at law, before he can proceed in equity against the estate of the deceased partner, is one of difficulty, and from the facts that this is the first time that it has been presented for adjudication in this Court, we have duly considered it: and we give, with due caution, our views on this embarassing topic.

The old English doctrine on this subject, though not entirely clear and settled, was, that the joint creditor must, in the first instance, seek his redress against the surviving partner, and that he had no claim in equity against the deceased partner, unless the surviving partner was insolvent or bankrupt.

This doctrine was based upon the general principle that, the joint estate was the first fund for the payment of the joint debts; and inasmuch as the joint estate vests in the surviving partner, the joint creditors, upon equitable considerations, ought to resort to the surviving partner before they should endeavor to obtain redress or satisfaction out of the *assets* of the deceased partner. Bishop vs. Church, 2 Vesey, 100. Ex parte Kendall, 17 Ves., 519. Story on Partnership, 514, and cases there cited.

This doctrine has been since contravened, and it is now held (says Judge Story,) that all partnership debts are to be deemed joint and several; and consequently the joint creditors have in all cases the right to proceed at law against the survivors, and an election also to proceed in equity against the estate of the deceased partner whether the survivors be insolvent, bankrupt, or not. Story on Part., 515.

This doctrine was first definitely settled in the case of Devaynes vs. Noble, 1 Mer., 593.

The case was pending many years, and was first decided by Sir Wm. Grant, and finally by Lord Brougham, 2 Russell & Mylne, 495. It was followed by other decisions to the same effect, and is now the settled and firmly established doctrine of the English law. Wilkinson vs. Henderson, 1 Mylne & Keen, 582, and other authorities cited on page 514, of Story on Partnership, and in the brief of counsel for appellants.

102 The English decisions upon this point have been adopted, as we have seen, by Judge Story, and regarded by him as settling definitely the law on the subject. So also, Chancellor Kent, in the 3d book of his Commentaries, page 64, uses this language: "But relief may be now had in equity against the representatives of the deceased partner having assets, if the surviving partner be insolvent. And it is now held, that a partnership contract, upon the death of a partner, is in equity to be considered as joint and several and to be treated as the several debt of each partner;" citing in a note 3d Merrivale, 393. 3 Paige, 367; and in that note he says: "A joint creditor may file a bill against the representatives of a deceased partner, though the survivor be not insolvent. He is not compelled to sue the survivor in the first instance." And then cites the cases of Devaynes vs. Noble, Wilkinson vs. Henderson, 1 Mylne & Keen, 582, and other authorities.

We have been referred to some American cases by the counsel for appellee, going the other way, such as 2 Peters, 171. 2 Denio, 585. 6 Con., 258. Pendleton vs. Phelps, 4 Day, 477, and others. But to these stands opposed a very recent decision. Nelson, et al., vs. Hill, 5 Howard, 133.

The Court in this case uses this very cogent and explicit language: "It is now a rule of law too well settled to be shaken, that the creditor of a partnership may, at his option, proceed at law against the surviving partner, or go in the first instance into equity against the representatives of the deceased partner."

So, too, the Supreme Court of Alabama, in a case reported in 8 Alabama Reports, 577, remarks: "It is true, by the common law, upon the death of a partner, the remedy was gone at law, against his personal representatives, but in equity the liability was held to continue, and it is said could be enforced by bill whether the survivors were solvent or otherwise. Story on Part., 514, and cases there cited. Indeed in this respect, it is now recognized as the well settled doctrine, that there is no distinction between the debts due from partners and those due from other joint debtors. In equity all are considered as joint and several, and the creditors may pursue the personal representatives of the deceased joint debtor or partner, whether the survivors are insolvent or otherwise."

The Court then refers to a decision in the case of Marr vs. South-

wick, et al., 2d Porter, 351, as having been made in opposition to 103
the foregoing principles, and clearly by the above language expresses its dissent to that decision.

Upon a review of the whole subject, we feel constrained to side with the English rule, as adopted by the highest legal tribunals in our own country, and such text writers as Judge Story and Chancellor Kent.

We deem it consonant with reason and justice, that creditors should possess every facility of enforcing their demands against the estates of those who contracted the obligations, without being obliged to await the law's delay, by being forced in the first place to pursue the surviving partner, before they can come upon the estate of the deceased partner; nor can we see any good reason why the death of one of the partners should place the creditor, as to the efficiency of his remedy, in a worse position than if the death had not occurred. Credit is far from being given in any instance to partners on account of their partnership effects, but creditors look, and they have a legal right to do so, not only to those effects, but to the separate property of the individual partners. The *lex mercatoria* regarded the contract of partners as joint and several, and Courts of Equity have, we think, very wisely adopted that principle. At common law, the rule was different, being then regarded as a joint contract. In Abbot vs. Smith, 2d Black., 949, Chief Justice DeGrey remarks, "that a contract when made with partners is originally a joint contract, but may be separate as to its effects, and that each is answerable for the whole, and not merely for his proportionable part."

Creditors certainly cannot complain because a two-fold remedy is afforded them; nor should the heirs or representatives of the deceased partner be querulous—for we cannot see that any prejudice can accrue to them, by the ability of the joint creditors to render them primarily liable; for if the estate of the surviving partner be solvent, they have a remedy over by virtue of the subsisting equities; and if it be insolvent, it is very certain that the estate of the deceased partner is liable to the payment of the debt. Sir John Leach, in the case of Wilkinson vs. Henderson, 1 Mylne & Keene, 582, bases his decision upon the ground—"that the estate of the deceased partner is, at all events, liable to the full satisfaction of the creditors, and must, first or last, be answerable for the failure of the surviving partner; that no additional charge is thrown upon the assets of the de- 104
ceased partner by a resort to them in the first instance, and that great inconvenience and expense might otherwise be occasioned to the joint creditors."

Besides the foregoing reasons, we coincide with the modern rule, as being more compatible and more in consonance with the policy of our statutes, in relation to the settlement of estates of deceased persons. It is the province of every Court, where the policy of law is clearly discernible, to carry out that policy, unless militating against the letter and spirit of the Constitution. Cases of individual hardship, may no doubt, occasionally arise, from the enforcement of this principle, but this is preferable to the infraction of the laws, regulations, or policy of a State.

All our statutes in relation to the estates of decedents bear upon their face the determination, that estates shall be settled as speedily as possible. The Legislature saw the evil results which would almost inevitably ensue, if estates remained a long time unsettled, arising from the expense of administration, the detention of property from the legitimate and appropriate owners, the presentation of stale demands, and the litigation springing out of them.

To obviate these mischiefs, various statutes were passed, all having the same object, all converging to one point, the speedy settlement of estates. Among them is the one invoked by the appellants, which is in the following words: "All debts and demands of whatsoever nature, against the estate of any testator or intestate, which shall not be exhibited within the said two years, shall be forever barred: *Provided*, That the executor or administrator shall, by advertisement, to be published once a week for the space of four weeks, in some newspaper printed in the State, give notice to all creditors, legatees and persons entitled to distribution, that their claims and demands will be barred at the expiration of the period aforesaid, unless exhibited within the same"—with a saving to married women, infants, &c.

Much stress is laid upon the fact that this statute is of a stringent nature, but for that reason it is not to be disregarded; and if the law-making power prescribes a rigid rule, a corresponding rigid observance must follow, and is as much a duty, as though the rule was more mild, qualified, or equitable. Legal morality can drow no distinction.

Fillyau and wife vs. Laverty.—Opinion of Court.

105 This statute is virtually a statute of limitations, passed not only for the security of the legal representatives, but for the benefit of the heirs and distributees, to effect the speedy and final settlement of estates.

By it, and the statute preceding it, (section 2,) the executor or administrator is enabled to ascertain what debts or demands are due by the estate, so that he can discover whether the estate is solvent or not; while it enables the distributees or legatees to demand distribution of the estate, unless it be necessary for the administrator or executor to retain it longer in his hands, for the purpose of paying debts.

If a creditor of a partnership, in case of its dissolution by the death of one of its members, was obliged to exhaust his legal remedies against the surviving partner, before he could proceed against the estate of the deceased partner, the result would be, that the estate would necessarily be kept open and unsettled in many instances for a long period, owing to tedious litigation; and this would be, we have seen, against the policy, and I may add also, the explicit declarations of our statutes.

The statute, too, seems to have contemplated the idea that legatees and distributees should take their portions, discharged from all claims not exhibited within two years; because the bond they give, upon receiving their portion, refers to debts or demands appearing within two years, after granting the letters testamentary or letters of administration.

If, therefore, the contract of partners be joint and several in equity—if the joint creditors can proceed primarily against the estate of the deceased partner, and such we deem the law to be—we are clearly of the opinion that such creditors should exhibit his demand within the time prescribed by our statute. Having an option, he should exercise it; possessing a right, he should pursue it, within the terms of the law. If he does neither, he waives his remedy, and is estopped by a statute, as obligatory in a Court of Chancery as at law.

As to the form of the notice published by Meacham, the administrator of Wilder, we deem it sufficintly correct. It is in these words: "All persons having any claims against the estate of William D. Harrison, deceased, are hereby warned to present them to the subscriber within the time prescribed by law, or they will be forever
106 barred of recovery; all those indebted to the estate are requested to make immediate payment." It embodies, we think, substantially the requirements of the statute; and although it does not contain the words, "creditors, legatees and persons entitled to distribution," still we think the words, "all persons having any claims against the estate," are of so comprehensive a character, that they include and embrace within their meaning, "creditors, legatees and persons entitled to distribution." upon the principle that the *major* includes the *minor*.

The statute prescribes two notices, one to be published four the other eight weeks. Whether the one to be published for the latter period was so published or not does not appear, but the one before the Court, from its substantial conformity to the requisitions of the section containing the statute of non-claim, must be taken by the Court as sufficient compliance with the proviso of that section.

By the first statute (sec. 2,) the advertisement is merely directory, while by the second (sec. 6,) it is the condition upon which, on its being complied with, the statute applies as to barring debts or demands. As to the question, what shall constitute an exhibition of a debt or demand against an estate, we think there should be actual presentation of the claim within the time prescribed, or something done by the party equivalent to it.

The presentation need not be in any particular form, but sufficient to give such notice to the executor or administrator of the existence of the debt or demand, its character and amount, as would enable him with reasonable certainty to provide for its payment. Mere knowledge on the part of the executor or administrator of the existence of the claim is not enough. The party holding the claim or demand must pursue some measure to prevent his demand, and not remain passive, or sleep upon his right. The bringing a suit or action at law or in equity, we would regard as equivalent to an actual presentation, and we think that a debt, though not due, is embraced within the intention of the statute. In this last point, we are sustained by the decisions in Alabama. Jones' Ex'rs. vs. Lightfoot, 10 Ala. R., 26., King & Barnes vs. Moseley, 5 Ala. R., 610. Pinkston vs. Huie, 9 Ala., 262.

The court, in the case of Pendleton vs. Phelps, indicates an opinion in accordance with the one by us expressed, for it remarks:
"This is different from the case of a demand payable at a future pe- 107
riod. We think that the words "debts or demands," clearly cover debts not due. If A promises to pay B fifty dollars in a year from the date of the promise, it certainly creates a debt on the part of A. It is the obligation or contract that creates the debt. In the words of counsel it is *debitum in praesenti solvendum in futuro.*"

It is said that the statute of two years does not bar equities, where there is no concurrent remedy at law, and more than the statute of five years, and that the heirs and distributees of Harrison's estate are trustees for the debt due by their intestate as a member of the firm or Harrison & Wilder.

By way of response to these propositions we will cite the case of the Executors of Fisher vs. the Executors of Tucker, 1 McCord Ch. R., 169.

It was in the first place decided by Chancellor Wattes, and afterwards affirmed on appeal in the Court of Appeals in South Carolina. The circumstances of that case are very similar to the one at bar. Heriot and Tucker were copartners in trade, and they became indebted to James Fisher in the sum of £1100. Tucker, one of the firm, died, leaving Heriot the surviving partner. A bill was filed against the estate of Tucker by the Executor of Fisher, the creditor, on not being able to procure payment from Heriot, alleging his insolvency. The defendants rested their defence upon the statute of limitations. The Chancellor uses this language: "The books furnish no case in which a Court of Equity has ever felt at liberty to dispense with the operation of the statute against a legal demand, unless there has been some extrinsic equity to authorize it. The cases are numerous to the contrary, but I will only refer to the following: In Read vs. Read, 5 Ves., 744, the Court would not, on a bill for mesne profits, decree an account for more than six years, *because more could be recovered at law.* And it is then said that the circumstance of being obliged to sue in equity, does not alter the nature of the action for mesne profits. And in Hovenden vs. Amnesly, 2 Sch. & Lef., 630, Lord Reddesdale says: "Courts of Equity are bound to yield obedience to the statute of limitations upon all legal titles and legal demands." "It is manifest that the present demand was originally a legal one, and the circumstance of bringing it into this Court will not, as was said by the Court in the
case of Reade vs. Reade, alter its original nature. It is stated to 108
have been for goods sold to the firm of Heriot and Tucker, the remedy for which was exclusively a legal one while the partners were alive, or while the survivor of them was solvent." The Chancellor decreed that the bill be dismissed.

Sir Thomas Plummer, Master of the Rolls, says, that after a bar has been fixed by statute to the legal remedy, the remedy in a Court of Equity in analagous cases has been confined to the same period. He then stated it to be clear that had the claim in question before him been a claim of a legal estate in a Court of law, the remedy would have been barred by the statute of limitations, and it was therefore, clear, that being an equitable claim, the remedy was equally barred in a court of equity. 3 Brown Ch. R., 630. Angell on Lim., 24.

"Courts of Equity," says Lord Reddesdale, "are not within the words of the statute, because the words apply only to particular legal remedies, but they are within the spirit and meaning of the statute, and have been always so considered." Angell on Lim., 25.

"Whenever," says Thomas Plummer, "any statute has fixed the period of limitations, by which the claim, if it had been made, in a Court of law, would have been barred, the claim has by analogy, been confined to the same period in a court of Equity." And the Supreme Court of the United States say, that Courts of Equity are no more exempt from statutes of limitations than Courts of law. Ib. 26. Melicot vs. O'Donnell, 1 Ball & Beauty, 156. Thomas vs. Heirs of Harvie, 10 Wheat., 149. Ib. 168, 170. 3 Bro. Ch., C., 639, note. 4 Harrington, 274.

The contract of partnership is dissolved by the death of one of the partners. At law the estate of the deceased partner cannot be proceeded against by the joint creditors, because the contract being joint, all the original parties should be joined. Of course, the surviving partner cannot be, because different judgments would have to be given. The resort of the creditor against the estate of the deceased partner must be in equity. Now does this, as a result, change the original legal contract into such an equity as to prevent the bar of the statute? A change of remedy from one at law to one in equity, should not have such a result, and more especially in the face of the words of the statute "all claims or demands of whatsoever nature."

109 To say that the statute should not be a bar in a case like the present, would be an evasion of it. The pleadings create an issue of fact, whether the claim or demand was presented or not within the two years. It is not pretended that it was presented until the 6th December, 1841, being after the expiration of the term prescribed by the statute.

We consider the other point, that the legatees and heirs of Harrison are trustees for this demand, as untenable. There is certainly no express trust, and if one is merely constructive, the statute does apply.

In the case of Townshend vs. Townshend, 1 Brown C. C., 554, the Court say—"Then, as to trusts being an exception to the statute of limitations, the rule holds only between trustees and *cestui pue trusts*.. It is true that the trustee cannot set it up against his *cestui que trust;* but this is merely the case of a trustee by implication, and as such, affected by an equity—but that equity must be pursued within some reasonable time. Both courts, of law and equity preserve an analogy to the statute of limitations."

In Lockey vs. Lockey, Prec. in Ch., 518, the Lord Chancellor was of opinion, that when one receives the profits of an infant's estate, and six years after he becomes of age he brings a bill for an account, the statute of limitations is as much a bar to the suit, as it would be to an account of law.

In Webster vs. Webster, 10 Ves., 93, a bill for an account and payment of a debt was filed against defendant, who pleaded the statute, and though regarded in equity as a trustee, the plea was held a good one. See also 194-5-6 of Angell on Limitations.

These authorities are cited in the case in 1st McCord, already referred to, and the Court in that case also confirmed the views we have taken as to this last question.

With these views, we think, therefore, there was error in granting the decree in the Court below, and it is ordered, adjudged and decreed that the bill of complainant be dismissed.

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110 JOHN D. GRAY, PLAINTIFF IN ERROR, vs. FREDERICK BELDEN, DEFENDANT IN ERROR.

A promise or undertaking by a defendant, whose property has been levied on and advertised for sale, to pay a sum of money exceeding in amount the *legal* interest of the debt for which the execution was issued, upon an agreement by plaintiff to stay the execution for a certain specified time, is a usurious contract; and the sum of money so stipulated to be paid cannot be recovered.

Error to the Circuit Court of Franklin County.

This case was tried at the Spring Term, 1849, of Franklin County Circuit Court, before the HON. GEORGE S. HAWKINS, Judge of the Western Circuit. The facts were these: Gray was security on a forthcoming bond, given by one Tobey, whose slaves were levied on, for a debt of $4,000, and replevied. The slaves were not forthcoming on the day of sale; the bond was returned forfeit and execution was issued against Gray, whose property was levied on, and advertised for sale. On the day of sale, Gray agreed with one T. J. Vickers, the holder of the execution, to give and did give him a note for the sum of $200, payable thirty days after date, upon the consideration that Vickers would stay the execution for that time; and the object of this stay is stated to be, that Gray might have time to go to Mobile, and get the slaves mentioned in the forthcoming bond, and have them sold, in discharge of the execution which had been levied on his own property. The note thus given was endorsed to Belden, the defendant in error, who brought suit thereon against the maker. The defence set up was usury.

On the trial of the case, defendant's counsel prayed the Court to charge the jury—

1st. That if they believe that the note sued on was given in consideration of a forbearance of the enforcement of a debt of $4,000 for thirty days, then it is an usurious contract.

2d. That if they believe the contract usurious, then they will find for the plaintiff only so much money as may be the legal interest of $4,000 for thirty days.

3d. If the whole note is for interest, no other consideration having been proved, then the jury will find generally for defendant—which

instructions the Court refused to give, but instructed the jury in sub- 111
stance as stated in the opinion of this Court, pronounced by Justice Baltzell. To this refusal of the Judge to give the instructions asked. and to the instruction given, the defendant by his counsel excepted.

Thompson, for plaintiff in error:

The errors assigned in this case are,

1. The refusal of the Judge below to instruct the jury, as prayed by the plaintiff in error. And

2. The instructions given by the Judge below to the jury.

The facts proved set forth a clear usurious transaction. A forbearance to enforce an execution for a debt in consideration of a sum of money beyond the legal rate of interest, is usurious. In this case it fully appears that the note sued upon was made and executed upon the consideration of a stay of execution for thirty days, and was in addition to the legal interest.

If we have erred in our view of this case, the long sought for device to cover an onerous and illegal exaction for the forbearance of moneys, has been discovered in this transaction, but we feel confident that even this chevizance will fail in its intended effect.

The case of Cleveland vs. Dare, decided in South Carolina in 1824, is precisely analagous with the case at bar. In that case, defendant's property was levied on, and in consideration of a postponement of the sale which was advertised for September, 1823, to the ensuing sale day, just one month, defendant gave the plaintiff his note for $100. Suit being brought upon this note, the defence was, that it was an usurious contract, and it was so held by the unanimous opinion of the Court. See Harper's Law R., 407.

So, also, in North Carolina, in the case of Carter vs. Brand, where Brand had a judgment and execution against Carter, which had been levied, and Brand agreed to stay proceedings for eighteen days, in consideration of the sum of ten dollars over and above the interest. which was paid. In an action by Carter *qui tam* for the penalty given by the statute, the Judges, in conference, were clearly of opinion that it was a case of usury, and it was so adjudged. Cam. & Norw. Conf. R., 28.

The facts being ascertained whether a contract is, or is not usurious, is a question of law for the Court, and it seems to me, that upon principle and reason, the Court below have adjudged this case 112
usurious.

It is not necessary to prove a corrupt agreement, for a contract may be usurious, though the parties did not know that it was contrary to law. Thompson vs. Nesbit, 2 Rich. R. 73. Marsh vs. Martindale, 3 Bos. & Pul., 159.

The Court will find in the case of Thompson vs. Nesbit, cited above, a very ingenious expedient adopted with the view "to steer clear of usury," in the sale of a chattel, but which was nevertheless determined by the Court to be an artifice to gain usurious interest.

Davis, for the defendant in error:

The contract was not usurious:—1st. Because the evidence does not show any device or attempt to violate the statute. The *intent* must appear. If it does not, it is not usury. 9 Pet. S. C. Rep., 399, 400, 224.

The contract was not to give further time of payment *alone*, so that Gray might use the money, in consideration that he would pay a certain sum by way of compensation. The agreement was, that he might have a further time, for the *purpose* and with the *intent* to enable him to produce the property of Tobey, and substitute it for his own.

2d. The consideration to support the note is not forbearance alone. The plaintiff in the *fieri facias jeopardized his debt,* by agreeing to stay the execution—he incurred the risk of losing his preference—he incurred the hazard of the death or absconding of the negroes. "Staying the execution," means suspending the right to proceed on the judgment. Vickers could not have seized the property, and he had no right to have a levy on a forthcoming bond. The *fieri facias* should have been returned, in accordance with the agreement to "*stay* the execution;" and a new one could not have been issued, until the expiration of the time agreed on. If there was a good and valid consideration, over and above the forbearance, and one which, in itself, would have been sufficient to have supported a promise to pay the money; and if the parties in making the agreement, had in view the production of the negroes of Tobey, and not a prolongation of the credit on the debt, the contract is valid—the fact that the sum agreed to be paid was more than legal interest, does not, of itself,

113 render it usurious. A contract to pay more than legal interest—in consideration of the loan of money, and the performance of other acts —the waiver of rights—is not usurious. 2 Con. Rep., 341. 8 Con. Rep., 513. Ibid, 52. U. S. Dig., Supp. Jus., vol 2, page 906-7.

3d. The agreement was not for a *loan*—it was for the continuance of a loan. The parties looked *not* to the ultimate payment of the debt by *Gray*, but to its collection from Tobey. It was to enable Gray to cause *this result*, that the time given. He, (Gray,)at the time he made the contract, hoped to be able to produce the property of Tobey, and to make it pay the debt. The plaintiff had the right to collect the debt *then* from Gray, and to leave him to seek his redress by action against the principal. The agreement was a waiver by Vickers of his said right, and a benefit to Gray, saving his property from sale, and saving the circuity of action against Tobey.

The case here *varies materially* from that of a forbearance by a plaintiff to proceed against an original judgment debtor—when there is no benefit arises to the defendant, *but the delay*—the day of payment *put off*—and no object on the part of *either party*,but to *extend the credit*, or to *alter time*. *Here* there are *other* and *important* object to be answered, by the forbearance to proceed under the judgment on the forthcoming bond. The object to be attained, and that which was the *chief inducement* which led to the formation of the contract, was, *that the debt might be collected out of the property of Tobey, the principal*. The intention was *not* that Gray should pay the money at the expiration of the day of grace, but that he might relieve himself and his property from *all liability;* that he did so, is fairly to be inferred from the facts stated. If he did not, it was for him to have shown it.

BALTZELL, J.

This was a suit instituted in the Court below to recover from the defendant, Gray, the amount of a note executed in 1841, for two hundred dollars. The defence was usury. On the trial, the Court below instructed in favor of plaintiff, and refused various instructions asked by defendant, to which he excepted, and has brought the matter to this Court by writ of error. It is proper that the mode of consideration by Appellate Courts of a case so situated should be well considered and understood, and I propose to regard it upon authority
114 of the Courts in England and this country, professing to follow the common law. "At common law, a writ of error lay for error in law apparent on the record, but not for an error in law not apparent upon the record. If a party alleged any matter of law at the trial, and was overruled by the Judge, he was without redress, the matter not appearing on the record." 2 Institute, 42. To remedy this evil the statute was passed which gives the bill of exceptions. It is to correct an error in law." By C. J. Marshal, ex parte Crane, &c., 5 Peters, 199. The statute passed as early as 13 Edward 1, is in these terms, "Where one is impleaded before any of the justices, and doth allege an exception praying that the justices will allow it, which if he that hath alleged the question do write the same exception, and require, the justice will put their seal as a witness, the justice shall do so." 1 Starkie, 465. "The statute is silent as to the time of tendering the bill; it has been held on reason and principle that it must be done at the trial, for the party may have misled his adversary by not insisting on his objections at the time." Ibid. 465. "It is not to draw the whole matter into examination." Again, "It is only for a single point, and the truth of it can never be doubted after the bill is sealed." "It lies only to exceptions taken at the trial to the ruling of the law by the judge, and to the admission or rejection of the evidence." "Beyond this," say the Supreme Court of the United States, "we have no power to look into the bill on a writ of error, as it is a creature of the statute, and restricted to the points stated." Ex parte Crane, &c., 5 Peters, 199. 4 Howard, 298, 401, 292, 418, 541.

"The exceptions taken at the trial," say the Court of Appeals of Virginia, "present the only points for the consideration of the Court." The Supreme Court of New York, say, "Though a jury find a verdict against the evidence, the error cannot be corrected on a bill of exceptions; the remedy is by a new trial. It (the bill) does not draw the whole matter into re-examination, but only the points upon which it is taken, and the party must lay his finger upon these points." 1 Leigh, 86. 1 Wendall, 418. 1 Cowen, 622. 14 Johnson, 304.

"The proper function of a court on a writ of error, is to pass its judgment upon the points excepted to in the opinion of the Court below, and not to decide the law of the case in anticipation of its trial below," 16 Peters, 318.

Passing then from this point we proceed to regard a question of 115
no less importance; how the instructions themselves are to be treated, and about which the decisions of the Court are equally clear.

"The charge of the Court below, should be interpreted with reference to the testimony which is shown to have preceded it, upon which, in truth, it was prayed—with reference also to the reasonable conclusions which that testimony tended obviously to establish." "In examining the charge, its whole scope and bearing must be taken together. It is wholly inadmissable to look at detached passages. In short, we are to construe the whole as it must have been understood both by the Court and jury at the time when it was delivered." Rhett vs. Poe, 2 Howard, 481. 4 Howard, 245. 7 Peters, 390. Again, "The instructions were intended by the Court to be legal conclusions from all the evidence in the case. Our inquiry will be, are they so? And as legal conclusions, were they given in such terms as in no way to encroach upon the province of the jury to weigh the evidence as to the facts of the case." Gratiot vs. United States, 4 How., 110. "It is sufficient if the instructions given are applicable to the evidence before the jury, and the merits of the case as pretended by the parties." 3 Howard, 688.

The Court below, in the case before us, instructed the jury that "the statute of usury was inapplicable to the case—that the contract was an original one, and not for the payment of money, bringing it within the statute of usury——that the consideration was a good one and that if the jury are of opinion that the note was given altogether for the forbearance to push the execution, they will find for the plaintiff." The facts upon which these instructions were given, and upon which we must base our opinion as to their correctness, are succinctly stated in the testimony of W. G. M. Davis, which indeed is all the testimony in the case, as follows: "Merchant's Bank at St. Joseph had a fieri facias for about $4000 against Tobey, whose negroes were levied on and replevied, a forthcoming bond being given, and Gray was security on the forthcoming bond. The negroes were not forthcoming on the day of the sale, and the bond was returned forfeited, and execution was issued against Gray on this bond, and his property, negroes, &c., levied on and advertised for sale. On the day of sale, by agreement, Gray gave the note sued on to Vickers, payee and holder of execution, in consideration that Vickers would stay the execution for thirty days, in order to 116
give Gray time to go to Mobile, and get the negroes mentioned in forthcoming bond, and have them sold, in discharge of the execution against him, founded on the forthcoming bond."

Do these facts present a case of usury, or of a valid and binding contract, supported by a fair and good consideration? We see a defendant in execution, occupying the position of a security, and upon whose property an execution for the large sum of $4,000 had been levied, obtaining the short grace and suspension of a month, by an engagement to pay the large sum of two hundred dollars—the legal interest is about the sum of $26.66; so that this engagement would give the plaintiff more than eight times the amount of the legal rate of eight per cent. allowed by law. Is a proceeding of this kind usurious?

We confess we cannot regard it in any other light than as embraced by this statute. The statute, in its ordinary application, acts upon voluntary engagements, created by the loan of money, where the party may, if he thinks proper, reject the terms proposed, and seek out another mode of relief. With what additional force may it not apply to a case like the present, where defendant was wholly in the power of plaintiff—no option of declining his terms—no hope of relief elsewhere; a case, indeed, in which the plaintiff in execution held the power and the dominion without control. Such a position presented temptations which the law might well desire to restrain and prevent. When it is considered, too, that our laws forfeit the interest only, there is not the reluctance felt by the Courts, on occasions where the loss of the entire debt is the consequence: nor is there any want of authority directly on the point.

The case of Cleveland vs. Ware, decided by the Constitutional Court of South Carolina, presented facts identical with the present. Defendant's property was taken under execution by the sheriff, and advertised for sale. He agreed to give his note for $100, (the execution being for $1.400.) if plaintiff would indulge until next sale day. In an action on the note, the Court say—"He secured himself an interest on the debt at the rate of about eighty-five per cent. per annum—and if such a contract was good for one month, it must be for a year, and so on, *ad infinitum*." They sustain their decision by reference to Pollard vs. Schley, Croke Eliz., 20, referring to

1 Vesey, Jun., 53, and declare, without hesitancy, the note to be usurious. 117

To the same effect, is a case decided by the Court of Conference of North Carolina, Carter *qui tam* vs. Brand, in which the agreement was to pay £10, for a stay of eighteen days on an execution of £106, and the Court declared the agreement usurious, saying—"No part of the principal is put to hazard, but the whole is actually secured by the levy; nor is the agreement to pay the excess subject to any contingency, but positive and absolute." N. Carolina Confer. Rep., 28-30. These are too clearly in point to leave the question open to argument or consideration on general principles as a new question.

The case of Smith vs. Algar, 1 B. & A., 603, to which we have been referred as sustaining the contrary doctrine, was that of a third person, bargaining with the plaintiff to stay his execution, if he would pay him £107, but his agreement was not with defendant in execution, the party was not under the pressure of the execution—was free to contract or not, as he pleased—he had not borrowed from plaintiff, nor stood security for the borrower.

It is insisted that the plaintiff in *fieri facias* jeopardized his debt, and incurred the risk of losing his preference; but we find no evidence to this effect in the record. There is proof only of an agreement to stay the execution, none of a release or discharge of the levy—no delivery of the property to Gray—no proof of other executions, justifying the inference that there was risk of loss. The most we can regard in proof was, that there was a suspension of the sale under execution for thirty days.

Again: It is said the agreement was not for a loan. We do not understand the statute to confine usury to such a case merely. The third section provides, that "when any note, bond, &c., shall be upon or on account of any usurious contract, the interest shall be void, and the obligor forever exonerated from the payment of the same." Duval, 78-9.

Again: It is urged that the chief inducement to the cantract was the collection of the debt out of the property of Tobey, the principal. Our proper inquiry is with the action of the plaintiff, and whether the consideration with him for granting the extension of thirty days, was not a rate of interest prescribed under the statute as usurious. There was not only an obligation on the part of Gray to 118
pay the debt, but an execution against him. It was, in effect, as if a judgment had been obtained against Gray, and his principal, with an execution issued, and an agreement had been made with either for indulgence, under the terms prescribed by the plaintiff.

We cannot distinguish the case before us from the cases to which we have already referred as conclusive. We, threfore, think the instructions given by the Court below erroneous.

The defendant moved three instructions to the jury, which the Court refused to give, and the correctness of this ruling is also presented for our consideration.

The opinion expressed above affirms the correctness of the two-first, which it is unnecessary to notice more particularly.

The third instruction asked for was, "if the whole note was for interest, (no other consideration being proved,) the jury will find for defendant."

Is it competent for a Court to thus instruct a jury? If so, under what circumstances, shauld such an instruction be given? In a recent case, decided by that very able Court, the Exchequer of England, it is said—"the judge had a right to act upon all the uncontradicted facts of a case; it is not necessary to leave every part to the jury. It is only when some doubt is attempted to be thrown upon the credibility of the witnesses, or where some contradiction occurs, or some inference is attempted to be drawn from some former fact not distinctly sworn to that the judge is called upon to submit any question to the jury." 11 Meeson & Welsby, 217.

In Ewing vs. Burnet, decided by the Supreme Court of the United States, plaintiff moved the Court to instruct the jury that he was entitled to recover, which was refused and excepted to. The Court say, "before this notion could be granted, the Court must have been satisfied that there was nothing in the evidence nor any fact which the jury could lawfully infer therefrom, which could in any way prevent plaintiff's recovery." 11 Peters, 50, 51.

The case of McNeille vs. Hilbrook, decided by the same Court Ch. Justice Taney, delivering the opinion, is full to the entire question. The defendant moved to instruct the jury, that the evidence given on the part of the plaintiff was not sufficient to entitle him to recover on three of the notes, and a second instruction.

The Court refused these instructions, and directed the jury that the 119
evidence was sufficient to entitle plaintiff to recover. The Supreme Court sustained the decision, saying "as to the first instruction, the negotiation as disclosed by the testimony was concerning the time of payment and not in relation to the amount to be paid, and there was an admission of the debt," &c.

"As to the second prayer, the Court would have been unquestionably bound to give it if there had been any testimony from which the jury could have inferred that that admission was an offer of compromise. The same reasoning applies to the direction which the Court gave. If there had been any evidence conducing to prove the fact insisted upon by defendant, the jury were certainly the proper judges of its sufficiency, and the Court could not, without encroaching upon the province of the jury, have instructed them on that point. But there was no contradictory testimony, nor any testimony in relation to the credibility of the witness." 12 Peters, 88.

In Toland vs. Sprague, the error assigned was, "that whether there was a stated account was a question of fact for the jury, and that the Court erred in taking that question from them." The Court say, "the answer is, there was no dispute about the facts." 12 Peters, 336. To the same effect was the decision of the Supreme Court of Florida, in Sessions vs. Stephens, 1 Florida Reps.

There are abundant other cases of the same Court affirming the same doctrine. In the case of Thompson vs. Nisbet, the Court of Appeals of South Carolina, say, "the facts are undisputed, and present a case for the judgment of the Court with the same certainty as if they had been found by a special verdict." "Whether a contract is usurious, is a question of law. If the facts be disputed, the decision of them is submitted to the jury with instructions and if on a clear and uncontradicted state of facts, the Court does not give judgment, it surrenders to the jury its proper function and authority to enforce the law." 2 Richardson, 75.

It is believed to be the received doctrine of all the Courts in the Union, where not inhibited by special, legal prohibition. We are then, of the opinion, that the third instruction should have been given. The judgment of the Court below, will be, therefore, reversed with costs, and the cause remanded for a new trial to be held therein, not inconsistent with this opinion.

[On a subsequent day, near the close of the term, Chief Justice 120
Douglas delivered the following opinion in this case for himself and Justice Lancaster, the object and design of which will be seen by reference to the opinion itself:]

We concur in the conclusion to which Judge Baltzell has arrived in the opinion pronounced in this case: that the contract sued upon was usurious: that the Court below erred in its instructions to the jury in regard to the question which there arose, whether it was usurious or not. But we did not deem it necessary to discuss the doctrine relative to the powers of the Court to charge a jury, or the nature of the instructions that may be given, as no questions of that kind were presented by the record. It was not pretended that the Court had exceeded its powers in charging the jury,or that it had departed from the evidence in the instructions it gave, the only complaint being that it had taken an erroneous view of the law applicable to the case made by the proof. We therefore thought it better to leave those questions to be discussed when a proper case should arise.

We did not, therefore, look into the authorities cited upon those questions. The course of argument an authorities cited, seemed well calculated to leave the impression upon the mind of the reader, that this Court entertains the opinion that a Judge in this State may charge the jury upon the facts of the case, and express to them his conclusions and deductions from the testimony adduced in the case, propositions to which we cannot assent. We have, therefore, looked into some of those authorities since that opinion was pronounced, and so far as our examination has extended, we think that when they are fully read, and their whole scope and bearing duly considered, they will be found generally to sustain the doctrine laid down in 11 Peters' Reps., 50, 51, which is one of the cases to which reference is made, though the part we quote is not cited. The Court in that case, immediately following the citation alluded to, said, "it is the exclusive province of a jury, to decide what facts are proved by competent evidence. It was also their province to judge of the credibility of a witness, and the weight of testimony as tending in a greater or lesser degree to prove the facts relied on. And these were matters with which the Courts could not interfere." And this we deem to be in accordance with sound principles, and well sustained by authority. The case of Thompson vs. Nesbit, cited from 2 Richardson

121 Law Reps., 75, was a motion for a new trial on the ground that "the evidence clearly established a case of usury, and his Honor should so have charged the jury, and the verdict is contrary to the law and the evidence." The Court said, "the facts are undisputed and present a case for the judgment of the Court, with the same certainty as if they had been found by a special verdict." Whether a contract is usurious is a question of law. And either because the Court had not laid down the law to the jury, upon that question, with sufficient clearness and force, or because the Court considered the verdict to be contrary to law and the evidence (it does not appear which,) a new trial was granted. The Court in the case of Mitchel vs. Williams, 11 Meeson and Welsby, 216, also cited, (which was likewise a motion for a new trial) held that where there is an uncontradicted state of facts, or the facts are immaterial, the Court need not charge the jury upon them at all, a doctrine not in accordance with that which the case of Thompson vs. Nisbet seems to have been cited to sustain. And if this be sound law, (a question we need not decide) the Court in the latter case must be presumed to have granted the new trial, because the verdict was "against law and evidence," and not because the proper instruction was not given to the jury. In regard to the case of Sessions vs. Stephens, 1 Florida R., 239, it might, perhaps, be sufficient to say, that it was decided before our statute of January 3d, 1848, "To amend the act regulating judicial proceedings," which especially prescribes that "the Judge presiding on the trial of a common law case shall charge the jury only upon the law of the case," was passed. But it may not be improper to observe that much of the language of the bill of exceptions in that case, seems to be rather that of the counsel who drew it, than of the Court speaking to the jury, for by reference to the record, it appears that it contains the following passage, viz: "In this case it was clearly proven that Sessions took the note after it became due, and that before he took it the defendant had been garnished by one James Brannon. Held that plaintiff is not entitled to recover."

The language therefore, had undoubtedly been changed, and very likely in the hurry of business some portion of the charge was inadvertently left out; but if given in that strong language to the jury, without leaving to them the question whether such facts were proven or not, the Judge who tried that cause is satisfied upon the most ma-
122 ture reflection that it was not justified by sound principles even before the passage of our statute above mentioned, unless the facts were fully and distinctly admitted. And we are clearly of opinion that such mode of charging is by that statute now clearly prohibited.

The Supreme Court of Iowa, in the case of Frederick vs. Gaston, 1 Green's Reps., 403, 404, said: "It is very evident to us, that the Court instructed the jury upon questions of fact, which we think the Court ought never to interfere with in jury trials. At common law, it is true, (Say the Court,) the facts and testimony were taken up in this order by the Judge, and placed in review before the jury, and the practice was frequently carried to such an alarming extent that the jury became mere machines in the hands of the Court, to reflect back a verdict, which the Court would more than intimate, by a particular reference to and application of the facts;" and after noticing that, in many States of the Union, it is the practice of the Courts to charge the jury upon the facts, say—"But, in this State, the Legislature, to protect the people against any such interference of the Court, upon matters of fact submitted to the jury, and to secure to the parties a just and perfect trial, have passed a law, by which the Courts are confined to instructing the jury upon questions of law." The statute provides that the District Court, in charging the jury, shall only instruct them as to the law of the case, (citing Revised Statutes, page 475, sec. 35,) and adding—"The only safe rule is to confine the Courts to the law;" and in this sentiment we fully agree with that Court, and we deem it very important that the boundaries between the power of the Court and the province of the jury should be distinctly preserved. In the case of the King vs. The Dean of St. Asoph, Lord Mansfield observed, "That the fundamental definition of trial by jury depended upon the universal maxim, *Ad questionem juris respondent juratores, ad questionem, facti non respondent judices;*'" and his Lordship added, "Where a question can be severed by the form of the pleadings, the distinction is preserved upon the face of the record, and the jury cannot encroach upon the jurisdiction of the Court—where, by the form of the pleadings, the two questions are blended together, and cannot be separated, upon the face of the record, this distinction is preserved by the honesty of the jury. The constitution trusts that, under the direction of a Judge, they will not usurp a jurisdiction that is not their province.

They do not know, and are presumed not to know, the law—they 123
are not sworn to decide the law—they are not required to decide the law. It is the duty of the Judge, in all cases of general justice, to tell the jury how to do right, though they have the power to do wrong, which is a matter entirely between God and their own consciences." 21 Howard's State Trials, 1039, 1040.

Mr. Hargrave, in a note to Coke on Litt,1551, after a dissertation on the subject, marked with his usual refined learning, states the result to be, "that the immediate and direct right of deciding upon questions of law is entrusted to the judges—that in a jury, it is only incidental—that, in the exercise of this incidental right, the latter was not only placed under the superintendence of the former, but are in some degree controlled by them, and therefore, that, on all points of law arising on a trial, juries ought to show the most respectful deference to the advice and recommendation of the judges." 2 Wynne Eunomous. Bushell's case, 6 Howard's State Trials, 999, 1008, 1013, 1014. Vaughan Rep., 135, S. C. Franklin's case, 17 Howard's State Trials, 625. The King vs. Woodfall, 5 Burrow, 2661. To all this we freely assent; but the principle here asserted by Lord Mansfield is to be taken in connection with what is said by the same learned judge and distinguished jurist viz: "That the fundamental definition of the trial by jury depends upon a universal maxim, which is without exception; though a definition or maxim without exception, it is said, is hardly to be found, yet his Lordship considered this to be a maxim without exception—'*Ad questionem juris non respondent juratores ad questionem facti, non respondent judices.*'" Worthington on Juries, 131, 132. "That declaration in our books, '*Ad questionem facti, non respondent judices, ad questionem legis, non respondent juratores,*' taken literally (says the author,) is true; for if it be demanded what is fact, the Judge cannot answer it." Worthington on Juries, 129, 130, 27 Law Library, 42, 43.

Our statute was doubtless passed for the same purpose as that of Iowa, to secure to the parties a full and perfect trial, without interference of the Court upon matters of fact, and preserve the purity of jury trials. We have deemed it advisable to say this much upon this subject by way of *protestando ex abundanti cautela*, lest, hereafter, at any time it should be said that we had assented to doctrines which 124
tend to sustain a course of proceeding, not in accordance with the provisions of our statute above mentioned, which, in our opinion, governs the Courts of this State, upon the subject we have had occasion to consider. [Note.]

JASPER STRONG, APPELLANT, VS. GEORGE WILLIS, ET AL. APPELLEES.

A trustee cannot renounce, after having accepted the trust, but must execute the provisions of the trust deed.

A deed of trust conveying property to trustees, for the sole and separate use of the grantor's wife and children, free from the debts of the grantor, secures the property so conveyed against the debts and claims of the trustees executing the deed, and accepting the trust. A trustee executing such a deed and accepting the trust, cannot assail it as fraudulent, and subject the property to the payment of a debt due to himself from the grantor. An attempt to do so is a breach of trust—he cannot be both trustee and assailant of the trust deed.

Jasper Strong field his bill in the Circuit Court of Escambia County, against George Willis, Mary B. Dallas, Alexander J. Dallas, Jr., Byrd C. Dallas and Henrietta C. Dallas, alleging and setting forth—That, in the summer of the year 1838, he entered into a verbal contract with Alexander J. Dallas, since deceased, whereby it was agreed that he should erect and finish a dewelling house for the

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NOTE—Judge Baltzell requests the Reporter to state, that the foregoing opinion was not submitted to him, nor was it considered in conference with the Judges. Several weeks after the principal opinion was delivered by him as the judgment of the Court, the Chief Justice produced and read in open Court, the foregoing as the opinion of himself and Judge Lancaster, and this was the first time Judge B. saw it. He does not (he states) feel called upon to express his approbation of, or dissent from, the views taken, which he might have done, if the opportunity had been afforded him, according to the regular action of the Court. If the majority disagree with the sentiments or views expressed in an opinion, their course (in the opinion of Judge B.) is to recall and correct it. But they are concluded from *dissent*, after allowing an opinion to be read in Court as their judgment.

The Reporter would add, that there is no difference between the two opinions upon the only question in the case—that is, whether the contract sued on was usurious or not.

said Dallas on lot number 276, in the City of Pensacola; that he should keep an account of the expense of the work and materials furnished, and that said Dallas should pay him for the same, upon the completion thereof; that this contract and agreement were fully executed on his (complainant's) part, at an expense of upwards of six thousand dollars; that on the thirty-first day of December, 1838, a deed of trust was executed by the said Dallas, in behalf of his wife, Mary B. Dallas, and his children, the said Alexander J. Dallas, Jr., Byrd C. Dallas and Henrietta J. Dallas, whereby the said lot and building and other property were conveyed to complainant and G. Willis, (who is made a party defendant,) for the use and benefit of the said wife and children of Alexander J. Dallas; that complainant executed the deed and accepted the trust, but with no intention on his part to surrender any legal or equitable right which he might have to enforce against the property of the said Dallas the payment of his debt; that Alexander J. Dallas died in the year 1844, the debt to the complainant being due and unpaid, and that Mary B. Dallas, his widow administered upon his estate; that, in the year 1847, complainant obtained a judgment against the administratrix for the sum of four thousand one hundred and seventy-five dollars and 98-100, being the amount due him under the contract and agreement before referred to; that the execution issued on the judgment aforesaidwas levied on the lot No. 276, in the City of Pensacola, there being no personal property of the intestate in the hands of the administratrix to be administered, and no lands or tenements not conveyed by said deed of trust.

The bill then charges that the settlement attempted to be made by said deed was made upon the said wife of the intestate after marriage; and that with reference to all the beneficiaries under the said trust, it was purely voluntary and without valuable consideration and that the complainant is not barred or precluded from the payment of the debt due to him from the said Dallas, by reason of his having been a party to the said deed of trust.

The specific relief prayed for is, that the property levied on may be sold for the satisfaction and payment of the judgment at law, and that defendants be perpetually enjoined from setting up any claim to said property.

The following is the deed of trust referred to in complainant's bill, and prayed to be taken and considered as a part thereof:—

126 This indenture tripartite between Alexander J. Dallas of the first part, George Willis and Jasper Strong, their heirs, executors and administrators, of the second part, Mary Byrd Dallas, wife of Alexander J. Dallas, and Alexander James Dallas., Jr., Byrd C. Dallas, and Henrietta Constantia Dallas, children of the said Alexander J. Dallas; That is to say, Alexander James Dallas, Jr., by his former wife, and Byrd C. Dallas and Henrietta Constantia Dallas, by his present wife, Mary Byrd Dallas: Whereas, the said Alexander J. Dallas is desirous of providing more effectually for the support and maintenance of his said wife Mary Byrd, and his said children: Now this indenture witnesseth, that the said Alexander J. Dallas, for and in consideration of the premises, and for and in consideration of the natural love and affection which he hath and beareth towards his said children, Alexander James, Byrd C., and Henrietta Constantia, and for the purpose of providing more effectually for the support and maintenance of his wife, Mary Byrd, during her life, and for and in consideration of the sum of ten dollars to him in hand paid by the said George Willis and Jasper Strong, the receipt of which is hereby acknowledged, he, the said Alexander J. Dallas, hath given, granted, bargained, and sold, aliened, enfeoffed, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien enfeoff convey and confirm, unto the said George Willis and Jasper Strong, their heirs, executors, and administrators, the following pieces, parcels, or tracts of land, situated and bounded as follows, to-wit: a certain lot or parcel of land, situate, lying and being in the city of Pensacola, and know on the plan of the said city as number two hundred and seventy-six, (276,) containing eighty feet front on Intendencia street, by one hundred and seventy in depth. Also the following tracts of land, lying, situate, and being in the county of Escambia and Territory of Florida, viz: Fractional section twenty-nine, (29,) of township two, (2) range thirty,South and West containing thirty-eight acres and fifty hundreths of an acre. Also, Franctional section twenty-seven, (27) township two, (2) range thirty, (30) South and West, containing one hundred and nine acres. The aforesaid lands being in the district of lands subject to sale at Tallahassee, Florida. Also, a certain lot situated on Intendencia street in the city of Pensacola, and known and distinguished in the plan of the said city by the numbers or figures two hundred and seventy-five (275,) containing eighty feet front on In- 127
tendencia street, and one hundred and seventy feet in depth. Also the following negro slaves, to wit: A certain negro woman named Fanny and her future increase. Also, Lydia and her future increase. Also, a certain negro woman named Betsey, together with her future increase.

To have and to hold, the aforesaid pieces, parcels or tracts of land, together with their improvements and appurtenances, and also, the negro slaves aforesaid, with their future increase, unto the said George Willis and Jasper Strong, their executors and administrators In trust, nevertheless, to, and for the following uses, intents and purposes, and to and for no other use, intent or purpose whatsoever: That is to say, in trust to and for the sole and seperate use, benefit and behoof of the said Mary Byrd, wife of the said Alexander J. Dallas, and the said children, Alexander James Dallas, Jr., Byrd C. Dallas, and Henrietta Constantia Dallas, free and exempt from the debts, contracts, and incumbrances of the said Alexander J. Dallas, free and exempt from any control, right, title, interest or property on the part of the said Alexander J. Dallas, of in and to the same or the rents, issues, or increase or profits thereof, but the said several pieces, tracts or parcels of land, together with the improvements, rents issues, and profits thereof as well also the several negro slaves aforesaid, together with their future increase, profits and issues, to be and remain to the sole and separate use, benefit, and behoof of the said Mary Byrd, wife of the said Alexander J. Dallas, and the said children, Alexander James Dallas, Jr., Byrd C. Dallas, and Henrietta Constantia Dallas, and to be used and appropriated in manner and form as hereinafter prescribed, to wit: The rents, issues, and profits of the said several tracts, pieces or parcels of land, together with their appurtenances; also, the said several slaves, their future increase as aforesaid, shall be appropriated in equal proportions to the support and maintenance of the said Mary Byrd, and the said children, Alexander James Dallas, Jr., Byrd C Dallas, and Henrietta Constantia Dallas, for and during the life of the said Mary Byrd; and after the death of the said Mary Byrd, the said several tracts of land and the said negro slaves shall be equally divided between the said Alexander James Dallas, Jr., Byrd C. Dallas, and Henrietta Constantia Dallas. But the said Mary Byrd, wife of the said Alexander J. Dallas, shall have her elections to use, 128
occupy and enjoys and one of the aforesaid several pieces or parcels of land with its improvements, also any one of the several slaves aforesaid with her future increase, as an equivalent for her proportion of interest, or profit under this deed, although it may exceed in value and profits her rateable portion under this deed; and in the event of such an election being made by her, and exceeding the rents, issues, increase, and profits, then the remainder of the property shall be equally divided between the said children.Alexander James Dallas Jr., Byrd C., and Henrietta Constantia, but should such a selection fall short in value of her third or proportion of the rents, issues, increase or profits, the said trustees shall make good the deficit.

In witness whereof, the parties to these presents have hereto set their hands and seals at Pensacola, this 31st day of December, in the year of our Lord one thousand eight hundred and thirty-eight.

A. J. DALLAS, [Seal.]
GEO. WILLIS, [Seal.]
JASPER STRONG, [Seal.]

To this bill the defendants filed a demurrer.

At the Fall Term, 1849, of the Circuit Court of Escambia County, Hon. George S. Hawkins, Judge of the Western Circuit, presiding, this cause having been by consent set down for final hearing, and having been heard on the bill and demurrer, it was decreed by the Court that the demurrer be sustained, and that the bill of complainant be dismissed for want of equity, and that complainant pay all costs, &c.

From this decree, the complainant prayed an appeal to the Supreme Court, and it was granted him.

B. D. Wright, for appellant:

In this case, the bill and demurrer present the following facts:

1st. In 1838, Alexander J. Dallas, deceased, employed Strong, the complainant, to build him a dwelling house in Pensacola. This Strong did, at large expense to himself, receiving from Dallas, but a small sum in part payment.

2d. In 1839, Dallas executed a deed of trust to George Willis and the complainant whereby he conveyed to them the lot whereon said

house was built, and all his other property, in trust for Mary B. Dallas, his wife and his three children. 129

3d. That said deed of trust had no other consideration but the love and affection of the said Dallas for his said wife and children.

4th. That suit at law was afterwards brought against the administratrix of Dallas, and a judgment was recovered against her as such, by the said Strong, for the sum of $, the balance due to Strong, upon the contract for building the house.

5th. That execution issued on the judgment, and was levied on the house and lot in question—no other property of the intestate being found.

The object of the bill is to relieve the property of the pretended title growing out of the deed of trust, so that the same may be sold for the satisfaction of the judgment.

The only question in the case is, whether the deed of trust is available, as against the pre-existing debt of the complainant. And this depends upon the question whether the complainant's being a party to the deed of trust destroys, or otherwise affects his rights as a creditor.

A careful comparison of our statute with that of 13th Elizabeth, will show that the two statutes are identical in principle, and nearly so in terms. These statutes strike directly at all voluntary conveyances, and instead of requiring proof of the intent to defraud, (as was, to a certain extent, required at common law,) they infer the intent (as against pre-existing debts) from the voluntary nature of the conveyance. The common law opposed itself to actual fraud in all aspects; but the common law was not adequate to the preservation of the rights of creditors and purchasers; and so the statute has set up certain *indicia* of fraud; thus making it a question of law, rather than of fact. 7th Cowen, 304. 9th John. Rep., 342. Roberts on Fraudulent Conveyances, 83, 450, 451.

In the case of such conveyance, when the person making it is indebted at the time, the conveyance is void *ipso facto;* in case of *subsequent* indebtedness, (or a subsequent conveyance,) such voluntary conveyance is void by relation merely. In the earlier cases decided under 13th Elizabeth, some contrariety of opinion seems to have prevailed, as to the effect of *family settlements* upon the right of *subsequent* creditors, (the party making such settlements not being 130
indebted at the time.) 2nd Atkins, 13. 2d Ves., 10. 2nd At., 520.

But there never was a case since the passage of the 13th Elizabeth, where a merely voluntary conveyance was deemed good, as against the rights of a creditor existing at the time of the conveyance 1 At., 94. 2d At., 600.

This is not denied on the other side, but it is contended that a distinct inquiry is here presented, by the complainant's being one of the trustees. Let us examine. At law and in equity, the property in question was responsible for the debt of complainant, as against any one claiming under a merely voluntary conveyance—that is to say, such conveyance was void as to this debt. Strong had a right so to consider it.

If, then, the conveyance was void as to Strong's debt, the accident of his being one of the trustees does not give it validity, unless it be upon the ground that *concealment* is, in such cases, a necessary *indicium* of fraud; and so far is this from being the case, that even a *purchaser*, for valuable consideration, (under the 27th Elizabeth,) may treat a former voluntary conveyance as fraudulent, though he had full notice of such voluntary conveyance when he purchased.—5 Co. Rep., 60. Cowper, 278. 4th Atkins, 412.

The language of the statute is, "for the intent and purpose of defrauding," &c. Some of the decided cases go to the length of establishing the principle, that the "intent and purpose" here denounced, may exist in the purchaser, as well as in the seller, and that even a conveyance, for an adequate valuable consideration, shall be deemed void, as against pre-existing debts, where it is ascertained that the purchaser knew of the intent to defraud. Strong's assenting, then, (for his being a party to the deed amounts to no more,) to this deed of trust, does not in the least affect the "intent" of the other party. This must be judged of by the effect of the conveyance, which certainly is to "hinder, delay and defraud."

Assuming that this conveyance, then, was void, on account of its being voluntary, there is no force whatever in the objection that Strong is one of the trustees. His being so, does not make the conveyance more or less voluntary. The only difficulty in the case grows out of the misuse of the word "fraudulent." It matters not though the most perfect good faith existed in a transaction of this sort—still, if those badges of fraud (to wit, a voluntary conveyance 131
and indebtedness at the time) be presented by the case, they are conclusive.

W. Anderson, for appellee:

The deed from Dallas to Strong and Willis, in trust for the wife and children of the grantor, is sought to be set aside by Strong as fraudulent upon the ground that Dallas was indebted to Strong at the time of its execution.

It is to be observed that Strong was himself a party to the deed, he having accepted the trust under his hand and seal.

As a voluntary conveyance is not fraudulent of itself, it is necessary to inquire whether under the circumstances of this case Dallas committed a fraud either actual or constructive on Strong. "The mere fact of indebtment at the time does not, *per se*, constitute a substantive fraud to avoid the voluntary conveyance even in regard to prior creditors—but the question whether it is fraudulent or not is to be ascertained from all the circumstances of the case—and if the circumstances do not establish fraud, then the voluntary conveyance is deemed above all exception." 1 Story's Eq., pp. 354-5.

Dallas, making the conveyance to Strong, of course proves no concealment was designed. Strong, accepting and ratifying the trust, waives all objection to the conveyance, and negatives any fraudulent intent on the part of Dallas.

If there was an absence of fraud, the deed cannot be set aside 3 Desau, 1.

Strong is also estopped from denying the validity of this deed by being a voluntary party to it.

BALTZELL, J.

This is a suit in Chancery by the complainant, Strong, alleging indebtedness of the late Alexander J. Dallas, to an amount of nearly six thousand dollars, through a contract made in the summer of 1838, for the erection and finishing of a dwelling house on lot 276, in the city of Pensacola. The bill alleges that in December of that year, a deed of trust was executed by the said Dallas in behalf of his wife and children, whereby the said lot and building and property were conveyed to complainant and the defendant, Willis, as trustees for the use and benefit of the said wife and children. Complainant 132
alleges that "he became a party to the deed of trust by accepting the trust, but with no intention on his part to surrender any legal or equitable right which he might have to enforce against the property of the said Dallas, the payment of his debt abovementioned, and set forth," and he asks for a sale of the trust property. The defendants demur to the bill, and raise the simple question whether it is competent for a party, after having by his signature, accepted the trusts of a deed, thus to complain of it as fraudulent. It is purely a question of law, and to be decided as if the facts presented by the bill had been admitted by the answer. The office of trustee, his duty, rights, powers, and obligations are now well ascertained and understood (having been declared by the Courts in such terms) as to create an exclusive branch of equity jurisprudence. Amongst the rules established, we recognize the following:—"The trustee holds the estate for the *cestui que trust*, and to effect the purposes and objects declared by the deed." He cannot renounce, after acceptance, but must execute its provisions. He is bound to convey, at the direction of his *cestui que* trust, and may be compelled by suit to fulfill any particular act of duty. If the estate is assailed, his duty is to protect it—he may be enjoined from committing a breach of trust, and his laches or tort shall not effect the *cestui que trust*. Bearing in mind then, these principles, let us examine the trust deed in the case under consideration, to ascertain, the duties imposed and the trusts and covenants assumed by the trustees, and to see how far the individual right of one of them, as presented by this bill, may be consistent with them. The deed is in the usual form, and as a copy of it will be given by the reporter, we refer only to the material parts of it. The conveyance is declared to be in "trust for the sole and separate use, benefit and behoof of the sole and separate use of the wife and children, free and exempt from the debts, contracts and incumbrances of the said Alexander J. Dallas, free from any control, right, title interest or property of the said Dallas," and provides that the rents and profits of the land, &c., shall be appropriated to the support and maintenance of the said wife and children." This, undoubtedly, is an express declaration on the part of Willis and Strong, the trustees signing the deed, that the property shall not be disposed of to pay the debts of the grantor, amongst which clearly would be embraced debts

133 due to the trustees as well as to any one else. The property is not only not to be subject to the debts of Dallas, the grantor, but the trustees engage that it shall be appropriated to the support of the family. If assailed by a stranger, the duty of such trustee would be to defend and protect the property, and he would be compelled to do so.

Does he occupy a more favorable position, as far as his own rights are concerned? Can he, who has undertaken by his solemn act to defend this property, and carry into effect its objects and purposes of express and specific character, be permitted himself to turn round, repudiate the trust, and defeat and destroy it?

If the design of complainant was, as he states it to have been in his bill, not to surrender any equitable or legal right which he might have to the property, he should have insisted upon a declaration to that effect in the deed, and his neglect to do so, should be regarded as a waiver on his part. The deed is equivalent to a covenant or agreement on his part, that the property should be free from his own debt, as it undertakes to defend it generally against the debts, contracts and incumbrances of the grantor. Not a case has been exhibited to us in which a trutsee has been permitted in a Court of Equity to accupy such an anomalous position; and to allow it, would be to assume a position directly in opposition to all the leading and governing principles and rules upon which this branch of equity has been constructed. This would, indeed, be giving judicial sanction to such a design.

One of the rules alluded to above is, that, in attempting an injury to the trust property, the trustee acts without warrant, and in breach of his duty. What more serious injury—what more intolerable breach of trust, than to assert a right in the trust property, for his own individual purposes?—to ask that property, which, by his own act, has been confided to his care, to guard and protect for the wife and children of the grantor, shall be sold and appropriated to his own use?

Another principle, common to this as well as to every other branch of the law, is, that a man should not be permitted to allege his own fraud. If decedent was in debt, so as to make this deed a fraud as to creditors, complainant did wrong in aiding and sanctioning the act. It cannot be regarded as a fraud as to himself—for by his free act, his solemn deed, he has consented, as he had a full right to do, that the property should not be subject to his debts, but that he would look to other means for payment.

134 The case of a purchaser, for a valuable consideration, with notice of a prior fraudulent sale, is not that of complainant. As to him, such sale is in law a nullity, as if it never had been made. It is not a matter to which he is committed, and with which he had any connection or concern. It would be different, if such a purchaser had been pledged by solemn deed to sustain the very claim which he was asking leave of the Court to assail.

It may be a case of hardship for the complainant; but it is not the province of the Courts nor of the law to compensate the deficiencies of parties, or repair the consequences attending their neglect or inattention. If we mistake not, a law of the State provides a lien to mechanics, which might have been available to complainant—or he might, before undertaking the work, have required security—or, by declining the office of trustee, he might have occupied the position of a creditor, so as to assert the defects or fraud in a deed or deeds made to his prejudice or injury; but he cannot be both trustee and assailant of the trust deed; he cannot be both maintainer and holder of the legal title, and the asserter of its invalidity. For these reasons, we think the decree of the Court below must be affirmed, with costs.

ISAAC W. MITCHELL, APPELLANT, vs. FREDERICK R. COTTEN, EXECUTOR OF JOHN W. COTTEN, APPELLEE.

Under the discretion vested in the Courts by the act of November, 1828, section 50, in reference to the allowance of amendments in pleadings at any time before trial, the plea of the statute of limitations may be filed.

Admissions made by the counsel of a party must be made in his presence, and without objection, to be binding upon him. Admissions by counsel of the law will not affect his client's rights, if there should be error in the admission.

The act of 1833, in regard to usurious contracts, declares that "the interest on the same shall be void, and the obligor or obligors forever exonerated from paying the same." This provision making only the interest void, excludes the idea of making void the principal.

Concealment by a creditor from a surety of material facts, by which the surety 135
may be injured, or his rights affected, will invalidate the contract as to him, and discharge him from all liability. But the contract between the principal parties, of which a surety, without privity, can avail himself, for his discharge, on the ground of concealment, must be a valid contract as between the principals; and the act or transaction of which the surety seeks to avail himself for his discharge, must be such as lessens the ability of the principal to comply with his contract, or alters the rights of the parties, or enlarges the demand, to the prejudice of the surety.

The statute declaring that the whole interest only shall be void in a usurious contract, does not enlarge, but diminishes, the liability of the surety. An agreement therefore between the principals for usurious interest, to which agreement the surety was not a party or privy, does not discharge the surety from his liability on the principal valid contract between the parties.

Appeal from the Circuit Court of Leon County.

On the trial of this cause in the Court below, at the Fall Term, Hon. THOMAS BALTZELL, Judge of the Middle Circuit, presiding, the same issues were tried that were presented and tried on a former trial between the same parties at the Spring Term, 1847, of said Court. Two othr issues were taken and tried in this case, upon two additional and amendatory pleas, which the Court permitted the defendant to file, viz: The plea of the statute of limitations, and a plea of the discharge of Cotten, the surety, by reason of an alleged giving of time, and extension of credit to Doggett, the principal, without the knowledge or consent of the surety.

The testimony submitted to the jury was the same that was given on the former trial—a statement of which (as well as of the pleadings) will be found in the report of the case between the same parties, in the second volume of Florida Reports, page 136, and in the report of the case of Mitchell vs. Doggett, decided at January Term, 1847. See 1st Florida Rep., 356.

On the trial of this cause, plaintiff's counsel moved the Court to instruct the jury, as follows:

1. That the plaintiff may recover the consideration given for any usurious note or security on the money counts, provided there is no usury in the consideration itself.

2. If the jury believe, from the evidence, that the note of the first day of January, 1839, contained no usury, and was a valid contract in all respects, and was the consideration of the subsequent usurious contract, then the plaintiff is entitled to recover the principal sum of 136
said note, with legal interest thereon, up to the period of the making of the subsequent usurious contract, under the money counts in the declaration.

3. That our statute avoids only the interest on an usurious contract, and has nothing to do with interest or principal of a prior contract between the same parties, though such contract may be used as the consideration for a usurious contract; but the creditor is entitled to recover for his principal sum due and the legal interest up to the time of making such usurious contract.

4. The party setting up fraud, concealment, or giving time without consent of surety, or other matter in discharge of surety, must prove his allegations in discharge of himself.

5. That if the jury believe, from the evidence, that a promise was made by Henry Doggett, the principal debtor, to pay usurious interest in future for forbearance, such promise is void, and does not operate to discharge the surety, but both principal and surety are liable to pay the principal debt and legal interest up to the time of the making the usurious contract.

6. That both Cotten and Doggett being bound in the first instance, and the giving the note with the usurious premium being a subsequent and a distinct transaction, although the note declared on, or any part thereof, might be void, the pre-existing debt may be recovered on the money counts.

7. By our law, if the jury find usury, they can only deduct interest from the time the usury commences.

8. If two or more persons are jointly, validly bound, the law implies that the consideration passed to both of them.

9. That, under the statute of usury, a note or other security given upon a usurious contract, is not declared or made void, but the statute acts upon and makes void so much of the contract as relates to the interest secured thereby, both legal and the excess thereof; in other words, acts upon the contract, so far as the interest is concerned, from the time at which such illegal and usurious contract for extra interest is entered into and made.

10. That any acknowledgement or admission that the debt is a present and subsisting debt and unpaid, from which a promise to pay may reasonably be implied, will be equivalent to an express promise,

137 and will equally support the action; and when a general acknowledgement of a present subsisting debt is made, where nothing is said to prevent it, a general promise to pay may and ought to be implied.

11. That it is not necessary that the acknowledgement should state the amount of the debt—extrinsic evidence is admissible to prove that.

12. If the jury believe, from the evidence, that John W. Cotten, by his letter of the 25th November, 1844, acknowledged and admitted a present subsisting indebtment on account of the debt due by Doggett and Cotten specified therein, then that the law implies a promise therefrom to pay, and will save the bar of the statute, if within five years prior to the institution of the suit.

Which said instructions, excepting the tenth (10th) and twelfth. (12th,) the said Judge did then and there give in charge to the jury; and the said tenth (10th) and twelfth (12th) instructions, the said Judge did refuse to give in charge to the said jury.

And the said Judge did further instruct and charge the jury as follows, to wit:

13. "If you shall be of opinion, from the evidence, that at the "time of entering into the note sued upon for $15,955, of January, "1841, signed by H. Doggett and J. W. Cotten, that J. W. Cotten "was only security, and not primarily liable for the debt, by having re- "ceived part of the consideration, and another note was given by the "principal, Doggett, for the sum of $———, for part interest of said "note, as part of the contract, but extending the same two and a half "per cent. further, unknown to, and without any communication "with, the security, so that he remained wholly ignorant that twelve "and a half per cent. interest was in fact agreed to be paid by his "principal, instead of ten per cent., as agreed by the note executed "by the two, that this in law is a fraud on the security, invalidates "his note and agreement, and plaintiff has not a right to recover "thereon.

14. "That, under the decision of the Supreme Court, the note of "1839 is evidence of a debt against defendant, under the common "counts, and that plaintiff is entitled to recover thereon, unless pre- "vented by the statute of limitations.

15. "That the statute of limitations is a bar to the recovery of the "plaintiff on the note of 1839, five years having run upon it.

138 16. "That the letter of Cotten does not make a new promise, nor "revive any engagement of Cotten; its object seems to have been "to urge Mitchell to the early collection of the debt. To revive a "debt barred by the statute, there must be an express promise to "pay."

And the jury found a verdict for defendant.

And the said plaintiff, by his counsel, excepted and excepts to the refusal of the Judge to give in charge to the jury the tenth and twelfth instructions prayed and asked for by him; and also to the instructions and charge given to the jury by the said Judge, numbered thirteen, fourteen, fifteen and sixteen, as above set forth; and, inasmuch as the several matters hereinbefore stated and set forth, and his exceptions, do not appear of record, the plaintiff, by his counsel, presents this his bill of exceptions, and prays that the same may be signed and sealed by the Court, and be made part of the record; and it is done accordingly.

NOTE.—On the trial of the said cause, and after the evidence on both sides had been closed and submitted to the jury, the counsel for the plaintiff, who first addressed the jury and opened the cause, disclaimed and abandoned all right and purpose to recover under the first count of his declaration, and on the note dated 2d January, 1841, on which said count was founded; but stated that he claimed to recover under the general *indebitatus assumpsit* accounts, and on the note dated 1st January, 1839, for the sum of $13,186, for the amount of that note with interest, which said last mentioned note the said counsel then held in his hand and exhibited to the jury, as his then subsisting cause of action; and the arguments and addresses of the defendant's counsel were then made to the jury and the Court, on the state of plaintiff's case; and, further, the counsel for the plaintiff, who concluded the argument to the jury, maintained his right to recover on the note of 1841; and having denied that the plaintiff's counsel were precluded from maintaining their action on the said first count of their declaration, and on the note of 2d January, 1841, the cause of action therein declared on, by reason of any statement or admission made by the leading and opening counsel in his address to the jury, and denying that any such had been made. Thereupon the defendant's counsel moved the Court to instruct the jury as follows:

"That if the jury believe that the opening counsel for the plain- 139
tiff placed his ground of recovery on the note bearing date in 1839, and on the general *indebitatus assumpsit* counts, that it is not competent for the concluding counsel for the plaintiff, after the counsel for defendant have concluded their argument to the jury, to revive and urge the recovery of the note, dated in 1841. That the plaintiff is held to have abandoned that first count, and all recovery under it."

Which charge the Court refused to give, but allowed the plaintiff to claim before the jury a recovery on either and both counts, extending at the same time permission to the defendant's counsel to argue the case again to the jury, if they thought fit—of which permission, one of the defendant's counsel availed himself, so far as he thought proper.

To which ruling, defendant by his counsel excepted, and prays that the same may be certified and presented as part of the record of the case on the appeal of the plaintiff.

Brockenbrough, for appellant.

I

1. The Court erred in permitting defendant to amend his pleadings by filing the plea of the statue of limitations: Because the statute being a strict defence, the Court should not relieve the party by permitting him to amend by adding the plea. Angell on Limitation, 312, 313. Jackson vs. Varick, 2 Wend., 294. Johnson vs. Green, 4 Gill and Jo., 381.

2. The plea of the statute of limitations will not be received unless put in in due time, or amended if defective. La Motte vs. McLaughlin, 3 Har. and McH., 324. Perkins vs. Perkins' Ex'r, 1 Har. and McH., 400.

3. Defendant will not be allowed to add the plea of the statute. Cox vs. Holt, 2 Wilson, 253.

4. It is never allowed after issue joined. Hallegan vs. Golden, 1 Wend., 302. 1 Arch. Pr., 124.

5. On setting aside a judgment by default on affidavit of merits, the defendant will be required to withdraw the plea of the statute. Fox vs. Baker, 2 Wend., 244.

6. It is not allowed to be added to a plea of the general issue, in an action of trespass for mesne profits. 2 Yeates, 279.

II. 140

1. The Court erred in refusing the plaintiff's instructions, 10 and 12. Archbold on Plead and Evid. Pr., 28. Tanner vs. Smart, 6 Barn. and Cress., 603, 609. 2 Greenleaf Evidence.

III.

The Court erred in the instructions which it gave, numbered 13. 15 and 16.

As to 13, see Cotten vs. Mitchell, decided here last term, and 1 Comstock, 278.

As to 16, see cases cited before on 2d head, from Archbold. Barnwell and Creswell, and Greenleaf.

Also, 1 Espinasse, 435. Bailey et al. vs. Lord Inchiqui, and notes there cited. Perley vs. Little, 3 Greenleaf, 101. Porter vs. Hill, 4 Greenleaf, 42. Deshon vs. Eaton, 4 Greenleaf, 414. Bangs vs. Hall, 2 Pickering, 378. Whitney vs. Bigelow, 4 Pickering, 111 Moore vs. Bank of Columbia, 6 Peters, 93. Allen vs. Webster, 15 Wend., 289.

We have cited the strongest cases against us—the most stringent rule—we claim that Cotten's letter covers all. Otherwise it is a delusion—a vain thing. If he is not liable—if he never means to pay in any event—why write—why urge collection—why speak of liability—why of duty to his family—why press Doggett—why complain of time?

To say that he means to pay—"I owe it—press Doggett—but in any event I will never pay it"—is to force his words and wrest their meaning, to that which is palpably farthest from his thoughts.

Yet that must be done to bring that letter within the line of exclusion laid down by the cases.

IV.

But besides the necessary and clear implication of liability and duty and consequent promise of the letter itself, it refers to another paper, which is therefore a part of it—"the note you now hold * * since I last signed with him." It is proved to have been the note of 1841.

It is as much part of the letter as if incorporated in it. The letter thus gives us not only the implication, but the express promise.

It is no answer to say the note of 1841 is tainted with usury It is part of the letter.

141 1. And the usury then first commenced, and therefore he admitted he owes the debt before it began to run on usurious interest. The very allegation is, that usury was given for the further forbearance.

2. But if wholly void for usury or any other cause, it would still be proof of *admission* and promise—of those isolated facts—to bar the statute. Utica Ins. Co. vs. Kip, 3 Wendall, 373. Allen vs. Webster, 15 Wend., 289.

3. Apart from this, we have the note itself besides the letter, and the note is not void by any law. Only the interest on it is evaded.

4. Besides these, we have the evidence of Doggett evoked by themselves, which is conclusive, that Cotten owed, and promised in 1841.

V.

This letter seems conclusive in our favor on the money counts, or account stated. Upon it we must recover the debt due for eight years, and interest. He asks a statement of the principal and *interest*. To what purpose, if he never meant to pay it? He complains that the debt is *constantly growing larger*. Is this no promise? If we render that letter in common language, as all would interpret it, it is this: How much do I owe? I have been security a long time—nothing is paid—the debt increases—I wish to be relieved from my responsibility—Doggett must pay you—or give another note without my name—or you must sue him as you promised to do whenever I requested—and if he cannot, or will not pay, I must, and will.

Upon that we sue Doggett—that is consideration enough to support the promise, apart from his prior indebtedness. Landsdale vs. Brown, 4 Wash., C. C. R., 150.

We have shown his indebtedness to us from Flake—His subsequent obligation of 1839 to us, in discharge of his own former debt, nothing ever paid.

What is to prevent these facts and his letter from giving us our whole claim of principal and interest on the contract of 1839, or on the Flake notes? Certainly not the statute of usury. It is as foreign as the statute of wills.

The decision of this Court in this case last term, establishes this. It throws us back in conformity to universal precedent on the contract of 1839. There is no usury in that. We *cannot mix contracts*. The Court cannot decide that we may recover upon an old sound
142 contract, and then apply to us the law of a subsequent usurious contract upon which we do not recover—And say under the latter, we shall have no interest.

To say we shall recover on the contract of 1839, is to say we do not recover on the contract of 1841, which is to say we recover on a contract in which there was no usury and from which no interest can be cut off

Randall, for appellee:

This cause comes up to this Court a second time, upon *new issues*, in addition to the former ones, as presented in the case of Mitchell vs. Cotten, 2 Archer's Fla. Rep., 136. The new issues are—

1. Statute of limitations, p. 19, printed record.

2. Special plea of time given, or credit extended to principal, without the privity or consent of defendant, the surety. Ibid.

The jury rendered a general verdict for defendant on all the issues. P. 21.

The first error assigned by plaintiff is, that the Court below erred in allowing the filing of these additional pleas.

We answer, first—That the discretion of the Judge below in allowing and disallowing amendments of pleadings, is fully and expressly granted by statute of the State, viz: 50th section act of November 23, 1828, Th. Dig., 332, and it is not subject to revision.

The question is already settled by this Court. Stewart & Fontaine vs. Bennett, 1 Fla. Rep., 437.

But if the act of the Judge below was subject to revision in this case, it must be ruled that his discretion was rightfuly exercised:—

1st. Because it was for the first time, and owing to conduct of plaintiff on the former trial, that the occasion arose for the filing these additional pleas.

2d. As regards the plea of limitations, the Court is referred to the act of the Legislature of Florida, November 10, 1828, Sec. 12, Th. Dig., 444, to prove the absolute right of defendant's executor to have the benefit of this plea.

Defendant's counsel further submit to this Court, whether the terms of this act do not, *"per se,"* raise a flat bar to plaintiff's recovery in this case, the right of plaintiff to recover being, by his *own act*, in two Courts, or trials, placed on the general *indebitatus assumpsit* counts—in other terms, *"for a debt due upon an open account."* 143

"In limine," defendant's counsel contend that the note of 1841, and the special count of the declaration, are not to be considered as any longer constituting a ground of recovery, because of the facts of the *waiver* and *abandonment* of that note and count on the former trial, and by the leading counsel of plaintiff at the last trial. See case of same parties, 2 Arch Fla. Rep., 136. Bill of Exceptions in printed record, p. 38.

The fact averred as occurring at the last trial, is directly and positively affirmed and proved by his Honor the Judge in the bill of exceptions, and cannot be gainsaid.

On sound principles of correct practice, the parties should be held to abide admissions thus solemnly made. For authorities, see Greenleaf on Ev., sections 27, 186, 205, 207. Young vs. Wright, 1 Camp., 140. Lord Ellenborough's opinion. Colledge vs. Horn, 3 Bing., 119. (11 Eng. C. L. Rep., 61.)

Second error assigned: The Court below refusing the 10th and 12th instructions asked by plaintiff, and granting the 13th, 14th and 15th instructions.

We say, the matters embraced by the 13th instruction were not concluded or rendered improper by any expressed opinion or judgment of the Supreme Court. That it was justified by the law and facts of the case, and for this we refer to the argument on this part of the case, on the former appeal between these parties.

Not considering that the note of 1841 is in question in *this case*, defendant's counsel have not argued that point.

But they further submit that, *right or wrong,* however the ruling of the Judge below in this 13th instruction may be regarded, that ruling, and the facts and case to which it applied, are entirely foreign to and without this case.

Defendant's counsel contend that prayers for instructions Nos. 10 and 12 are not strictly and accurately correct, as *abstract propositions;* but in regard to the proceedings and evidence in the cause, could not be granted by the Judge below. If the Judge had recognized them as true in the abstract, and to be granted, he must have, of necessity, further instructed the jury, that all the attendant proofs and evidences going to take from the acknowledgement and admission of defendant, Cotten, *all effect whatever,* because of the paper evidence 144 referred to being written under mistake of facts, in ignorance of the attendant circumstances, and of the deception and fraud practiced by plaintiff. This addition to the instruction would have rendered their prayer unavailing.

The question of promise or no promise to be implied in this case, (there being no express promise,) was one for the Judge, and not for the jury—the evidence being a letter not disputed. 2 Greenleaf, Ev., 357. Snook vs. Mears, 5 Price Eq., R., 636. Strong vs. Wright, 9 Mees. & Wel., 630, (Rolfe, B'n.) Burke vs. Wood, 13, Price, 667. Waters vs. Earl of Tharnet, 2 Ads. & El., 769, (42 E. C. L., 904.) Colledge vs. Horn, 3 Bing., 113. 3 Taunt., 380. Bell vs. Morrison, 1 Peters, 364. Craig vs. Cox, Holt's N. P., 380.

Acknowledgement or admission—evidence of, from which promise will *be implied*. Cases referred to—Rowcroft vs. Lomas, 4 Maul & Sel., 457. Snook vs. Mears, 5 Price, 636, 639, (Graham & Garrow, Barons, p. 639.) Mucklow vs. St. George, 4 Taunt., 612-13-A Court vs. Cross, 3 Bing., 329, ((11 E. C. L., 124.) Scales vs. Jacob, 3 Bing., 638, (13 E. C. L., 85.) Tanner vs. Smart, 6 Barn. & Cr., 603, (13 E. C. L., 273.) Crips vs. Davis, 12 Mee. & W., 159. Strong vs. Wright, before cited. Book vs. Wood, same.—Kennett vs. Millbank, 8 Bing., 38. American cases—Sands vs. Gibson, 15 John., 511. Allen vs. Webster, 15 Wind., 284. Clark vs. Dutcher, 9 Cow., 674. Clemenson vs. Williams, 8 Cranch, 72. Melzel vs. Buzard, 11 Wheaton, 309. Bell vs. Morrison, 1 Peters, 351. Opin. of Mr. J. Story, 356, 357, 359, 362

By the latest English decisions in the Exchequer, a mere acknowledgement of personal indebtedness is not sufficient. By the American cases, "a liability and willingness to pay" must further appear, and neither of these last requisites can be inferred from Cotton's letter. These principles, too, are applicable properly to the principal debtor, and not to a surety. But Cotten's letter was written under an entire ignorance of the true facts, under mistake, induced by fraudulent misrepresentation.

Moreover, Cotten's acknowledgement applied to the note of 1841, and not to any other debt or security, and the Court will not extend it to anything but *the note;* and if that note fail, the acknowledgment or promise fails likewise. Clark vs. Dutcher, 9 Cow., 674.—Page's Adm'r. vs. Bank of Alex., 7 Wh., 35.

145 In this last case, testator repeatedly promised to pay the *note*, but the note failing, the Court would not extend the promise to any collateral liability, nor to the "general *indebitatus assumpsit* counts." It may be proper to add, that this last case did not turn (as is asserted) upon the peculiar principles of the law of Virginia, but upon the general doctrine of the common law.

But if the note had contained a promise, *an express promise*, yet being made in ignorance of the facts of the release of promisor by act of promisee, it would not be binding. Cockshot vs. Bennett, 2 T. R., 765-6. Goodall vs. Dally, 1 T. R., 712. West vs. Ashdown, 1 Bing., 164, (8 E. C. L., 282.) Cartwright vs. Williams, 2 Stark, 340, (3 E. C. L., 374.) This last case very strongly applies in the facts as well as the doctrine of the present case.

Even after payment, under such circumstances of fraud and mistake, money paid by party released in law may be recovered back. Buller vs. Harrison, Cowp., 555. Biez vs. Dickerson, 1 T. R., 285.

It is perfectly admissible and proper here to comment upon the diversity of views entertained by plaintiff's counsel in this and the Court below, upon what cause of action to ground their recovery—the leading counsel contending for the note of 1839, the associate counsel for that of 1841. They cannot both be right, for that would involve a monstrous absurdity. Mr. Thompson is right in holding on to the note of 1841, (*if permitted, after what has occurred*)—for if that be abandoned, unquestionably the right to recover is gone.—Plaintiff, Mitchell, having once voluntarily surrendered, given up to be cancelled, the note of 1839, can never again revive that note against the surety, independently of the bar of the statute of limitation; and this notwithstanding any promise, express or implied, from surety, in ignorance of the facts of his discharge. Cartwright vs. Williams, 3 E. C. L., 374, already cited.

If the pretention of leading counsel be allowed, principal will be held fixed, bound on the note of 1841, and the surety on that of 1839—thus severing and making diverse their liabilities.

Defendants never did contend for the doctrine of *novation*, as being borrowed from the civil law, *with all its incidents*, but to the extent invoked by them, it does prevail at common law.

1st. That *two valid securities*, the one taken as the substitute for the other, cannot both be in existence at the same time.

146 2nd. That when a new *valid* security is taken by creditor from principal, the surety on the old security, is no longer held bound by the first.

Not a case can be found in the books to the contrary. Smith's Case of Contracts, 49 Law Lib. Ap. 171. Burge, 167.

The note of 1841 is no nullity, was not void, in the sense of the New York and other cases. No law made it void, as it would have been in England and elsewhere, under certain usury laws.

But supposing there existed error in any of the foregoing rulings of the Court, none of these objections apply to the additional special plea filed since the first, and before the last, trial. The only instruction asked by any, was by plaintiff's counsel, touching "giving time or extending credit," and that *was granted*. That issue, with all the others, was found for defendant by the general verdict.

The Court below might have been applied to, if the facts warranted the application, for a new trial. Waiving that, plaintiff is without remedy for any mistake of jury. Their verdict cannot now be impeached. But we go further, and assert, that the facts of the case warrant the finding.

After the note of 1839 had arrived at maturity, plaintiff extended time and credit to principal by taking another valid security, viz: the note of 1841, by which he suspended his remedy against principal. And if, as we contend, the note of 1841 was obtained from Cotten by false pretences, by fraudulent misrepresentation, then that note, being void as regards him, can bind and conclude him to nothing. It is no evidence of his assent to the extended credit. This note of 1841 is the only evidence in the case, of any such privity or consent. As to the effect of Cotten's letter, that was written years after the time of credit extended, and was written in equal ignorance of facts, under the influence of the same fraud and deception—See the before cited cases of Cockshot vs. Bennett. Kennedy vs. Millban,k, 8 Bing., 38. West vs. Ashdown. Cartwright & Williams.

Cases referred to as doctrine of "giving time to principal, without assent of surety."

1 Paine C. C. R., U. S. vs. Tillotson. Mr. J. Thompson opin- 320-1. 1 Holt, 84, (3 C. L. R.) 6 Taunt., 379, (1 E. C. L.) Archer vs. Hale, 4 Bing., 464. (15 E. C. L., 42.) Bowmaker vs. Brown, 7 Price, 223, 234. Gold vs. Robson, 8 East., 576. Samuel vs. Howarth, 3 Merrivale, 277. McLemore vs. Powell, 12 147
Wh., 554, (6 Cow., 636.) Mr. J. Story's opinion, p. 637.

In the argument thus far presented, the counsel for defendant have acted on the firm persuasion that the right of plaintiff to recover on the note of 1841 will be repudiated by the Court, because of the incidents attending the two trials in relation to that note. And they have not adduced the arguments and authorities heretofore offered to impeach the validity of that note on its intrinsic demerits. But as by possibility they may be mistaken in the first supposition, they beg leave to recall the objections heretofore presented, both in the Court below and in this Court, to the validity of that note, as regards the surety, Cotten.

It has been argued as if the objection was only founded on the *usury laws*, and existed *because of the usury;* whereas, the objection would be the same, and the surety's release would be equally assured, if no usury had been perpetrated in the excess of interest exacted. It has been asked from the Bench if a case can be shown from the books where the release of the surety was wrought by a subsequent exaction of usurious interest? We answer that our defence is not under any statute, but at Common Law.

When stringent statutes prevail, creating forfeitures and penalties, for imputed fraudulent exactions, no other resort need be had beyond the provisions of such statutes.

But in principle and reason, and under the most direct analogies, numerous cases can be cited precisely resembling the present. Let us now re-state the doctrine we assert, and some of the leading cases, promising, as the Court will see, that the doctrine is precisely the same in Courts of Law and Equity.

And first for a summary of it, see 1 Story's Eq. Jur., 329, 386, sec. 177. "The concealment from the surety of any of the terms of the principal contract, prevents *any obligation* arising from the engagement of the surety. It renders the engagement a nullity."

This covers the whole ground we contend for.

Our "principal contract" was the note of 1841—our then sole subsisting "contract."

Very material terms of that contract—a secret excess of interest beyond that apparent on its face—was concealed from the surety—and what is the consequence?

It "prevents any obligation arising," &c. 148

"It renders the engagement a nullity."

Does it merely create a forfeiture, as regards "the excess?" Certainly not. That would be inadequate—a very short measure of justice.

Look now to the first case formerly cited: Pidcock vs. Bishop, 3 Barn. & Cr., 606, (E. C. L.)

In that case it was not the excess of ten shillings per ton on the iron charged, which was forfeited, but the whole contract, the whole debt.

In that case, too, the *excess* did not even increase the ultimate responsibility of the debtor, for it went to pay an old debt, not to increase or create a new one. It never was a charge against the surety, and never could swell the amount of his liability *directly*, for his guarantee was for a limited amount, and the suit for less than the limit. Yet the Judges all declared it a fraud on the grantor, and vitiated his contract.

See language of Ch. J. Abbott, page 198—same of Bailey, J., 198-9.

In that case no such excess was actually paid by any one, but only stipulated to be paid—only charged in the "bill of parcels."

Can any distinction be found between *excess of price* and *excess of interest?*

Another strong case is Jackson vs. Duchain, 3 T. R. 551. Here there was no actual imposition practiced upon any one in respect to *extortion*, or excess of any kind. But yet the secret agreement between the creditor and the principal, without privity of surety, was the sole ground of invalidating the whole engagement. Neither was any stipulated excess in this case actually paid.

See reason for the decision in opinion of Ashurst, J., p. 553: "If surety had known of the private agreement, he would not *probably* have advanced the money."

The principle in that and the present case is *"ex dolo malo, non oritur actio."*

Other cases. Stone vs. Compton, 5 Bing. N. C., 142. Cockshott vs. Bennett, 2 T. R., 765-6. Smith vs. Bromley, 2 Doug., 696, (in note.) Jackson vs. Lomas, 4 D & E., 166. Leicester vs. Rose, 4 East., 372.

149 In several of the foregoing, neither principal nor surety were injuriously affected, in a pecuniary sense. Nor were the claims of the party released always of a meritorious character. In some instances the party relieved—discharged—was participant in the fraud.

In all, the relation was total from the whole engagement, or contract, and not from the excess.

Other cases. Archer vs. Hale, 15 E. C. L., 42. Henry vs. Stone, 2 Rand., 464. 3 Merivale, 277—opinion of Lord Chan. 7 Price, 223. See 1 Paine C. C. R., 305 to 335. Judge Thompson's opinion, 320—"Any agreement," &c.

Same, page 321—Any new debt increased, or demanded enlarged, &c., to prejudice of surety, &c., will discharge him, &c.

"These are controlling and undeniable rules, and universally admitted, both in Courts of Law and Equity."—Ibid.

And mark his conclusion: "But whether the alteration were for the benefit or prejudice of principal, cannot enter into the question." &c.

See also page 328, the answer to the suggestion that the sureties are not injured by the variation: "That they are only to be reached under the unaltered admitted terms of the original engagement.

And whether the alteration leaves them liable on the portion of the contract *not altered*. He decides the contrary. See his emphatic language on this point.

In conclusion, defendant's counsel respectfully submit, that their defence is at common law, and not under the statute of usury, and they conceive that much misapprehension would have been avoided if no reference had been made to cases of usury.

At common law, the obligations of sureties are *"strictissimi juris,"* and entire candor and good faith are exacted from all who deal with them, under penalty of their entire release. Not a case can be found where the remedy stops short of their total discharge, when secret and fraudulent exactions are *sought* to be imposed upon their principal.

To stop with cutting off the mere excess, would be an inadequate measure of redress, would carry no adequate sanction.

In most of the cases, the excess never was charged to nor sought to be exacted from them. Yet the discharge was total.

150 *Long*, for appellee:

1. We deny that the Court below erred in permitting the defendant below to file the plea of the statute of limitations, after the cause was remanded from the Supreme to the Circuit Court. All amendments of pleading are in the discretion of the Circuit Courts, and cannot be assigned for error in this Court. Stewart & Fontaine vs. Bennett, 1 Florida Reports, 437, and authorities there cited. Our statute, however, is peremptory, which says, "The Court may, *at its discretion*, give leave to a party to amend his declaration, *or other pleading* in a cause, at any time before the case is submitted to a jury," &c. Thompson's Digest, 332. There is no exception to this discretion, excluding the plea of the statute of limitations. The discretion, then, is absolute, and this Court has no power to control it. Whether it would be wiser to allow this discretion to be so qualified as to be subject to revision by this Court, is for the Legislature to settle.

But we say the discretion exercised in this case was proper, and would not be altered, had this Court the power. The note of 1839 was not declared on in the declaration, or inserted in the bill of particulars, but another and different note was, namely, that of 1841. When this Court decided that it might be offered in evidence under the money counts, it was a virtual and important amendment of the declaration and bill of particulars. This is obvious—for it appears that the note of 1839 had been given up to Doggett ever since the 1st of January, 1841, when the note of that date was executed, and was so given and cancelled, in consideration of the note last mentioned. Of course its existence must have been unknown to plaintiff, when he filed his declaration. It was brought into the cause by defendant, to prove the real consideration of the note sued on, namely, that of 1841. When the plaintiff is allowed to regard it as set forth in the declaration and bill of particulars for the first time, does not common fairness require that the defendant shall be allowed to plead any defence which might exist in law and in fact? A discretion which should have refused this, would have been unjust and oppressive in the highest degree.

Again: If it be said that this note of 1839 was not offered as a written subsisting contract, but only as a piece of written circumstantial evidence, to prove the *amount* of money due at the time the note

of 1841 was made, with a view to recover the original considera- 151
tion, &c., and that as defendant knew he would bring the same into the cause, he is to be charged with the knowledge of the right and intention of the plaintiff to rely on the same, we have three answers. The first is, because the debt for which the note of 1839 had once been the evidence, was "extinguished," and the evidence cancelled and delivered to the maker, "by the substituted note of 1841," as expressly declared by the Court in the suit against the principal on this latter note. The language of the Court is, "The note of 1839 was extinguished by the substituted note of 1841," upon which latter note this Court then confirmed a judgment against Doggett, the principal. I think no case can be found where a note "extinguished" as to the principal, has been held binding on the surety. Counsel do not pretend that such a decision has ever been made; at least prior to the decision on this case, which they seem to understand. The defendant being a mere surety, as alleged in the pleas, established by the proof, and admitted by the plaintiff, had no right to expect an attempt to recover the original consideration, under the money counts specified in the note of 1839, on account of two other distinct principles of law. The first is, that whenever the suretyship of a joint and several obligor to a contract is established, the presumption that he received the money, or any part thereof, is fully rebutted. That is the exact meaning of the difference between a principal and a surety. He that receives the consideration is not a surety, but a principal. A surety can only bind himself in writing, by the statute of frauds, and if the written promise to "pay the debt of another," becomes invalid by any means, the surety is discharged. This most reasonable doctrine of the English Courts has been fully established in this country. An accommodation endorser and a surety cannot be made to pay the original consideration under the money counts, for the same reason, namely, that in neither case do they receive the original consideration. 7 Wheaton Rep., 35. 8 Taunt., 737. 7 John., 132. 4 Bos. & Pul., 351.

A third reason why the original consideration cannot be recovered against the defendant under the money counts, is found in the fact that he is an *executor*, to whom our statute applies. The money due upon the old note of 1839, fell due on the 1st day of January, 1840. and the testator of defendant died subsequent to the 10th of June, 1845, near five and a half years after the same was due. Our 152
statute requires the "Court before whom such suit shall be brought, to cause to be expunged from such account every item thereof which shall appear to have been due five years before the death of the intestate." Thompson's Digest, 444. Therefore, it seems plain that it was the duty of the Court to expunge from the bill of particulars the old cancelled note of 1839, without any plea of limitations. I am not prepared to believe that this court have decided, or for one moment meant to be understood as overruling, either one of these principles. If I am mistaken in this, I most respectfully ask the Court to reconsider these questions.

2. My colleague having so fully investigated the questions raised by the assignment of errors, in relation to the instructions given and refused by the Court, and having so fully vindicated the action of the Court in this respect, I will proceed to show that the cause is with the defendant, upon different and independent grounds."

The plaintiff contends that the verdict and judgment in this cause is wrong, because he has failed to recover upon either the note of 1841, or upon that of 1839. He does not pretend that he has any right to recover on both. That he has heretofore openly abandoned all attempts to recover on the note of 1841, is plain from this record. and from the assertion of this Court, in its opinion in this cause at the last term. At pages 147-8, the Court say: "The plaintiff, at the "trial of the cause in the Court below, *abandoned* the first count in "his declaration, which (as we have seen) was upon the note of "the 2d of January, 1841, and sought to recover only on the original "consideration." The bill of exceptions in this case shows that the same was *abandoned* on the last trial also, by the leading counsel, and that his associate differed with him in that respect, and "in *his* argument to the jury maintained his right to recover on the note of 1841," in the language of the record. This is about as much as saying that the associate counsel *abandoned* all hope of a recovery on the note of 1839, or the original consideration, and if so, we have the authority of the plaintiff's counsel for saying that no recovery can or ought to be had on either.

It is difficult to perceive how this Court is to determine whether a recovery can be had on either of these alleged causes of action—it being admitted that but one can rightfully be recovered on, unless

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153 the plaintiff will point out *which*, and show *why*. If the note of 1839 is good, it is merely because that of 1841 is bad, and if that of 1841 is good, it is because that of 1839 is bad. Every reason and argument which tends to uphold the one, has the exact same force and tendency to destroy the other. If the associate counsel can show that the note of 1841 ought to be recovered on, he will thereby establish that the note of 1839 ought not; and if the leading counsel shall be able to prove that the note of 1839 ought to be recovered on, he will thereby establish that that of 1841 ought not. And hence this curious dilemma will ensue, that if each of plaintiff's counsel shall succeed in his respective aim to establish a right to recover on each, it will thereby conclusively follow that there exists no right to recover on either.*

3. It appears from the record in this cause, that all the issues are found for the defendant. It also appears that the two instructions refused by the Court (10 and 12,) refer alone to the plea of the statute of limitations. Therefore it is immaterial whether those instructions should or should not have been given. One issue in favor of a defendant is sufficient. In this case there are at least two upon each count of the declaration, to which there is no exception in the record.

The plea of the *general issue* was filed prior to our new rules, with notice of special matter, and applies to both notes and both counts in the declaration. That is found for defendant. Under this plea, all the proof in the cause was admissible, and the notice accompanying that plea recites all the facts which are proven, and they clearly make out a case of payment, satisfaction, extinguishment and release, as to the note of 1839, by the substitution of that of 1841. The rule on this subject is laid down in Chitty's Pleadings as follows:

"In *assumpsit*, before the Pleading Rules, (Hil. T., 4 W., 4,) al-
154 most every matter might be given in evidence under the general issue, *non assumpsit*, on the ground, as was said, that the action was founded on the contract, and the *injury* is the *non-performance* of it, which disaffirms the *continuing obligation of performance* of the contract *at the time when the action was commenced*, goes to the gist of the action." 1 Chit. Plead., 472.

The 4th instruction asked by the plaintiff was given by the Court in these words: "The party setting up fraud, concealment, or giving time without consent of surety, or other matters in discharge of surety, must prove his allegation in discharge of himself." Now it is plain that the jury were not misled on these points, and they were all at issue under the general issue, and notice attached thereto, and two of the matters were also specially pleaded, namely, fraud in the concealment from Cotten, the surety, that a greater rate of interest was secretly contracted to be paid by the principal than was made known to the security, or expressed on the note, and also that time was given to the principal without consent of surety. The fraud and concealment of the true contract applied to the first count of the declaration, upon the note of 1841, and the giving time without consent is specially pleaded to each count, and to both notes. These matters were provable under the general issue, but they were also specially pleaded, doubtless to raise the question of law directly whether they constituted good defenses to the action, in case the plaintiff should signify any doubt upon the point, by demurring. This he did not dare do, but joined issue. It is no matter of surprise that the plaintiff should abandon the first count and the note of 1841, when these issues were so perfectly sustained by the defendant's proof. Then it was that the old cancelled note of 1839, being found among the papers of the cause, as a link in the chain of defendant's proof, was seized upon by the plaintiff, and offered in evidence under the money counts on the first trial; but as the Court refused to allow it to be read in evidence, the case was brought up to this Court to obtain this permission, which was then for the first time granted. Upon the last trial, the plaintiff was allowed to offer the note of 1839 in evidence under the money counts, but the proof under the general issue, and under the special plea of extension of time, were just as potent to bar the note of 1839 as it had been, and then was, to bar that of 1841.

I see no complaint made of the charge of the Court in relation to these issues, and being found for defendant by the jury, must stand. 155 Indeed, the record shows no hint or suggestion even, that the plaintiff considered the verdict upon these pleas unwarranted by the evidence. No motion for a new trial, nor any complaint of the verdict or charge of the Court upon these matters. This is decided by this Court in Mitchell vs. Chaires, 2 Florida Reports. Seeing that one good issue is as useful to a defendant, as a bar to the action, as a dozen, and that we have at least two unquestioned issues found in our favor, it is difficult, from the record, to imagine what useful purpose the plaintiff can have had in view in bringing the case to this Court. If it be said that the object was to settle the matters of law arising upon the instructions relative to the statute of limitations, we say, "sufficient for the day is the evil thereof."

It has been contended, rather vaguely, that instruction numbered 13, as given by the Court, is subject to objection. If I correctly understood the objections, they were as follows:

1. That the Court, in that instruction, takes from the jury the decision of the facts. This I deny. The facts stated hypothetically, are preceded by the distinct language, "If you shall believe from the evidence that," &c., and after reciting the facts thus hypothetically, concludes as follows: "this in law is a fraud on the surety, invalidates his note and agreement, and plaintiff has not a right to recover thereon." It is impossible to conceive of a charge less subject to the objection here made than this.

2. That the facts stated thus hypothetically in the instruction were not proved in the cause, and hence that their recital was calculated to mislead the jury. This objection is equally unfounded, for every fact recited is proven most distinctly, without the least conflict of evidence as to any. They are all the most familiar facts in the case, viz: that Cotten was a surety only, and that he was ignorant of the secret agreement between Mitchell and Doggett, the principal, that a greater rate of interest was to be paid than that stated on the face of the note of 1841. It was doubtless the clear proof of these facts which at the first trial induced plaintiff to abandon the note of 1841, and seek to recover upon that of 1839.

3. The third objection is, that the conclusion of law announced by the Court, namely, that such secret agreement "is a fraud upon the surety, invalidates his note and agreement," &c., is erroneous. The first answer to this objection is found in the numerous authorities ci- 156 ted by my colleague, directly in point, and the fact that not one solitary authority has been cited to the contrary. Indeed, this objection comes strangely from plaintiff in this place, and at this stage of the cause, for the first time. If these facts did not amount to a good defence, the special plea in which they are set forth in almost the very language of this instruction, should have been demurred to, and at least some authority cited, if any existed, overruling those cited on our side. By taking issue upon the plea stating these facts as a bar to the action, plaintiff has admitted the question of law, and cannot now be heard to question the same. The plaintiff's case is literally staked upon each and every issue joined in a cause. When the issue is found against him, it is rather late to inquire whether the plea constituted a good defence or not.

Briefly to recapitulate:

The note of 1841 cannot be recovered on because, 1. The plea of the general issue is found to be true. 2. Because the special plea of fraudulent concealment of the true terms of the contract from Cotten, is found to be true. 3. Because the special plea of extension of time without consent of Cotten, is found to be true.

These issues were found for defendant by the jury, under the distinct charge of the Court, that "The party setting up fraud, concealment, or giving time without consent of surety, or other matter in discharge of surety, must prove his allegations in discharge of himself," which instruction appears to have been given at the instance of plaintiff.

The note of 1839, or the "original consideration," cannot be recovered under the money counts in the declaration:

1. Because Cotten, the defendant, is only surety, and never received any part of the "original consideration."

2. Because the original consideration, or "note of 1839, was extinguished by the substituted note of 1841," the plaintiff having in fact sued and recovered thereon.

3. Because the issue of *non assumpsit* has been found for defendant upon the proof in the cause.

4. Because the special plea of extension of time to principal without consent of surety, has also been found for defendant.

5. Because the "original consideration," or money mentioned in

*The associate counsel for plaintiff, after relying upon the decision of this Court at its last term, to prove that the note of 1839 might be recovered on under the money counts, being asked in conclusion which one of the notes he considered himself entitled to recover on, replied, "I think we are entitled to recover on the note of 1841." This would seem to show that the plaintiff's counsel do not themselves believe that the decision of this Court has overruled either of the three principles of law, which we have shown prohibit a recovery on the money counts, the amount of money mentioned in the note of 1839.

157 the note of 1839, was due more than five years before the death of defendant's intestate, and therefore should have been "expunged" by the Court below from the declaration or bill of particulars, in pursuance of our statute on the subject.

Each of these reasons constitutes a perfect bar to the plaintiff's suit.

L. A. Thompson replied.

LANCASTER, J.

This cause was before this Court by writ of error, at the January term, 1848—see Report of that year from page 136 to 158, inclusive. It is now again here by appeal from Leon Circuit Court; but the questions raised by the bill of exceptions, which have been made part of the record in this cause, are very different from those then presented. After this case went back to the Circuit Court, upon the production of the mandate of the Supreme Court, it was ordered by the Court, in pursuance of said mandate, that the judgment theretofore rendered by the Circuit Court in this cause be reversed and set aside, and that the cause be docketed, and such further proceedings be had therein, as are in conformity, &c. After this cause was so docketed, and before trial, the defendant by his attorney moved the Court for leave to file two additional and amendatory pleas, to wit: A plea of the statute of limitations, and a plea averring that the promises and undertakings of John W. Cotten, defendant's testator, and on which this suit was brought, were made as surety of one Henry Doggett, and alleging that, for a valuable consideration given by Doggett, the principal, to Mitchell, the plaintiff, time was given, or a credit extended, without the knowledge or consent of defendant's testator, J. W. Cotten. After argument, the pleas were allowed by the Court, and the plaintiff by his counsel excepted thereto. And it is assigned for error, that the Court erred in permitting defendant to amend his pleadings, by filing the pleas before mentioned.

The act of November 23, 1828, sec. 50, see Thompson's Digest, 332, provides: "The Court may, in its discretion, give leave to a party to amend his declaration, or other pleadings, at any time before the case is submitted to a jury;" but it must be done instanter, and if of substance, the adverse party has a right to a continuance. The record shows, after leave given, the pleas were filed on the same
158 day, to wit, instanter; and the record does not show that any continuance was asked by plaintiff, by reason of the filing of said pleas. It was contended that the Court must, in any such case, exercise a sound discretion, in permitting the amended pleas to be filed—or, otherwise, it will be subject to reversal in this Court. It might be a sufficient answer to this objection to say, the record does not state the circumstances or reasons on which the Court exercised its discretion of permitting the pleas, by way of amendment, to be filed, and in the absence of such reasons, this Court will presume the discretion of the Circuit Court was soundly exercised. But the question was considered by this Court, in the case of Stewart & Fontaine vs. Bennett, 1 Fla. Reps., 446, and it was there held, that, after a "new trial the pleadings of both parties can be amended by leave of the Court." Now, after the former judgment of the Circuit Court, in favor of defendant; was reversed and set aside, the case docketed, and further proceedings ordered, it seems obvious that both parties could look to nothing but another, or new trial, and the case stood, in all respects, precisely like one on which a new trial had been ordered. The parties, therefore, had a right, by leave of the Court, to amend their pleadings, unless the decision in the case of Stewart & Fontaine vs. Bennett, is erroneous; but, on looking into that decision, we are inclined to think it correct, and to regard it as authority.

From what has been said, it will be perceived that this Court is disinclined to entertain or allow objections to the rulings of the Circuit Court, in matters appertaining to the pleadings, where a discretion is given them by law, and we might cite much authority for a similar practice in other Courts. We are, therefore, of opinion the exception we have been considering was not well taken, and do overrule it.

The action in this case is founded on a promissory note, in the words following, to wit:

"On or before the 1st day of January next, we or either of us, promise to pay Isaac W. Mitchell, or order, fifteen thousand nine hundred and fifty-five dollars, with ten per cent. interest from date, for value received, this the 2d day of January, 1841.

(Signed) "H. DOGGETT,
"J. W. COTTEN."

Mitchell vs. Cotten, Executor.—Opinion of Court.

The declaration of the plaintiff contains two counts the first is a 159 special count on the note above set forth, and the second contains the common money counts, and account stated. To this declaration, there were at the original trial eight issues joined, two pleas having been demurred out—all which is fully stated in the report of that case in the year 1848, at page 136-7, and for brevity, is here referred to. At the late trial, and from which this appeal is had, all the issues of fact in the former trial, and the two others in this opinion before noticed, came on to be tried. At the trial, plaintiff, as appears by the bill of exceptions, offered in evidence the note herein before set forth—a letter from J. W. Cotten to Dr. Mitchell, the plaintiff post-marked Tallahassee, Fla., Dec. 3, paid—10 cents, and dated 25th November, 1844, and also the praecipe, showing the commencement of the original suit, to wit, January 8th, 1845.

The defendant then offered sundry depositions and exhibits, and the testimony of sundry witnesses sworn to in Court, which may be referred to herein, but for brevity, will not be set out.

It is contended *"in limine,"* by defendant's counsel in this Court, that the note of 1841 (before set forth) and the special count of the declaration thereon, are not longer to be considered as constituting a ground for recovery for plaintiff, because (as he says) of a waiver and abandonment of that note and count on the former trial, and by the leading counsel at the last trial. The only matter on the record touching a waiver by the plaintiff's attorney, will be found in the note appended to the bill of exceptions at the request of defendant's counsel, also signed by the Judge, and made part of the record and excepted to by defendant's counsel.

On the former trial, by reference to that record, it appears the Court instructed the jury, that the counsel for the plaintiff did not ask a recovery on the special count on the note, having conceded he could not recover thereon. And this, we apprehend, is as much as he at any time intended to admit. It was his intention, which he has followed with unwavering fidelity, to recover on the common counts, and whether he really entertained the opinion, he could not recover on the note and special count, or whether he desired to avoid that note, the interest of which by the testimony, he knew to be tainted with usury, and by recovering the consideration for which the note was given, on the common counts, to have interest divested of usury, from the date of that consideration, up to the time of judgment, 160 it is perhaps not material to inquire; but, admitting that counsel thought and conceded he could not recover on the special count, and the plaintiff's other counsel thought he could, and insisted on such recovery before the jury, to which insisting defendant's counsel were permitted to reply, and one of them did reply, ought such an admission to discharge and defeat any legal liability or obligation of the defendant, if plaintiff's counsel was mistaken in point of law, as to his client's rights? In the case of Colledge vs. Horn, 3 Bingham, 199, where it was sought to introduce proof of an admission by plaintiff's counsel, and the testimony had been ruled out: Best, C. J. says, "the question is one of great difficulty, and I avoid saying any thing on it until we have all the facts before us. At present, it does not appear whether or not the plaintiff was in hearing of the statement made by the counsel, or how far that statement was authorized." In the same case, Borroughs, J., says: "parties are every day bound by the acts and declarations of their counsel; if the plaintiff was in Court, heard what his counsel said and made no objection. I think he was bound." The other two Judges gave no opinion, but if we are to collect the law from this authority, which was cited by defendant, it seems that admissions made by the counsel, of a party, to bind that party, must be made in his presence and without objection. In the case of Young vs. Wright, 1 Campbell's N. P. C., 140, Lord Ellenboro said, "if a fact is admitted by the attorney on the record, with intent to obviate the necessity of proving it, he must be supposed to have authority for this purpose, and his client will be bound by the admission, but it is clear that whatever the attorney says in the course of conversation is not evidence in the cause." And Greenleaf on Evidence, as referred to, is to the same effect. The attempt here is not to bind the plaintiff by any admission of fact made by his attorney, to obviate the necessity of proof; but to bind him by his admission of law, wherein he concedes he could not recover on the note sued on and special count in his declaration. Whether he could recover on that count, is a question of law, and we presume it will not be seriously contended that admissions of counsel of the law, where there happens to be an error in the admission, can make the law. The record abundantly shows, notwithstanding the admission made, that the note sued on was read in evidence before the

161 jury, that one of plaintiff's counsel maintained his right to recover on that note, and under the circumstances, the Court permitted plaintiff to claim before the jury on either and both counts, extending permission to defendant's counsel to argue again before the jury, which one of them actually did. These occurrences do not, this Court is of opinion, amount to any waiver or abandonment of any legal right of recovery by the plaintiff, and ought not to bind him, as by one of his counsel he was still asserting his right to recover on the note of the second of January, 1841.

We shall next inquire whether that note was and is good and valid in law, and whether plaintiff is entitled to recovery thereon. For these questions are raised by the record and exceptions sent here for review. The note is the joint and several note of John W. Cotten and Henry Doggett, and is expressed to be for value received; and no question is raised on the record touching its execution, but every where in the record it is treated as a note of Henry Doggett and John W. Cotten, so far at least as their signatures to it are concerned. Suit was brought on that note by plaintiff, Mitchell, vs. H. Doggett and John W. Cotten, on the 8th of January, 1845, as appears by the praecipe in evidence in this suit, and as appears by the statement of that case in 1 Flor. Reps., 365. "Cotten, dying before trial, the suit abated as to him, but continued as to Doggett." In the decision of the case of Mitchell vs. Doggett, 1 Flor. Rep., 373, the question of usury being raised, this Court said "by the letter and spirit of the statute, whenever illegal interest is taken or contracted for, the whole interest is void." The 3d section of the Act of February 12th, 1833, Duval's Laws, 79, on which this decision was given, is in these words: "That when any note, notes, bond or bond, shall or may be upon, or on account of any usurious contract, the interest on the same shall be void, and the obligor or obligors forever exonerated from paying the same." It is worthy of remark as distinguishing this statute from almost all others in other States and countries, that while others declare a usurious contract wholly void, this provides and declares the interest only shall be void, carefully abstaining from any provision declaring the contract for the principal sum void on which usurious interest is taken or reserved. The decision of the point last referred to, as given by the Supreme Court in that case, was strictly consonant with our statute,
162 and therefore sound. These views were again sustained by this Court at January term, 1848, in the case of Mitchell vs. Cotten. The learned counsel for defendant, in their argument of this case, seem to have lost sight of the manifest distinction between other statutes of usury, where it is provided that the whole contract shall be void, and our's in which it is only provided the interest shall be void. Now a provision which, for usury, makes the interest void, excludes the idea of making the principal void, for *expressio unius exclusio est alterius.* But counsel for defendant, in this case, now and in 1848, and in the former case of Mitchell vs. Doggett, gave the same construction to the statute of usury, we now seek to establish, by contending that the note of the 2d of January, 1841, given by Doggett and Cotten to Mitchell, and on which the special count in the declaration in this case is founded, is good as against Doggett, the principal, but void as to Cotten, the security. Now if our statute made the whole contract void the note as against Doggett, would be void, and consequently void as against the surety also. But is is not denied in this case, that at the time of taking the note of 1841, although on the face of it, it was payable on or before the first of January next thereafter, with ten percent interest from date, (which at the time of the contract was lawful) there was at the time of making said note a contract made by Mitchell and Doggett, that over and above the interest mentioned in the note, Mitchell was to have the further rate of two and a half per cent, additional interest, which was usurious, and that on the same day Doggett executed another note to Mitchell for $398 87-100, being the interest on the principal sum for twelve months at two and a half per cent. Doggett says, however, and it is nowhere controverted, that the usury in his contracts with Mitchell began when he executed the note declared on in this suit, and gave the note for $398 87c., above mentioned.

It seems that the sum of fifteen thousand nine hundred and fifty-five dollars, mentioned in the note declared on, was due to the plaintiff by defendant on account of a prior indebtedness, at the day of the execution of that note, free from usury, if the uncontroverted testimony of Doggett, one of the obligors, is to be relied on. Upon which state of case, under the statute of usury, we have no hesitation to decide that both obligors as such, became at the time of executing the note declared on, jointly and severally legally bound to the plaintiff, Mitchell, for the principal sum named in said note, but for no inter- 163
est whatever if the interest reserved (which seems to be admitted) was usurious.

The question is raised in this case, that upon the note sued on, Cotten was only a surety for Doggett, the principal, (which from the testimony of Doggett and the course of the argument, we think appears manifest was the fact,) and as such surety his rights were different from those of his principal, and that a concealment from him of the terms of the principal contract prevents any obligation arising from the engagement as surety, and renders the engagement a nullity. Upon reference to Story's Equity Jur., 239, referred to by defendant's counsel, we find the doctrine laid down thus: "Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditor, either by surprise or by withholding proper information, will undoubtedly furnish sufficient ground to invalidate the contract." And at page 330, sec. 225, same book, the doctrine is stated in a more general form, thus, "that if a creditor does any act injurious to the surety, or inconsistent with his rights, or omits to do any act when required by the surety which his duty enjoins him to do, and the omission proves injurious to the surety, in all such cases the latter will be discharged." The distinction between the position of defendant's counsel, and the authority of Justice Story, just cited, is a plain one. The counsel says "the concealment of any of the terms of the principal contract." The authority referred to, in substance says, the concealment of material facts by which the surety may be injured, will furnish sufficient ground to invalidate the contract, and we think in reason as well as authority, the doctrine as laid down by Justice Story, should prevail. Why should a surety in matter between his co-obligor and his obligee which cannot possibly injuriously affect his interest and obligation, insist on being informed?

We have liked into a number of authorities cited to see if the above principle has been at all extended to favor sureties. In Pidcock vs. Bishop, 3 Barn. & C., 606: Our Tickell applied to plaintiff John Pidcock, to supply him with pig iron on credit in the usual way, and agreed if the plaintiff would supply him he would pay them the market price and ten shillings per ton extra, in liquidation of an old debt due the plaintiff, John Pidcock. John Pidcock said he must consult his partners, but he thought they would require a guarantee 164
John Pidcock afterwards agreed the iron should be supplied, Tickell paying the company the market price and ten shillings extra to himself on his private debt, and requiring a guarantee for the price of the iron. Tickell furnished the guarantee of the defendant to be responsible for £200 value of pig iron to be delivered to Tickell, but the agreement of Tickell to pay John Pidcock ten shillings per ton, extra, on his private debt, was not communicated to the guarantor.

In this state of case, Abbott, C. J., says, "I am of opinion, a party giving a guarantee, ought to be informed of any private bargain made between vendor and vendee, which may have the effect of varying the degree of his responsibility." "The effect (in this case) would be to compel the vendee to appropriate to the payment of the old debt a portion of those funds which the surety might reasonably suppose would go toward defraying the debt, for the payment of which he made himself collaterally responsible. That being so, I am of opinion that the withholding the knowledge of the bargain from the defendant was a fraud upon him and vitiated the contract." The other Justices concurred. But they all proceed on the ground that the contract as between vendor and vendee was valid, and increased the liability of the surety, which was a fraud on him.

In the case of Jackson vs. Duchain, 3 D. & East., 553, Ashurst, J., said: "It is clear, both on the principles of law and equity, that when any friend advances money, to relieve another person from the pressure of his necessities, and the parties interested enter into a private agreement, over and beyond that with which the friend is acquainted, such agreement is void in law, as being a fraud on such friend." Here it is to be observed, that Welsh, who was desirous of benefiting his friend, agreed to advance £70, which he understood to be the full purchase money, (for certain goods), for such was the representation made to him, and £70 is expressed in the bill of sale to be the consideration. But now it turns out that the defendant was to give two promissory notes for a further sum, under a private agreement between her and the plaintiff, to which Welch was not a privy, and which, if he had known, he would not probably have advanced the money. This, therefore, was a fraud on him; and the principles of analogous cases go to show that this private agreement between plaintiff and defendant cannot be enforced."—

165 The other judges concurred. To apply the decision of this case to the one under consideration, it would make Doggett's extra note for $398 87 fraudulent as to Cotten, if he was not privy to it, and, therefore, as between Doggett and Mitchell, it could not be enforced. But our statute goes further, and declares that if that note was given for usurious interest, **the whole interest shall be void**, which diminishes Cotten's liability. It is worthy of note here, the advancement made by Welch, the principal, is not declared fraudulent, or void, but only the secret contract, to which he was not privy.

The next case to be considered is the United States vs. Robert Tillotson, 1 Parris C. C. R., from 306 to 335. The case in substance is this: One Hopkins had contracted with an agent of the United States to construct a fortification in the vicinity of Mobile Point, according to the terms, conditions and stipulations of a written contract, reference to which was to be had—and he dying, the right of performing his contract was assigned to his legal representative, one Hawkins. Whereupon Hawkins, with his defendant, Tillotson, and one Nicholas Gouverneur, as his sureties, entered into bond to the United States for $150,000 penalty, with the following condition: "That if the said Hawkins shall well and truly perform, or cause to be performed, all the covenants, undertakings and engagements contained in the said contract, so made as aforesaid, by the said Benjamin W. Hopkins in his life time, for the construction of the said fort, which remains to be fulfilled, and shall also faithfully and well account to the War Department of the United States, for all sums of money heretofore advanced by the United States, under and in virtue of the last mentioned contract, and also for such further advances as may be hereafter made to facilitate the execution of said contract, then this obligation to be void." &c. About seven months after the foregoing bond was made, Hawkins, the contractor, entered into a new contract with the United States, (without the privity of the defendants, his sureties,) as the Court says, materially changing the terms of the contract of Hawkins, for which they were bound, which new contract is set out in the report of the case, at pages 312 to 316; and it is only necessary to read the case, to see that the terms of the contract, for which the sureties were bound, were so materially variant, that, if the new contract was executed, the other could not be.

166 On this branch of the subject, Thompson, J., says: "But whether this alteration was for the benefit, or to the prejudice of Hawkins, (the principal,) cannot enter into the question—this was a matter upon which the sureties had a right to judge for themselves, and it was not in the power of the plaintiffs to transfer the suretyship from one contract to another, without the consent of the sureties. The first contract became *functus officio*, so far as it was altered by the second;" "but, admitting the first contract in part to remain in full force, the second was an essential alteration or modification of it and cannot be binding on the sureties in this new shape; such a rule would be placing it in the power of the principal to draw his sureties into responsibilities they never assumed, contrary to the law in relation to principals and sureties." Again, at page 320, it is said—"Sureties cannot be made responsible beyond the scope of their engagement. Any agreement between the creditor and principal, which varies essentially the terms of the contract, without the consent of the sureties, will exonerate them from their responsibility; any new debt incurred, or the demand enlarged, or any act done to the injury and prejudice of the surety, will discharge him from all liability." Again, at page 333, the same Judge says: "The law is particularly watchful over the rights of sureties, and will not countenance any transaction between the parties that shall lessen the ability of the principal to comply with his contract, or that shall alter the rights of the parties to enlarge the demand, to the prejudice of the sureties."

The principles to be deduced from these authorities and others referred to, which have been examined, but to avoid prolixity, will not be further mentioned, are not variant from those on this point extracted from Mr. J. Story's Eq. Jur. In all the cases it is fairly collectible, that the contract between the principal parties, of which a surety without privity can avail himself for his discharge, as between the principals, must be a valid contract.

In the case before us, the surety if, indeed, not privy, seeks relief from a contract which, as between the principals, was not valid; and he seeks to make that invalid contract the ground of discharging him from the payment of a sum of money, which he validly bound himself to pay. By the usurious contract for interest, which was illegal, Doggett, the principal, did not lessen his ability to comply with his obligation to pay that which was legal; neither are the rights of the 167
parties altered or enlarged, to the prejudice of the surety, but to his benefit, for thereby he is discharged from the payment of all interest until judgment. As to the surety, it is not different from what it would have been, had a release of all the interest been given by the plaintiff to Doggett, one of the obligors—for the other would, as surety, be entitled to the benefit of it; but it would be monstrous to say, that such a release being given, without the privity of the surety, (the other obligor,) or a partial payment made, without his knowledge, would defeat his liability as surety, or obligor; every partial payment alters the rights of the parties, but not to the prejudice of the surety—and whether he is a privy to it or not, as his liability is thereby diminished, his consent will be presumed. Even in the case we are considering, the consent of Cotten, the security, to the usurious transaction, between his co-obligor and Mitchell, the plaintiff, is to be presumed, as he thereby saves several thousand dollars in interest he had contracted to pay. His counsel, however, place him in the attitude of refusing to consent, because they insist on a release from his entire obligation; but failing of this, it is presumed they will insist on, as well as consent to, the other—as the simple interest to the 2d January this present year, will alone amount to $14,395.30, at the rate specified in the notes. The statute before recited provides, "that, on any usurious contract, the interest shall be void, and the obligor or obligors forever exonerated from the payment of the same"—the penalty in this act extends as well to the one obligor as to the other, and enures to the benefit of both; but it is the measure of redress for both.

The argument has proceeded upon the assumption, that the contract of Mitchell and Doggett for usurious interest was concealed from Cotten. Doggett testifies that there was a secret undertaking between himself and Mitchell for usurious interest, which was not made known to Cotten, but there was no bargain between witness and Mitchell to keep it from his knowledge; and to a cross interrogatory, he says Cotten may or may not have known of the secret stipulation of witness to Mitchell—did not learn it from witness, nor does he recollect ever to have conversed with Cotten upon the subject—from which it is inferable, if Cotten did not know of the stipulation, it was rather inadvertent than intentional, as nothing passed between the parties, manifesting a design to keep it 168
from him.

We close our review of the point under consideration, by reference to our decision in this case between the same parties at the January term, 1848, see Report p. 148—"The rule undoubtedly is, that a surety is not to be held beyond the precise terms of the contract; that the creditor has no right to increase his risk without his consent. But in Tudor vs. Goodloe, 1st B. Munroe's Reports, 324, as cited in 2d Vesey Jur., 540, in note by Charles Sumner, it was held, that "a promise by the principal to pay usurious interest in future, (the precise case before us,) is void, and does not operate to exonerate the surety, and this is in accordance with general principles." And see further same case, p. 149, "Where a surety which is given on a loan of money is valid at its creation, no subsequent agreement of the borrower to pay usurious interest or premium for the further forbearance of the loan will invalidate the original security, but the subsequent usurious interest will be void." Crane vs. Hubbell, 7 Paige's Reps., 413. Mitchell vs. Doggett, 1 Fla. Rep., 374, 376, 377.

We have been thus particular in giving, in a more extended manner, our views of the circumstances under which a surety will be discharged from his liability, because, although this Court at the former trial of this cause, in January term, 1848, expressed clearly and substantially the same views and opinions we now assert, and again in the case of Mitchell vs. Doggett, above referred to; yet these views and opinions appear to have escaped the attention of the learned Judge before this cause was tried in the Circuit Court. And that Judge gave the following instruction, number thirteen, which was excepted to by plaintiffs counsel: "If you shall be of opinion from the evidence, that at the time of entering into the note sued upon for $15,965, of January, 1841, signed by H. Doggett and J. W. Cotten, that J. W. Cotten, was the only security, and not primarily liable for the debt, by having received part of the consideration, another note was given by the principal for the sum of $ for past interest of said note, as part of the contract, but extending the same two and a half per cent. further, unknown to and without any communication with the security, so that he remained wholly ignorant that two and a half per cent. interest was in fact to be paid

169 by his principal, instead of ten per cent. as agreed by the note executed by the two, that this in law is a fraud on the security, invalidates his note under agreement, and plaintiff had not a right to recover thereon." The position assumed in the foregoing instructions, as law, are directly contrary to what is asserted in this opinion as law, and to what, according to our best information and judgment, we believe the law to be. We hold, therefore, the exception well taken, and that the opinion of the Court giving said instruction, must be reversed and set aside. There were other instructions asked by plaintiff and refused by the Court, and others not asked which were given by the Court, numbered 10, 12, 14, 15, 16, and the rulings of the Court thereon were excepted to by plaintiff's counsel. These exceptions were elaborately discussed before this Court, but the decision of them is not deemed material to this cause.

At the trial of this case in the Circuit Court at November term, 1849, the jury returned the following verdict: "We, the jury, find verdict for the defendant;" and the defendant's counsel insists, this is evidence that all the issues were found for the defendant. At the trial of this case in the Circuit Court, the instruction, No 13, above set forth, and there given, precluded the jury from finding a verdict for the plaintiff on the first or special count of his declaration. Here there is a bill of exceptions made a part of the record, in which the whole testimony is embraced, together with the rulings of the Court, in which respect it is entirely unlike the case of Mitchell vs. Chaires, Exr., 2 Flor. R., 22. And we can have no difficulty in perceiving with instructions as given, the jury without particular inquiry as to the proof of any plea, felt bound to render the verdict they gave; nor can we suppose, with the evidence before them, they would ever have consented to the truth of some or most of the pleas pleaded in bar, but for the instruction given. We think if an instruction was given to the jury as follows: "If, from the testimony, you are of opinion the note declared on in the first count of plaintiff's declaration was executed by the defendant's testator, as co-obligor and surety, and that an agreement was entered into between his co-obligor and principal, Henry Doggett, for usurious interest with the plaintiff, Mitchell, on the note sued on, without his knowledge, the Court charges that such agreement for usurious interest, was a void contract, and from the day of such agreement made void all interest on the
170 note sued upon, but did not injuriously affect Cotten, the surety, nor in any manner increase his liability to Mitchell, the plaintiff, nor diminish the means of his principal, Doggett, to pay and discharge said note declared on, and said note remained and remains a valid subsisting obligation. as well against Cotten, the security, as against Doggett, the principal, for the principal sum named therein, but for no interest whatever. And if you find the matters stated in the first part of this instruction, you will find a verdict for the plaintiff on the first count of the declaration for the principal sum named in the note, but for no interest." Such an instruction, for the reasons contained in this opinion, wouuld, we think, be lawful and right to be given.

It is therefore considered by this Court, and it is hereby ordered and adjudged, that the decision given herein by the Circuit Court, and from which this appeal was taken, be reversed and set aside, that this cause be remanded for a new trial, and that proceedings be had thereon in conformity with the opinions and principles in this opinion contained.

ISAAC W. MITCHELL, APPELLANT, VS. F. R. COTTEN, EXECUTOR APPELLEE.

ON PETITION OF REHEARING.

[After the decision of the foregoing case of Mitchell vs. Cotten, and on the last day of the term of the Court, the counsel for appellee filed a petition for a rehearing in said cause, assigning therefor, in substance, the following reasons:]

1st. That the Court erred in deciding that the matters and things and defence set up in the sixth plea did not constitute a bar to the plaintiff's right of recovery:

1st. Because at the first trial of said cause, the said sixth plea was demurred to—the demurrer was overruled by the judgment of the Court, and afterwards the plaintiff replied to said plea.

2d. Because, after issue joined thereon at said first trial, verdict was found thereon for the defendant.

3d. Because, at the first trial of said cause in this Court, at January term, 1848, it was assigned for error, that the Court below erred

"in overruling the plaintiff's demurrer to the defendant's sixth plea, 171
then said, "As to the first error assigned, viz: That the Court erred
"in overruling the plaintiff's demurrer to the defendant's sixth plea,
"it is sufficient to observe, that the judgment upon said demurrer
"was *respondeat ouster*, and thatplaintiff (as it appears by the record)
"answered over by filing his replication to that plea and thereby
"waived his demurrer thereto. On overruling a demurrer, if the
"demurrant resorts to ulterior pleadings on the same point, de-
"murrer is waived. Burdet vs. Burdet, 2 A. K. Marsh, 143
"Morrison vs. Morrison, 3 Stewart's Rep., 144. Breese, 19.

"The same doctrine was maintained by this Court in the case of
"Mitchell vs. Executor of Chaires, at the present term. A decis-
"ion overruling a demurrer cannot be revised, if afterwards it is
"withdrawn and issue joined to the country. Acre vs. Rose, 3 Stew-
"art, 288. Trigg vs. Shields, Hardin, 168. A plaintiff cannot de-
"mur and reply to the plea. Riley and another vs. Harkness, 2
"Blackf., 34. Harris vs. Weaver, 1 Blackf., 77, and authorities
there cited. Stephen on Pleading, 296. See 2 Florida Rep., 145."

Therefore the petitioner contends, that the said sixth plea and the matters and things therein alleged and found by the jury, are and were by the foregoing decision of this Court, *"res adjudicatae."*

2d. This Court erred in deciding at the last trial of the cause here, that the matters and things set forth in the sixth plea (being the same identical matters of fact set forth in the charge of the Court below, number 13, as the ground of defendant's discharge from all liabilty) did not constitute a valid bar to plaintiff's action, because the question of law involved therein was for that reason not assignable as error in this Court. Therefore petitioner contends, that if the question had not been adjudicated by the Court, the same ought now to be determined in the same manner it was determined at the former term of this Court, and for the same reasons and on the same authority above referred to.

3d. That of the charge of the Court below, number 13, did contain error, it could only be legally applicable to the plea of the *general issue*, the law embraced in the sixth special plea having been, adjudicated by this Court being no longer open to question by the Judge below—and if in truth that error may have been influential on the verdict of the jury, it could only have affected their finding under the plea of the general issue, while the bar arising under the finding on 172
the sixth plea and on pleas 7, 8, and 9, would, notwithstanding, constitute a flat bar to plaintiff's recovery.

4th. That the proposition advanced. in the opinion and judgment of this Court, that the matters and things alleged in the sixth plea and found by the jury, did not constitute a defence to the action, was not duly considered by this Court, the same not having been fully argued at this term by counsel for appellee, for the reason that they regarded it no longer as an open question.

5th. This Court erred in reversing the judgment if the Court below, notwithstanding the verdict of the jury in defendant's favor on the issues joined on the 7th, 8th and 9th pleas, setting forth in divers ways the giving of time by plaintiff to Doggett the principal, without the consent of defendant, the surety—Because,

1st. There was no motion for a new trial on account of any defect of proof or misfinding upon those issues.

2d. Because there was some evidence in the record (and the bill of exceptions does not state that it embraced the whole evidence) and the jury being the judges of its sufficiency, and having been expressly charged by the Court, "that the party setting up the giving "of time, &c., must prove his allegations in discharge of himself," they must be presumed to have correctly found under such instruction.

LANCASTER, J.

In the matter of the petition for a rehearing in the case of Isaac W. Mitchell vs. Frederick R. Cotten, executor, filed on this the last day of the term, we have to regret that time it not afforded to the Court to deliberate and examine authorities, as the subject from its importance would induce us to desire to do; but the remembrance that the sum in controversy is very considerable—that, as it stands, the plaintiff can recover no interest, until he recovers judgment, and that the delay of a year will subject him to considerable loss, in the use of the sum in controversy, we are inclined to dispose of the questions raised by the petition, before the final adjournment of the Court.

The first ground assigned for the rehearing is, that the Court erred in deciding that the matters and things set up as a defence in the

sixth plea did not constitute a bar to the plaintiff's right of recovery, 173
because the matters and things contained in said plea were, by the rulings of the Court, in the same case, between the same parties, *re adjudicata*. 2 Fla. Rep., 145. By reference to that case, it will be seen that the objection taken to the decision of the Circuit Court in overruling the plaintiff's demurrer to the defendants's sixth plea, was interposed after the plaintiff had filed a replication to the plea, and had, as the Court there decided, waived his demurrer. The validity of the plea was not decided, nor did the Court look into it, to ascertain its value, as a bar to the action; but it was only held, as he, the plaintiff, had taken issue on it, and there remained no demurrer to it, there was no issue of law on the matter, properly before the Court.

In regard to the second ground set up in the petition, it is to be remarked, that at the trial at this term, the charge or instruction No. 13, therein referred to, was contained in the bill of exceptions, and stated to have been given by the judge to the jury at the trial below, and to have been excepted to by plaintiff; this, therefore, brought the doctrines it contains directly and unavoidably before the Court, for review and adjudication. Their judgment thereon will be found in the opinion delivered; and they do not perceive any valid objection to the assignment of that instruction as erroneous, because the same identical matters of fact, or of law, are set forth in the plea, as a bar to the action, which are contained in the insertion No. 13. This Court certainly did not, in this case, at the former trial, 2 Florida R., 145., make any decisoin as to the legality of defendant's plea No. 6, but declined to consider it. If, therefore, tha plea, in the facts it alleges, and the bar to the action which it thereby seeks to maintain, is identical in principle with instruction No. 13, above mentioned, it follows, if the opinion delivered at the present term in this case is correct in law, that plea does not present a good legal bar to the action; that the issue it presents is an immaterial issue, and if found for the defendant, could conclude the plaintiff nothing; and if the other material issues were found for the plaintiff, then judgment *non obstante vere dicto* ought to be given for plaintiff on that issue; but as the finding was a general verdict for defendant, then a *venire facias de novo* was the proper remedy.

The third remedy raised is supposed to be mainly answered; but 174
it may be remarked, that let that instruction No. 13 have relation to what plea or pleas in this case it may, they will separately be affected to the extent they, or either of them, may be in conflict with the law, as contained in the opinion delivered in this case at this present term of the Court.

The 7th, 8th and 9th pleas of defendant, are pleas which allege (in various ways) that Mitchell, the plaintiff, for a value consideration, gave delay of payment to Doggett, the principal obligor, without the knowledge and consent of Cotten, the surety. H. Doggett was examined as a witness touching the matters in issue in those pleas, and in answer to the 10th interrogatory, says: "Witness saith he was not in Florida, and did not see the said Mitchell about the time mentioned in the interrogatory, or make any contract with him about further time." Cotten, in his letter to Mitchell, dated 25th of November, 1844, says: "You were so kind as to tell me, in the last conversation we had upon this subject, that, whenever I desired it, you would proceed to collect, and I now say that unless, &c., I shall certainly wish you to proceed, as quick as possible, to collect your money from Col. Doggett." Again: "I have no wish to have Col. Doggett pushed, and my permitting the note to run so long, is, I think, satisfactory proof of that fact." There is no testimony of any witness in the case, but what is made by Henry Doggett and John W. Cotten, going to sustain the issues on the three above mentioned pleas, and Doggett himself, the witness of defendant, says "he made no contract with Mitchell about further time." It also abundantly appears, that Mitchell commenced a suit soon after Cotten desired him to do so. Will the counsel ask the Court to shut their eyes, and suppose testimony on which these issues could or might have been found for defendants?

It is said the bill of exceptions does not state that it embraced all the testimony given in the case. At page 36 of the printed record, at the end of the testimony, it is said, "This being the whole testimony offered," &c.

The fourth ground of the petition is, that the matter and things alleged in the sixth plea, and found by the verdict of the jury, did not constitute a defence to the action—was not duly considered by the Court, the same not having been fully argued to this Court at this term, because appellee's counsel no longer regarded it as an open

question. The answer is, the 13th instruction was before the Court, 175
and elaborately argued, and maturely considered by the Court, and the law arising thereon announced in the opinion delivered. It is the determination on that 13th instruction which affects the 6th plea of defendant, and counsel must have been as well apprized of the effect of reversing that instruction at the argument as they are now.

The fifth ground of the petition has been mainly replied to, in our review of the third.

But suppose we are mistaken, and the jury, on the testimony before them, meant to find these issues, Nos. 7, 8 and 9, or one of them, for defendant, we can only say, it does not appear plainly to us; but it appears much more probable, that the plea of the statute of limitations with them formed a bar to the second count; and the sixth plea, under the 13th instruction, formed a bar to a recovery on the first count. And upon the whole case, justice appears to be advanced by ordering a new trial. It is, therefore, ordered by the Court, that the rehearing petitioned for in this case be denied.

THE UNION BANK OF FLORIDA, PLAINTIFF IN ERROR, VS. THE HEIRS AND TERRETENANTS OF JEREMIAH POWELL, DECEASED, DEFENDANTS IN ERROR.

The act of November 10th, 1828, requires that a *scire facias* or action of debt against executors or administrators, or other persons having charge of the estates of deceased persons, upon any judgment against their testators or intestates, shall be brought within five years from their qualification. All such judgments, after the expiration of five years from the qualification of the executors, administrators, &c., are presumed to be paid, unless some proceeding shall have been had in the intermediate time.

It is not necessary to state in a plea of this statute, that no proceeding had been taken within that time. To avoid the bar, it is not necessary for the plaintiff to show such proceeding.

The 18th chapter of 13th Edward 1st, which gives the *elegit*, is not in force in this State, because it is inconsistent with the statute of this State which provides for the sale of land on execution. But the chapter which gives the writ of *scire facias* is in force here by virtue of the act of November 6, 1829, adopting the common and statute laws of England, which are of a general and not local nature, with certain exceptions and provisions.

A judgment at law, or a decree in equity, is a lien upon the lands of a debtor 176
which binds from its rendition. This lien is not lost by the death of the debtor, but it continues only upon the compliance by the creditor with the provisions of the laws regulating the exhibition and enforcement of demands against the estates of decedents.

Lands are assets, under the laws of this State, and it is the duty of the executor or administrator, in case there should be a failure of personal assets, to make application in the mode pointed out by law, for the sale of the lands. This is not a matter of discretion with him.

Upon the death of the ancestor, the fee vests in the heir, but he takes it subject to the payment of debts.

Lands being held to be assets in this State in the hands of the personal representatives, it is not necessary in a proceeding by *scire facias* against the *heirs and terretenants* to make the executor or administrator of the deceased, a party. It is questionable whether it is necessary to make the heirs and terretenants parties to a proceeding by *scire facias* to subject the lands. Unless they can be regarded as persons in charge of the estate and the lands in *their* hands assets, they are not properly made parties.

Error to Leon County Circuit Court.

This case is stated in the opinion of the Court. The judgment in the Court below was rendered at the Spring Term, 1849, Honorable THOMAS BALTZELL, Judge, presiding.

The case was argued in this Court by R. S. Hayward and L. A. Thompson, Esq., for plaintiff in error, and by M. A. Long, Esq., for defendants in error.

R. S. Hayward, for plaintiff in error:

The Court below erred in overruling plaintiff's demurrer to first plea of defendants, because—

1. The plea is no answer to the *scire facias*. The *scire facias* was a proceeding in this case, to revive a judgment against the heirs and terretenants of Jeremiah Powell, were bound by a judgment against him and others. The plea urges as a ground for not charging these *heirs* and *terretenants*, that certain persons qualified as executrix and executors of Powell, and that said *scire facias* did not issue within five years next after such qualification. Now, this executrix and these executors are not parties to this proceeding—they are not mentioned in the *scire facias* or declaration; and if it had been ne-

177 cessary that the *scire facias* should have been issued against them, and not against the heirs and terretenants, the failure to name them in the *scire facias* would have been good ground for a plea in abatement.

2. The plea is sufficient. It is based upon the act of November 10th, 1828, Thomp. Dig., p. 444, sec. 3, § 2, which says "no action of debt," &c. The plea should have stated, not only that five years had elapsed from the qualification of said executrix and executors to the suing out of said *scire facias*, but that *no proceeding had been had upon said judgment within that time*.. The law does not absolutely require that *scire facias* shall be sued out against executors or administrators within five years, but that that shall be done, *or some proceeding had upon the judgment*, in order to do away the presumption of payment. It would be hard, if, whilst we are endeavoring to make our demand out of the *survivors* in this case, the statute of limitations should be running on to bar us of our ultimate rights against the *executors of the deceased*, in the event of the insolvency of the survivors. This point is before your Honors, in this case of Oscar Fillyau and wife vs. Henry Laverty.

But the principal question which arises upon demurrer to defendant's plea is this: Could the executrix and executors of Powell have been properly made defendants to this *scire facias*? If they could, then the above statute of limitations may have been correctly pleaded in bar of our action—if they could not, then their plea was demurrable. The judgment upon which this *scire facias* issued, was founded upon a written contract—it was a *joint* judgment; and by reference to 1st Chitty's Pleadings, page 50, it will be seen that, "in the case of a *joint* contract, if one of the parties die, his executor or administrator is *at law* discharged from liability, and the survivors alone can be sued; and if the executor be sued, he may either plead the survivorship in bar, or give it in evidence under the general issue." If the contract were *several*, or joint and several, the executor or the deceased may be sued *at law* in separate action, but *he cannot be sued jointly with the survivor, because one is to be charged* DE BONIS TESTATORIS, and the other DE BONIS PROPRIIS." Vide note 4 Chitty's Pleadings, p. 50. This authority is conclusive upon the point that the executrix and executors of Powell could not have been made defendants in the *scire facias*. Clearly, then, the
178 statute of limitations, applying to executors and administrators, can not be properly pleaded as a bar to our proceeding against the *heirs* and *terretenants*. This statute, however, it may be urged, not only operates as a bar to persons suing executors or administrators, but also applies to those who sue "other *persons having* CHARGE *of the estate of a testator or intestate.*" This clause was never intended to apply to *heirs* and *terretenants*, who have the *estate itself*, and not the *charge* of it. It refers simply to *curators*.

I have shown that the executors or administrators of a deceased party to a *joint judgment*, cannot be proceeded against at law. The next question presented in the cause is this: Can we subject the lands of Powell, in the hands of *his heirs* and *terretenants*, to the payment of the claim of the Union Bank of Florida?

By the law of England, "where judgment is had against *several defendants*, and one of them dies before execution, since the charge upon the judgment survives as to the *personalty*, thought not as to the *realty*, the plaintiff may have *scire facias*, framed upon the special matter, viz: against the survivor, to show cause why the plaintiff should not have execution against him of his goods, and chattels, and of the moiety of his land, and against the heirs and terretenants of the deceased, to show cause why the plaintiff should not have execution of the moiety of the lands of the deceased, without mentioning any goods." 2 Saunders R., p. 72.

This proceeding against the moiety of the lands in the hands of and survivors, and the moiety in the hands of the heirs and terretenants, originated under the statute West. 2, 13 Edward 1st, which gave the *scire facias* and *elegi*, and enabled the plaintiff to extend half of the land of each of the parties defendant, until his debt was paid. Our writ of *fieri facias* gives us a more extended remedy, by rendering *all* the lands subject to sale; so that where in England, the plaintiff in *scire facias* proceeded against half the lands only, we ask *here* to have execution of the whole.

Such is the English law, and such is the law of this State, except so far as it has been altered by statute.

Let us see how far our statutes have qualified the right, which, under the law of England, we had. The statute of this State, passed in 1833, Thompson's Digest, page 202, section 7, par. 2, declares that "real estate shall be considered assets," &c.

Paragraphs three and six further provide, Thompson's Digest, 202. 179
These are the principal enactments of 1833, relative to the making *realty* assets in the hands of executors and administrators. It is *considered* assets, and after personal assets are exhausted, may be sold to pay debts, under an order from the Judge of Probate. This was certainly a very imperfect state of the law, when we consider that the same statute which made lands assets in the hands of the executor or administrator, did not require the executor or administrator even to *inventory* the real property of his testator or intestate; and the bond, which the law of 1828, Thomp. Dig., page 197, par 9, required him to give, was only conditioned for the making a true and perfect inventory of all and singular the *goods* and *chattels, rights* and *credits* of the deceased, which shall come to his hands, and further to make a just and true account of his administration of such goods, chattels, rights and credits, and to pay over the balance, &c.

Under such a state of the law, if the executor reduced land to possession, under an order of Probate Court, and sold it, and kept the money the only remedy which creditors or heirs would have, viz: suit on his bond, would be entirely unavailable, because his bond does not cover realty.

But the statute of 1841, Thomp. Dig., page 203, section 7, paragraphs 6, 7, 8, 9, 10, 11, 12, went further, and required the executor or administrator, when it became necessary to sell real estate for the payment of debts, or to make more equal distribution amongst the heirs or devisees, to petition the Circuit Court, setting forth the reason for his application, &c. Whereupon, the Court will order citations to all the heirs or devisees, who may appear and answer, and oppose the application, and take testimony, as in Chancery cases, to controvert the allegations of the petitioners. It becomes indeed as a Chancery cause, between the heirs or devisees, and the administrators or executors, and if the executor or administrator succeed, the Court appoints commissioners, (not the executor or administrator,) but *commissioners*, to sell the real estate, and the petitioner never gets nor can get possession of these assets, from the commissioner, until he enters into a bond, (another bond from his ordinary administration bond,) for the faithful payment and application of the fund arising from the *sale* made by the *commissioners*, according to the decree of the Circuit Court, rendered in the cause. The law of '41
does not entrust petitioner with the realty, it regards him as antago- 180
nistic to the heirs; it seems designed to protect the heir from his encroachments, and it will not even allow the proceeds of sale, and never the land itself, to reach his hands without some security, *additional* to his bond for the adminstration of his *goods, chattels, right* and *credits;* nor to apply one cent of said fund to the payment of any debt, except as ordered by the Court in its decree. And *further*, upon the coming in of the report of the commissioners, the Court will render a final decree in the cause; and, if the terms of the sale have been complied with, will direct the commissioners, (not the executor or administrator,) to convey.

The above is a brief expositon of the substance of the law of 1841, and from this view, I think we may conclude, that there are several conditions precedent to lands becoming assets in the hands of the executors or administrators: 1. *Petition.* 2. Hearing and good cause shewn. 3. Decree. 4. Bond. Even then, he only gets the *monies* from the commissioners, which are henceforth regarded as assets.

If this be true, may not lands be pursued by a judgment creditor, (who has a *lien* upon them by a subsequent statute to that making them assets,) unless executor or administrator file his petition? May not lands be liable to a *judgment creditor*, if upon petition heard, it be decreed by the Circuit Court, that the personalty is sufficient and that the realty be not sold. A judgment creditor has a lien upon lands, and I contend that these lands go to the hands of the heir charged with the judgment. Again, suppose the Executor fail to give the bond required, do not the lands continue in the hands of the heir? (See Fitzpatrick et al. vs. B. and W. Edgar, 5 Ala. R., p. 503.) If they continue in the hands of the heir, are they not subject to the lien of a judgment? The lien of a *judgment upon lands* is analogous to that of an *execution upon personalty.* See the case of Moseley vs. Edwards, 2 Florida Reps., where the *lien* of a *judgment* upon lands being declared to be a lien as *at common law*, is regarded as notiable to be divested by *laches*, as in Alabama. Fitzpatrick et al. vs. B. and W. Edgar.

What change has our statute effected in the law of England? I answer simply this: *that all debts* not in judgment, must be presented with us to the executor or administrator; whereas in England, *the lands descended were liable in the hands of an heir to a judgment*

Union Bank vs. Heirs of Powell.——Argument of Counsel.

181 *against him on the bond of his ancestor, in which he was expressly named.* This alteration, and only this, has been effected by the Legislature of Florida. Thus far goes the case of Gilchrist, Judge, vs. Fillyau and wife, 2 Flor. Reps., p. 94, and no further. That case declares that an heir cannot, in this State, be sued on the bond of his ancestor, because bond debts are with us no higher dignity than simple contract debts; and because lands, being only *sub modo* assets, it would be impossible for an executor to know whether the personal estate were insufficient or not, and consequently so to report it as required by law, unless these demands were brought against *him*. True, the Court seems to decide that lands are assets under our law of 1833, confirmed by 1841, but I do not understand that the Courts regarded them assets, unless, in case of insufficiency of personalty, they are sold by commissioners, and the money paid over to them. For the case of Gilchrist vs. Fillyau was decided by the authority of an Alabama decision, (in which State the law is declared to have furnished a copy for us,) and in that case the defendant pleaded, "That since the *scire facias* was sued out the estate had, *according to the statute, been reported insolvent.*" See, also, the argument of Elmore, counsel, and the decision of the Court, in the case of Fitzpatrick et al. vs. B. and W. Edgar, 5 Ala. Reps. In the former case, in 1 Stewart, the Court say: "Our statutes have pointed out another mode for subjecting the lands to the payment of debt. If the personal estate be sufficient, the administrator or executor *shall make his report* accordingly, and the land shall be sold by order of the Court. This court does not abridge the rights of creditors, for as the administrator cannot have fully administered, if, on a deficiency of personal estate, he fails to make his report as required, so that the lands may be resorted to, the remedy is more ample than at common law." What was the remedy at common law? Suit against the executor to subject the personalty alone to the payment of the debt. How was the remedy enlarged by the statute of Alabama? By making it the duty of the executor or administrator to report the personalty insufficient, and to apply for sale of realty and if he did not do this, he and his securities were liable on his administration bond. Suppose he neglected to do this, did the realty become assets in his hands? I imagine not—it remained with the heir, and the executor and his securities paid the debt. But what was the condi-
182 tion of the bond? It was that he should well and truly perform all the duties which are, or may be by law required of him. Clay's Ala. Dig., p. 221, sec. 3. This condition is broad enough to cover a case of refusal to make application for the sale of realty. But suppose, in Florida, the executor or administrator should fail or refuse to make the application spoken of in the statute, would the creditor have a remedy by suing him on bond, the condition of which is only to administer faithfully the goods and chattels, rights and credits which come to his hands? I cannot think he would be able to recover in such a case. Notwithstanding the Alabama law was, in this respect, so much more perfect at the time of the decision in 1 Stewart, p. 193, than our own is, the Legislature, deeming it unequal to the attainment of the desired object, passed subsequently the following act: "Whenever an executor of any deceased testator," &c. 5 Ala. Reps., p. 501, which case see *passim—and again in* 1843, the Legislature of the State passed another law requiring the Court to demand of an executor or administrator a bond for administration of goods and chattels, &c., together with realty. Clay's Ala. Dig., p. 229, sec. 44. The first of these statutes set forth in the opinion of the Judge, in the case of Fitzpatrick et al. vs. Edgar, before cited, is the only law of Alabama which ever gave any remedy against the heirs—for by the common law, the heir could only be made liable in a real action, and the stat. Wes. ? was never adopted there. There is consequently this distinction to be taken between the law of Alabama and the law of this State—that *there* the lands were never liable in the hands of the heir, unless the remedy were *expressly given by statute*, and *here*, the right to pursue them in the hands of the heir *exists*, unless *expressly taken away by statute*.

I have before remarked that the remedy of the *bond* creditor of the ancestor is thus taken away by statute—or in other words, the statute of Florida has, to that extent altered the law of England. Let us go one step further, and enquire if our statute has made any alteration in the English law in relation to the method of proceeding on the part of a *judgment* creditor. In 2d Saunders, p. 72, it is laid down, that where a judgment is had against one who dies before execution, upon a return of *nihil* to a *scire facias* against his personal representative, a *scire facias* will lie against his heirs and terretenants. In such a case, I should suppose that, under our law, *nihil* could not be returned to the executors or administrators properly, so long as heirs 183
had any real estate which the executors might, *upon application, reduce to assets*, and consequently this final resort against the heirs, in such an event, would be superfluous.

But where *judgment is had against several parties to a joint contract*, the executors or administrators of a deceased party, as I have before shown, are not liable at law—they cannot be charged *jointly* with the *survivors*, because you cannot have execution *de bonis testatoris* and *de bonis propriis*. Such a judgment being no charge upon the executor, if the personalty were sufficient to pay all *the other debts* of the estate, he would not reduce the land to assets on account of said judgment; the heirs, I imagine, could successfully resist his application so to do, if he desired it, because he (executor) is not bound for such a debt, and the lands have descended to the heirs under our statute of descents—or in other words, the fee has been cast upon them, subject to the charge of such a judgment. To this it may be answered, the executor is liable in equity—but I submit to this Court that we are judgment creditors, whose claim is made by *statute* a *lien* upon land. Ours is not an *equitable lien*, to be enforced, after great and expensive litigation, in a Court of Chancery—it is not such a lien as can be deferred to junior incumbrances, and postponed even to simple contract creditors, as might be the case if we were driven in to equity, but it is a *statutory lien*, and one which our statute declares shall be a *"lien as at common law*, which words, this Court has decided, mean something. Case of Moseley vs. Edwards, decided at the last term.

From this, I think it fairly deducible that the law of England has undergone no change, through the medium of our statutes, with respect to the remedy against the survivors, and the heirs and terretenants of a *joint* judgment debtor. Our statute in such case gives no remedy against executors or administrators, and until it provides one, and thus alters the practice, which, by virtue of our adoption of the English statutes, must be pursued, this proceeding is regular and sustained by law.

M. A. Long, for defendant in error:

1. Two principal questions arise in this cause. The one is, whether in Florida, a *scire facias* can be maintained against the heirs and terretenants of a deceased person, against whom and others 184
a joint judgment had been rendered before his death, to have execution of the real estate of the deceased. This arises upon demurrer to defendant's plea, which reaches back to the declaration. I contend that upon a full view of our several statutes, it will appear that this remedy is obsolete in this State, or more properly speaking, has been superseded by another and a better.

In England, "where a judgment is had against *one* who dies before execution, it is said that a *"scire facias* will not lie against his heirs and terretenants, until a *nihil* is returned to a *scire facias* against his personal representative." 2 Saund. Rep., 72. But "where there are *several* defendants, and *one* of them dies before execution, since the charge upon the judgment *survives as to the personalty*, though *not* as to the *realty*," &c., "the plaintiff may have a *scire facias* framed upon the special matter, namely, against the survivor, to show cause why the plaintiff should not have execution against him of his goods and chattels, and of the moiety of his lands, and against the heirs and terretenants of the deceased, to show why the plaintiff should not have execution of a moiety of the lands of the deceased, without mentioning any goods." Ibid.

Now I ask the Court to observe, that where the judgment is against *one* only, who dies before execution, no *scire facias* can be had against the heirs and terretenants, without first attempting to make the money out of the personal property in the hands of the representative of the estate. In default of sufficient personalty in the hands of the executor or administrator, the lands are resorted to in the hands of the heir (who is the oldest son) and terretenants, because the same in that country does not go to the executor and administrator, and could never be subjected at all to the payment of judgments, if resort was not had to him, to whom alone they directly descend.—"By the laws of Florida, there is no such thing as primogeniture; the land descends in parcenary, and is expressly declared assets in the hands of the administrator or executor, and after the exhaustion of the personal assets, may be sold to pay debts due by the estate, besides being liable with personal property to an execution existing upon any judgment against such executor or administrator," is the language of this Court in the case of Gilchrist vs. Fillyau and wife. 2 Fla. Rep., 95.

185 It is obvious, therefore, that there is no necessity in Florida for a *scire facias* against the heirs and terretenants, in order to subject the land to the payment of a judgment against *one* person who has died before execution—the whole estate, real and personal, being in the hands of the executor and administrator, subject to all debts. Until the debts are all paid, and the surplus, if any, distributed, a resort to the heir is not only useless, but impossible, for up to that time the land is in the hands or possession of the administrator. The land remains assets in the hands of the administrator until all the debts are paid and the administration closed. It is little short of absurd to say that during the administration, and before the debts are paid, that the same land is subject to the same debts in the hands of the heir. Lands cannot constitute assets in the hands of different persons at the same time.

It will be noticed also, that in the above extracts from Saunders' Reps. in relation to cases where there are several defendants, and one dies, that the reason why the *scire facias* is allowed against the heirs, is because "the *charge upon the judgment survives as to the personalty, though not to the realty.*" Therefore, in cases where the personalty of the survivors may be insufficient, in the apprehension of the plaintiff, he may have *scire facias* against the heir to compel him to "show cause why plaintiff should not have execution of a moiety of the lands of the deceased, without mentioning any goods." The goods are not mentioned, because not in the hands of the heir. Now, I say, that this reason for pursuing the heir does not exist in this State, under our system. "The charge upon the judgment," to use the language of the book, survives as to the *realty* as well as to the personalty, in this State. "Since the charge upon the judgment" *does* survive as to the realty, the plaintiff may *not* have *a scire facias* against the heir. He has no use for such a remedy, or any other, even in equity, until it shall appear that he has exhausted all the real and personal estate of the survivors. In the case before the Court, the survivors have not been pursued at all, as they might have been, according to the case cited on the other side from 1 Cowen's Reports. "At the common law, the charge upon the judgment being personal, "survived; so that where there are two or more defendants in a "personal action, and one dies after judgment, execution may issue "against the survivor, without a *scire facias*. The execution, how-
186 "ever, must be taken out against all defendants, otherwise it will "not be warranted by the judgment. 1 Lord Raymond, 224. 2 "Tidd., 10, 29. The reason given is, there is no alteration of the "record, nor any new party made liable to the execution."

If the plaintiff should fail to realize his judgment from the survivors upon the execution so issued against them, it would then be time enough to inquire whether any remedy existed against the estate of the deceased, by bill in equity or otherwise. It may be true, that the death of one of several persons, against whom a judgment at law has been obtained, totally extinguishes the same as to him, and certainly is so, I apprehend, if the position of the counsel be correct, that his death destroys all right to collect the same out of the personal estate. This is obvious, because our statute requires all the debts of intestates to be paid out of the personal property, if there be sufficient for the purpose, allowing the land to be resorted to only in the event of a deficiency of personal property. This most wise and important principle of our law would be repealed in every instance in which a judgment like the present should exist. Now, if the British statute of 2 West. does allow the remedy in that country, which the plaintiff has pursued in this instance, I think it manifest that the same is inconsistent with our statute, which directly prohibits a resort to the land in any case until the personalty is exhausted, and therefore the British statute must give way to our own. The first section of the act of 1829, Thompson's Dig., 21, which declares what portions of the statute and common law of England shall be of force in Florida, has this proviso: "The said statute and common law to be not *inconsistent* with the constitution and laws of the United States, and the acts of the General Assembly of this State." The principle and reason of the position assumed by the plaintiff in this case, seems to be totally inconsistent with the principles and reason of our system. It is plain that the right to resort to the heir in any case in England, resulted from the fact that the land could not otherwise be applied, to any extent whatever, towards the satisfaction of any debt of an intestate. It is also equally plain, that the land descended to the heir or oldest son directly, and never constituted assets in the hands of the administrator of the deceased, solely in consequence of a fundamental principle of the British Government, to wit, the preservation of a wealthy landed aristocracy. "When the Emperors," says Blackstone, 2 Com., 183, "began to create honorary feuds, or titles 187 of nobility, it was found necessary, (in order to preserve their dignity,) to make them impartible, or (as they styled them,) *feuda individua*, and in consequence descendible to the oldest son alone."

If this proceeding can now be sustained, it could be in any case, even before an administrator could be appointed to represent a deceased person's estate, and thus subject the land to sale, although there be sufficient personalty to pay the judgment, and when there was no one authorized to use it for that purpose. This monstrous consequence of the principle contended for on the other side, forcibly illustrates the danger to our whole system of legislation on this subject, by adopting one of the incidents of a principle of the British system totally repugnant to our own. When we repudiate the principle, we must also the incident. I beg to refer the Court to its own clear and forcible exposition of this subject, in case of Gilchrist vs. Fillyau and wife, herein before cited. Most of the reasoning in that case is equally applicable in this.

The 13th section of the act of 10th November, 1828, (Thompson's Digest, 444,) provides that "no action of debt shall be brought against any executor or administrator, or other person having charge of the estate of a testator or intestate, upon a judgment obtained against his testator or intestate; nor shall any *scire facias* be issued against any executor and administrator, or other person having charge of the estate as aforesaid, to revive such judgment, after the expiration of five years from the qualification of his executor or administrator, or such other person having charge of the estate; and all such judgments, after the expiration of five years, upon which no proceeding shall have been had, shall be deemed to have been paid and discharged."

The first reflection upon this statute is, that it clearly contemplates the enforcement of judgments rendered in the life-time, against the executors and administrators of testators and intestates, and not against heirs or terretenants, unless they are embraced under the terms "or other person having charge of the estate." If those terms do not embrace them, then they are not embraced, and I think they are not, from the fact that the *scire facias* here spoken of is to *revive* the judgment, and not to have execution of the land, as is here attempted. The case cited on the other side from Alabama Reports seems to be relevant only in this, that, where a particular mode of 188 collecting or enforcing a judgment is pointed out by our statute, the same must be pursued in all cases. It will be seen that there is no exception in this statute embracing judgments, or allowing them to be enforced against any one else than the representative of the estate. We have already seen why a *scire facias* in England against the heir was allowed, namely, that the lands of the survivors were not subject to the judgment, which is different in this State; and, therefore, there exists no shadow of reason for making any distinction in this respect between joint and separate judgments—for in each case, whatever is to be paid, is to be paid out of the land, in default of sufficient personalty.

The counsel on the other side say they must resort to the land, because they say they have no right to the personal effects. Now it seems plain that, if they were right in this, it would follow that they have proceeded against the wrong party. We have already seen that, until all the debts are paid, and the administration closed by final distribution, the lands remain in the hands of the executor or administrator. The tenants in possession of the land hold under the executor or administrator; for, as this Court remark in the case of Gilchrist vs. Filyau, "The rents and profits of the land constitute "a fund for the payment of creditors, and as they must by our laws "look to the executor or administrator for payment of their demands, "how could that fund be made available, unless the estate from "which it springs be made amenable for the debts? and the law "points out the mode in which it is to be accomplished. The rents "and profits are incident to the land, and it is obvious that the law "intended the whole estate to be subject to the payment of the "debts." 2 Florida Reports, 97.

This construction of our statutes, seems to amount to a very positive adjudication, that all creditors must look to the executors or administrators for payment of their demands, from which it follows that if the plaintiff has any debt at all, he must enforce the same against the person upon whom the law has cast the whole estate, real and personal, for the purpose of paying debts. It is equally plain, that if the plaintiff has any existing debt, on account of the judgment against the deceased, it is the debt of the estate, and not that of the heirs or tenants. If the plaintiff is correct in saying that he has no remedy

189 against the executor of the deceased, it is plain that he has none whatever, from the nature of the thing, and the decision above quoted.

2. If the plaintiff's judgment against the deceased was extinguished by his death, as I think, virtually admitted by the plaintiff's counsel, and as is very probable, then the Court need not inquire into the second question raised in this record, viz: that the judgment as to Powell *"shall be deemed to be paid and discharged,"* because no proceedings were had on said judgment within five years from the appointment of the executor in this case. But, because the Court may choose to consider this point, I will make a few suggestions. This language seems to imply something more than an ordinary statute of limitations to the remedy, and much more than a mere presumption of payment arising from the lapse of time, which might be rebutted by proof, as recognized in equity. Webster defines the word *deem* to mean "to think, to judge, to be of opinion, to conclude on consideration," &c. *"Deemed*—thought, judged, supposed." This judgment, then, is by the Court to be "thought, supposed, judged," and "concluded on consideration," "to be paid and *discharged;"* or in the language of Webster in defining the latter word, "paid, released, acquitted, performed, executed." This statute must be "regarded as one of repose, and specifying a period after which litigation must cease," as remarked by the Court in the case above cited.

I will only remark, in conclusion, that the formal objection taken to the plea of this statute, namely, that it does not aver that no proceedings were had on said judgment until the suing out of this *scire facias,* is untenable. This fact abundantly appears from the judgment itself, the writ of *scire facias,* and the declaration of the plaintiff. If a writ of execution had been issued against the survivors, as I have shown was proper, there would have been no particular sense in calling on them by this writ to show cause why one should not issue.

I think, upon a review of the whole question, this Court must confirm the judgment of the Court below, and thereby give symmetry and consistency to our statute-system of settling up estates of deceased persons, and of paying "all debts of whatsoever nature."

L. A. Thompson, in reply, contended:

1. That the section 13 of the act of November 10, 1828, on which the plea is framed, applies only to executors or administrators, or
190 others acting in a like fiduciary capacity, in the charge or care of the estate of any testator or intestate, and cannot be pleaded by heirs or terretenants.

The phrase, "or other person in charge of the estate," is clearly not intended to include heirs and terretenants—for they are not in charge of the *estate* of the testator or intestate, but they are in possession, and claim as owners and proprietors, although the lands may be subject to liens created or suffered by the former proprietor.

The defendants cannot claim the bar as one given them, nor as coming within the relative and generic meaning of the terms used in the statute.

II. That they cannot claim the benefit of the bar derivatively, through the executor or administrator—because to do this, it must be on some demand which is a charge on the proper fund committed to the executor, and this judgment is not such a demand.

The law of Florida gives the personalty to the executor or administrator as a fund to pay debts with; and if the same be insufficient, it authorizes a condemnation of the real estate to supply the deficit. Thomp. Dig., 202, 203, Sect. 6 & 7. Gilchrist vs. Filyau, 2 Fla. R., 94.

It is assumed as incontrovertible, that the executor cannot proceed to condemnation of real estate to pay a debt which is not chargeable upon the primary fund in his hands. The law directs him to pay from the personal property which goes to him, using the slaves last, and if this is insufficient, then to condemn the realty by the judgment of a Court, convert it into personalty, and apply it. Surely, then, no Court would grant the prayer of the petition to pay a debt, if that debt did not constitute a charge upon his peculiar and proper fund, or had been barred by the statute of non-claim.

The judgment on which this writ is procured, did not form a charge upon the personalty of the deceased, but being joint against the testator and other persons, it survived against the lands and personalty of the survivors, and against the lands of the deceased only. 2 Tidd Pr., (9th ed.,) 1122. 2 Wms. Saund., 51, n. 4. Woodcock vs. Bennett, 1 Cowen R., 738. Erwin vs. Dundas, 4 How. S. C. R., 77. Panton vs. Hall, Carthew, 105.

It is supposed that our statute differs from the common law, as to

what are charges upon the fund in the hands of the executor and the 191
mode of administration. This is an error. Our statute only directs the order in which debts are to be paid, and like the common law, makes all debts, whether due by record, specialty, or simple contract, payable out of the personalty. If it is not so provided in express terms; it results by necessary implication.

The provisions of the common law on this subject, will be found in 2 Wms. on Executors, 651-2, 656, 666, 674.

The personalty of the deceased being discharged, and his lands only remaining chargeable, the object of this proceeding is to enforce the lien given by the act of February 12, 1834. Thomp. Dig., 351, upon those lands in the hands of the heirs and terretenants.

It is conceded, that if this claim was a charge upon the fund committed to the administrator, that is, the personalty, and the bar had attached then, as in the case of the statute of non-claim, these parties could claim the benefit of it derivatively; this, however, is the very position which we deny. It would have been an act of mal-administration in him, if he had paid it.

DOUGLAS, C. J.

This is a proceeding by *scire facias* issued out of the Circuit Court of Leon County against the heirs and terretenants of **Jeremiah Powell,** deceased, upon a judgment obtained by the plaintiff in the Superior Court of Leon County at its November Term, A. D. 1838, against John Westcott, Jr., George W. Fletcher, William S. Paulin, James D. Westcott, Jr., and Jeremiah Powell, for the sum of $1783 50-100, &c. Since which time (as appears by the declaration herein filed, which is in the usual form,) the said Jeremiah Powell has departed this life. The defendants put in a number of pleas to this declaration, one only of which, however, is presented for our consideration.

That plea alleges that "heretofore, to wit, on the 15th day of January, A. D. 1840, in the County of Leon, aforesaid, Violet Powell, Nathaniel Hamlin, and John W. Adams, duly qualified as executrix and executors of the last will and testament of Jeremiah Powell, deceased, and letters testamentary were thereupon issued to the said Violet Powell, Nathaniel Hamlin, and John W. Adams, by the Judge of the County Court of said County of Leon, sitting as a Court of
Probate, and that the said *scire facias* was not sued out by said plain- 192
tiff within five years next after the said Violet Powell, Nathaniel Hamlin, and John W. Adams, qualified as executrix and executors of the said last will and testament of the said Jeremiah Powell, as aforesaid, and this," &c. &c.

To this plea, the plaintiff filed a demurrer, to which there was a joinder, and after argument had thereon, it was considered and adjudged by the Court, that this said demurrer be overruled, and that the plaintiff take nothing by his bill, &c.

The first question presented for our consideration according to the course of argument at the hearing of this cause, is, whether this plea, as pleaded, is a bar to the action. It is urged in a printed argument (which is now before us,) and which does much credit to the gentleman who prepared it, that the plea is insufficient. It is based upon the act of November 10th, 1828, Thompson's Digest, page 444, sec. 3, no. 2, which says, "no action of debt shall be brought against any executor or administrator, or other person having charge of the estate of a testator or intestate, upon any judgment obtained against his testator or intestate, nor shall any *scire facias* be issued against any executor or administrator or other person having charge of the estate as aforesaid, to revive such judgment, after the expiration of five years from the qualification of such executor or administrator, or of such other person having charge of the estate, and all such judgments, after the expiration of five years, upon which no proceedings shall have been had, shall be deemed to have been paid and discharged, saving," &c. "The plea, (it is insisted) should have stated not only that five years had elapsed from the qualification of said executrix and executors to the suing out of said *scire facias,* but that, no proceeding had been had upon said judgment within that time."

The general rule in pleading laid down by Chitty, vol. 1, page 229, is in these words: "In pleading upon statutes, where there is an exception in the enacting clause, the plaintiff must show that the defendant is not within the exception; but if there be an exception in a subsequent clause, *that* is matter of defence, and the other party must show it, to exempt himself from the penalty." The same principle is laid down in 5 Bac. Ala., title Statute L. 1 East., 646, in note. Rex vs. Pratten, 6 Term Reps., 559.

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193 But the case at bar does not seem to come within this rule. The peculiar provision of our statute seems to render it necessary that the plaintiff should, by his declaration, show that some proceedings have been had on the judgment within the five years, and that those proceedings have been unavailable, in part at least; otherwise he will show that he is proceeding on a judgment that has in fact been paid, or that in law is deemed to have been paid and discharged. For instance, in this very case, the plaintiff sets out in the declaration the record of the judgment in the Court below, rendered on the 9th day of November, A. D., 1838, more than seven years before the commencement of this suit, which was not instituted until more than six years had elapsed after the said Violet Powell, Nathaniel Hamlin and John W. Adams, had been duly qualified as executrix and executors of the last will and testament of the said Jeremiah Powell, deceased. If any proceedings were had upon that judgment in the meantime, they form a part of the record, and should appear in it; as no such proceedings appear by the record to be had in five years after the qualification of the said executrix and executors, as set forth in the plea we are considering, or before the commencement of this suit, and none are alleged in the declaration to have taken place, it is to be presumed that none were had, and the law, therefore, decrees the judgment to have been paid and satisfied. The words of the statute are—"Shall be deemed to have been paid and discharged," saving, &c. The word "discharged," as defined by Webster, in his Dictionary Ed. of 1848, page 339, means "paid, released, acquitted, freed from debt, performed, executed." The plaintiff, therefore, is endeavoring to recover a debt, which, according to his own showing, appears to have no existence. He might have relieved himself from this dilemma, by showing (if the fact were so) that a *fieri facias* had been issued on this judgment, and returned *nulla bona*, or only in part satisfied; or that other proceedings were had, if any had been had; this would have placed him *rectus in curia*. As it is, he seems to have no standing in court. This case, too, appears to come within another rule of pleading, viz: that matter which comes more properly from the plaintiff, need not be stated in the plea. Griswold vs. National Ins. Co., 3 Cowen, 96. But it is contended that the law does not absolutely require that *scire facias* should be sued out against executors or administrators within five
194 years; it is admitted, however, that it must be done, or some proceeding had upon the judgment, in order to do away the presumption of payment.

Another important question arises in this case—one which the learned counsel for the plaintiff seems to consider as decisive of the one we have discussed, which is this: "Could the executrix and executors of Powell have been properly made defendants to this *scire facias?*" "If they could, then it is admitted that the above statute of limitations may have been correctly pleaded in bar of this action." The argument is, that "the judgment upon which this *scire facias* issued, was founded upon a joint contract—it was a joint judgment; and in case of a joint contract, if one of the parties die, his executor or administrator is at law discharged from liability. and the survivors can alone be sued; and if the executor be sued, he can either plead the survivorship in bar, or give it in evidence under the general issue." "If the contracts were several, or joint and several, the executor of the deceased may be sued at law in a separate action, but he cannot be sued jointly with the survivor, because one is to be charged *de bonis testatoris*, the other *de bonis propriis*." And 1st Chitty's Pleadings, page 50, and note 4, is cited as conclusive of this case; and were it not for several provisions of our statutes, which have an important bearing on this question, we might, perhaps, so consider it, although we do not very clearly perceive the soundness of the distinction contained in the latter proposition—"because one is to be charged *de bonis testatoris*, and the other *de bonis propriis;* for we find it expressly laid down by the law of England, "that when judgment is against several defendants, and one of them dies before execution, since the charge of the judgment survives as to the personalty, though not as to the realty, the plaintiff may have *scire facias* framed upon the special matter, viz: against the survivor, to show cause why the plaintiff should not have execution against him of his goods and chattels, and a moiety of his lands, and against the heirs and terretenants of the deceased, to show cause why the plaintiff should not have execution of the moiety of the lands of the deceased, without mentioning goods." Underhill vs. Deveraux, 2 Saund. Rep., 72—citing Panton vs. Hall, which was decided by Lord Holt, in Trin. Term, 1st Will & M., Carew's Reps., 105, in which, it seems, this doctrine was first held; and if a *scire facias* might be framed upon the special matter in such a case, we are at a 195
loss to see why the same thing might not be done, if, by the provisions of the law, the executors or administrators ought to be made parties with the survivors, or the heirs and terretenants of the deceased, or both. In 2 Tidd's Pr. 1120, it is said, that "where there were two or more defendants, and one of them died after judgment, and before execution, it was formerly holden, that the plaintiff was put to his *scire facias* against the personal representatives of the deceased; and Yelverton, 208, is cited. In turning to the case of Spencer and Woodward vs. The Earl of Rutland, which is the case referred to, we find it laid down, *per totam curiam*, Yelverton Justice, "that, although the writ of error is but to discharge the plaintiff, yet, if the judgment be affirmed, the charge will fall on the executor of him that is dead, and does not survive to the other; and, therefore, the executor of Woodward must be made party, that he may plead in salvation of the testator's goods."

Now, although this case seems to have been overruled by Lord Holt, in the case cited from Carthew, yet, we shall see by and by, that it has a bearing upon this case. And in a note to the case of Trethewy vs. Ackland, and Green vs. same, 2 Saund. Reps., 67, it is said, "at common law, the plaintiff might take the goods of the survivor in execution by a *fieri facias*. But under the statute of Westminister 2, he must sue out an *elegit* against the lands of the survivor, and also of the heir and terretenants of the deceased, and must sue out a *scire facias* against the survivor, and the heir and terretenants of the deceased. For it seems that where the lands of several are charged with a debt, it shall not lie wholly upon the survivor, as if a recognizance be acknowledged by several, the lands of all are thereby become chargeable, and execution must be equally made, and if one dies, the creditor must bring a *scire facias* against his heirs and terretenants and also against the survivors. But it is otherwise, where the lands are not bound, as if two enter into a bond and one dies before judgment, the survivor shall be charged," citing Lompton vs. Callingwood, 4 Mad., 315. So, where judgment in debt was had against two, one died, the plaintiff brought *scire facias* against the survivor only; the defendant pleaded that the other had left lands and an heir upon whom they had descended, and demanded judgment if he should be compelled to answer, without the heir being warned. To which the plaintiff demurred, and judgment 196
was given that the defendant should answer, for the judgment is against the person. And although by the statute of Westminster 2, which gives the *scire facias* and *elegit*, he may charge the lands and make the judgment real; yet it is at his election to proceed against the personalty if he will. But if he will take out execution upon the real lien, the charge must be equally against both. The proceeding against the moiety of the lands in the hands of the survivors, and the moiety in the hands of the heirs and terretenants originated under the statute of West., 2, 13 Edward 1st, which gave the *scire facias* and *elegit*, and enabled the plaintiff to *extend* half the lands of each of the parties defendant until the debt was paid.

Our statute gives a more extended remedy, by providing that lands and tenements (as well as) goods and chattels, shall be subject to the payment of debts, and shall be liable to be taken in execution and sold. Thompson's Digest, page 355, sec. 2, no. 1; and therefore it is contended, as in England, the plaintiff in *scire facias* was entitled to proceed against half the land, he may here have execution of the whole. This question depends entirely upon the provisions of our own statute. The 18th chapter of 13 Edward 1st, which gives the *elegit*, is not in force in this State, because it is inconsistent with divers provisions of the act of our General Assembly, and especially those which provide for the sale of land on execution. But the 45th chapter, which gives the writ of *scire facias*, is in force here by virtue of the provisions of the act of November 6, 1829, which adopts the common and statute laws of England which are of a general and not a local nature, with certain exceptions and provisoes. See Thompsons Digest, page 21, sec. 1, no. 2. The act of 12th February, 1834, ibid., page 350, 357, sec. 4, no. 1, declares, that "every judgment at law and decree in equity which shall be entered and pronounced in any of the Courts of this State, shall create a lien and be binding upon the real estate of the defendant or defendants." How far this provision applies to judgments rendered against executors or administrators, it is not necessary now to determine. The difference between the effect of a judgment in England under the statute of *elegit*, and a judgment or decree rendered in this State under our statute, was noticed by the Court in the case of Moseley vs. Edwards, at the last term, 2 Flor. Reps., 434. Under

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197 the former, the lien did not attach until the writ was issued and levied; it then had relation back and cut out all intermediate incumbrances, and remained a lien until the debt was discharged. Our statute, by the natural import of its terms, makes a judgment at law or decree in equity, a lien upon the lands of the debtor, which binds from its rendition. It is not supposed that the death of a defendant destroys his lien, as remarked in the case of Filyau and wife vs. Laverty, decided at the present term. We see no good reason why the death of a defendant should make the plaintiff's condition any worse than it was before; his lien continues, but he may lose it by his *laches*. "All debts and demands of whatsoever nature against the estate of any testator or intestate, which shall not be exhibited in two years, shall be forever barred; provided, that the executor or administrator shall, by advertisement to be published once a week for the space of four weeks, in some newspaper printed in this State, give notice to all persons having claims or demands against the estate, that their claims and demands will be barred at the expiration of the period aforesaid, unless exhibited within the same." Thomp. Dig., page 206, no. 6. A party who claims a debt against an estate by virtue of a judgment, and does not exhibit it to the executor or administrator within that time, renders himself liable to have the bar of *non claim* set up against him. So, if he lets his judgment stand five years after the qualification of the executors or administrators, or other person having charge of the estate, without any proceeding being had upon it, he renders himself liable to a plea of the statute, and may lose the benefit of his lien. If his lien continues, the question is, how is that right to be enforced in such a case as this? Were it not a joint judgment upon a joint contract, the case would be attended with less embarrassment; being such a judgment on such a contract, it is by no means clear of difficulty. Our statute provides that real estate shall be considered assets in the hands of executors and administrators. Duval's Comp., 186, Thomp. Dig., page 202, sec. 7, no. 2.

In England, on *scire facias* to heirs and terretenants, the executor and administrator was not made a party, because, according to the ruling of Lord Holt, in Panton vs. Hall, above cited, which has ever since been followed, the personalty surviving, the remedy to recover it must survive; but the remedy against the lands could only be
198 against the survivor, and the heirs and terretenants of the deceased, and not against his personal representative. The reporter in that case, says, "that all the personal charge shall survive against John Hall alone, was agreed on all sides," (though the authorities in the margin are quite the contrary,) citing Yelv., 208, and other authorities. There the lands are not assets in the hands of executors and administrators for the payment of debts, but descended to the heir or eldest son, upon the principle of primogeniture. "When the Emperors, (says Sir William Blackstone, 2 Commentary, 183,) began to create honorary feuds or titles of nobility, it was found necessary (in order to preserve their dignity) to make them impartible, or (as they styled them) *feuda individua*, and in consequence descendible to the eldest son alone." Here all "the real estate is to be considered assets in the hands of executors or administrators—assets, *sub modo* or conditional assets. Gilchrist, Judge, &c., vs. Fillyau and wife, 2 Flor. Reps., 99. They are all assets for the payment of debts in all cases where the personal estate is exhausted, and may become so before. The act of 17th February, 1833, sec. 4, Duval Comp., 137, Thomp. Dig., 203, no. 3, enacts "that the Judge of Probate or officer discharging the functions of ordinary, may order and decree a sale (in like manner as to supply the deficiency of personal assets) of the real estate of any deceased person, in preference to a sale of slaves where it may be necessary for the payment of just and lawful debts, or demands against his estate, and when it may be deemed most beneficial to the heirs, legal representatives or devisees of the estate." The act of March 4, 1841, Thomp. Dig., 203, 204, no. 6, declares "that it shall be unlawful for any administrator of any deceased intestate, or the executor of any deceased testator, who has not power by the will of the testator, to sell real estate for the purpose of paying debts, or to make more equal distribution amongst the heirs or devisees or legatees, to file a petition in the Circuit Court of the County in which the letters of administration or letters testamentary were granted, &c., for the sale of the real estate." This act is set forth, and the views of this Court so fully expressed upon it in Gilchrist, Judge, &c., vs. Fillyau and wife, above cited, 2 Florida Reps., 96 to 100, that it is deemed unnecessary to enlarge upon it here. This Court, in that case, held that it did not repeal the act of 1833, further than changing the mode by which executors and administrators, were enabled to sell real estate for the payment of debts 199
where there is a deficiency of personal assets; on the contrary, that the law of 1841, is a virtual affirmance of that of 1833, which asserts that lands shall be assets; indeed its provisions as there held, are more extensive, as it enables an executor or administrator, to sell real estate to make more equal distribution, &c. It is clearly the duty of the executor or administrator, in case there should be a failure of personal assets, to make application for the sale of lands in the mode pointed out. It is not a matter with him (said the Court) of mere discretion; being assets, they must carry with them the incidents of assets; the rents and profits of the land constitute a fund for the payment of creditors, and it is obvious that the law intended that the whole estate should be subject to the payment of debts. 2 Flor. Reps., 97. Upon the death of the ancestor, the fee vests in the heir by our statute of descents, but he takes it subject to the debts of the testator or intestate. If the testator or intestate has entered into any written agreement or contract for the conveyance of real estate (in this State) the executor or administrator, (and not the heir) is by statute authorized and empowered to execute such conveyance.

Had the law in these respects been the same in England that it is here, we think that the ruling of the Court there would, in a case like this, have been different. They hold that where any new person is either to be better or worse by the execution, there must be a *scire facias*, because he is a stranger, to make him a party to the judgment. As in the case of an executor or administrator, Pennyoir vs. Brace, 1 Salk., 319, 1 Lord Raymond, 244, Holt, Ch. J., held that a *capias*, or *fieri facias*, being in the personalty, might survive, and might be sued against the survivors, without a *scire facias;* otherwise of an *elegit*, for there the heir is to be contributary. Ibid—citing 2 Inst., 471. Dyer, 175. Mad. Cases, 138, and 4 Mad. 404.

Now, an executor or administrator should be made a party to a *scire facias* here, for the same reason, viz: because he is contributary, and he is a new person, a stranger to the judgment, and to be better or worse by the execution; and it is laid down as a general rule, that, in all cases where the inheritance or freehold is affected, the tenant of the freehold is to be made a party. 8 Bac. Abr. Ed., 1848, page 612. Yelverton says, (page 209) "the executor must be
made a party, that he may plead in salvation of the testator's goods." 200
Is it not quite as important that he should have an opportunity to plead in salvation of the testator's lands, where they fall into his hands as assets?—assets for the payment of debts, and it may be for distribution? He cannot plead *plene administravit*, until the real, as well as personal, assets have been exhausted; he is required to pay all the debts of the estate, which are fairly and justly due, and the order in which they are to be paid is prescribed. First—the necessary funeral expenses; debts due for board and lodging, during the last sickness of the deceased; next physicians' and surgeons' bills, and debts incurred for nursing and other attendance, and for medicines by an apothecary, during the last sickness of the deceased; next judgments of record, rendered and docketed in this State in the life-time of the deceased, and all debts due the State; and, finally, all other debts, whether by specialty or otherwise, without distinction of rank. Thomp. Dig., page 206, No. 3 & 4. Duval's Compilation, 175, 186, The lands are, therefore, assets in the hands of the executors, for the payment of this very judgment, if it has not been paid, or is not by law deemed to be paid, and is not otherwise barred; and if the personal assets in their hands cannot be reached in this case, because, as contended, the judgment does not survive as to them—yet it does, by the rules of the English laws, survive as to the realty; and these executors, standing in the place of the heirs in that regard, so far as the debts due by the estate are concerned, they should have been made parties to this *scire facias*, and had an opportunity to plead in salvation of these lands.

Whether it was necessary that the heirs and terretenants should have been made parties or not, may be more questionable; it may be proper to remark here, that if these lands can be considered assets in their hands for the payment of this debt, then they are persons, other than executors, in charge of the estate, and are properly made parties to this proceeding; but if the lands are not assets in their hands for the payment of the debt, then the *scire facias* will not lie against them. We have seen, that if "they have the estate itself," as is contended, it is subject to the payment of this debt, and the executors hold it as assets for that purpose, and have a right to the rents and profits; they hold it not only for the payment of this debt in particular, but for the payment of all the debts of the testa-

tor, which were due or owing at his death, and not yet paid, or barred by any statute of limitation, and the heirs, so far as they are in charge of it, hold it for the same purpose.

In the case of Reynolds, administrator, et al., vs. Henderson, administrator, 2 Gilman's Reps., 118, which was a *scire facias* against the heirs, terretenants and administrator, to enforce the payment of a judgment rendered against the intestate in his life-time, where the question of lien arose as here, service was upon all, and held regular, and so we consider it in this case.

In the case of Bell and others, vs. The Heirs of Robinson, 1st Stewart's Reps., 193, 195, the Chief Justice, delivering the opinion of the Court, said: "Our statute of 1812 gives to judgments and decrees a lien on the lands and tenements, &c., and directs that the clerk shall frame the execution accordingly." The Clerks of our Courts, without any such express direction by statute, have framed an execution to meet the provisions of the statute, which subject lands to levy and sale on execution, and this is in accordance with a rule of law as old as the institution of a Court of Chancery, that where a case arose, and there was no writ to suit it, the Clerks in Chancery should frame one.

We do not, therefore, perceive any insuperable difficulty, were it necessary in such a case as this, again to change the form of the execution, so as to make it reach either the real or personal, or both, in the hands of an executor or administrator.

We are not so strongly attached to technical rules, as to be unwilling to overturn them, when they stand in the way of the administration of substantial justice; and our statutes have opened a way for us to do so. Whether, however, such a change in the process may be necessary, or can be made, we shall leave to be decided when a proper case shall arise, and the question shall be directly presented.

From the view we have taken of this case, we consider the plea a good bar to the action; but were it otherwise, we should feel constrained to act in consonance with the rule, that, upon demurrer, the Court will give judgment for the party, who on the whole case appears to be entitled to it, and against the party who committed the first error. Egberts vs. Dibble, 3 McClean's Reps., 86. Greathouse vs. Dunlap, Ibid, 303. Rosenberg vs. McKaine, 3 Rich. Reps., 145. Parkhill vs. The Union Bank, 1 Florida Rep., 131. Stephen on Pl., 144. 1 Chitty's Pl. 707, and authorities there cited in note 1096; and for the reasons above stated, adjudge the declaration bad.

The judgment of the Court below is, therefore, affirmed, with costs.

Per curiam.

SIMON TOWLE, COMPTROLLER, APPELLANT, VS. THE STATE OF FLORIDA, *ex rel.* FISHER, SHERIFF.

The law requiring a prosecutor to be set at the foot of an indictment for assault and battery, is not merely directory. If it is not done, the indictment for that cause is defective and may be quashed. But if it is not quashed, and process issues upon it, the officer, who is not bound to inquire into the regularity of the proceedings, is entitled to his costs, and the State is bound to pay them, if the party is acquitted.

The writ of *mandamus* is not the mode by which such a claim is to be enforced against the State. In the absence of any specific provision upon the subject of claims against the State, which the Comptroller rejects or refuses to allow, the only redress is by application to the Legislature.

Where a purely ministerial act is to be done, and there is no other specific remedy, a *mandamus* will be granted; but where the person against whom a *mandamus* is prayed is invested with judicial power, or acts in a deliberative capacity, or has the power and right of *deciding*, the writ will not lie, except to compel him to proceed to the discharge of his duty, by deciding according to the best of his judgment.

The Comptroller of this State, in the administration of the concerns of his office, is required to exercise judgment and discretion, and the Courts cannot act directly upon him by *mandamus*, and thereby guide and control his judgment and discretion.

The act creating the office of Comptroller vests him with discretion to be exercised in the examination of accounts, claims, or demands against the State. When, in the exercise of his discretion and judgment in any particular case, he rejects an account, the writ of *mandamus* is not the appropriate remedy.

Appeal from decision of the Circuit Court of the County of Leon, made at the Fall Term, 1849, awarding a mandamus against the Comptroller.

The facts of the case are sufficiently stated in the opinion of the Court.

Hogue, for appellant.

1. It was error in the Circuit Court to award a *mandamus* in this case, because, upon the principles governing in cases of this character, the writ does not properly lie. Where a discretion is vested in an executive officer, by law a *mandamus* will lie to compel him to proceed to the exercise of his discretion, but not directing him as to the mode and manner of its exercise, or as to the decision he should make. This is a matter for his own judgment.

2. The laws of Florida (see Thomp. Dig., 31, and the pamphlet laws, 1848,) give to the Comptroller the power of allowing or disallowing in whole or in part, claims presented against the State, and no provision is made for an appeal from his decision. Without such provision, his decision must be final, subject only to review and reversal by the legislative authority, to which, if a party feels aggrieved, he can apply for redress.

3. A *mandamus* only lies to compel the performance of a mere ministerial act enjoined by law, or appertaining to the duties of the officer. But where the officer is left to the exercise of his discretion as to whether he will or will not perform the act, it is impossible, upon principle, to coerce performance by *mandamus*. It is no answer to this to say that the fees of officers are ascertained by law, because still the Comptroller is the judge as to the question whether a particular claim presented is or is not a charge against the State. If this be true, why is he authorized to "admit or reject, allow or disallow." To support these positions, and to show the principle ruling in such cases. I cite Kendall vs. United States, 12 Peters, 524. 10 Pick., 245-6. 2 Va. Cases, 92. U. S. Dig., 3d vol., p. 9, art. 4, § 99—in some of which cases, it will be seen, a *mandamus* was granted; but the principle which I have laid down was fully recognized as the *criterion* by which it is to be determined in every case presented, whether the writ is the appropriate remedy. See also the case of Brashear vs. Mason, 6 Howard Sup. Court Reports.

To show that other States have thought it necessary to provide for appeals from the decision of the auditor of public accounts, I refer to 1 Robinson's Practice, page 33.

Maxwell, for appellee:

The relator, Fisher, filed his petition, complaining that the Comptroller refused to allow certain accounts of his against the State, and asking for a *mandamus*. The accounts were for services as Sheriff, in apprehension, &c. of the persons therein named, who were indicted for assault and battery, and were made up of the fees given by the statute for such services.

The Comptroller answers, admitting the rejection of the accounts, but denying power of the Court to control his action in the matter, on the ground that the statute prescribing his duties and powers invests him with discretion in such cases, not subject to the supervision of the Courts. He answers, further, that if the Court can exercise the power claimed for it, this is not a case in which it will do so, because the statute (Thomp. Dig., 522,) requires a prosecutor to be endorsed on indictments for assault and battery, who shall be liable for costs, on failure of the indictment, and as this was not done in the cases on which the accounts here presented were founded the State is not liable for them.

Upon the petition and answer, the Court below decided that the *mandamus* shall issue, from which the Comptroller appealed.

The question first arising is, as to the power of the Court to grant the *mandamus*. Our constitution gives it "original jurisdiction in all matters, civil and criminal, within this State," not excepted by that instrument, (Thomp. 53) and there is no exception against awarding a *mandamus* according to the common law, which is of force here. "Jurisdiction in all matters, civil and criminal," is certainly a grant of power broad enough to cover a proper case of *mandamus*. This will more fully appear by reference to the nature of the writ. It is a "command, * * directed to any person, corporation, or inferior court of judicature, * * * requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the Court * * has previously determined, or at least supposes to be consonant to right and justice." This is the definition of Blackstone, (Vol. 3, p. 110.) Lord Mansfield, in 3 Burr, 1266, says: "This writ ought to be used upon all occasions, where the law has established no specific remedy, and where in justice and good government there ought to be one." And this law is founded upon what Blackstone calls a general and indisputable rule, "that

where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded;" in other language of his, it is a "settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress."" 205

Now, in a clear case of right—for instance, if the legislature had, in so many words, directed the Comptroller to allow and pay this account—these principles would assuredly give the remedy by *mandamus*, if he refused, because there would be no other legal remedy open to the relator. So it is too, where the statute in general terms allows specified fees for certain services. If the services be performed, and the fact comes before him properly authenticated, there is no discretion left the Comptroller. He is but acting in a ministerial capacity, and must obey the directions of the law. He may have discretion in reference to accounts against the State, where the statute has made no specific regulations as to the charges. Then it would be for him to judge whether the account were too large or not; and the most a Court could do in such a case if the Comptroller refused to entertain it, would be by *mandamus* to direct him to audit and allow what was proper.

The discreation claimed for the Comptroller exceeds that given him by the statute—see Thompson's Dig., 31; and is certainly not intended to be given where the law itself specifies what shall be allowed, as in the cases of officers of the Court.

The Court, then, having the power to issue the writ of *mandamus* against the Comptroller in a proper case, the only question remaining is, whether this is a proper case, for its exercise. The facts are not disputed. The relator performed the services, charged for them only what the statute allows, and presented his accounts duly authenticated. The case was one of assault and battery, in which the State failed. The costs, therefore, were chargeable against her, unless the law provides to the contrary. The Comptroller insists that the statute, (Thomp., 522,) which directs that in cases of assault and battery, &c., a prosecutor shall be set at the foot of the indictment, who shall be liable for the costs, if the prosecution fails, does provide to the contrary. But this cannot be so. (The sheriff must execute the command of the Court. It is not his province to inquire whether it has been issued irregularly or improperly.) To require a prosecutor, who shall be liable for costs, is not to say the officers shall be denied their costs, if one is not set at the foot of the indictment. The statute merely enjoins a duty upon the Grand Jury, and the officers should not suffer, if they fail to perform it. He has no option, but must execute the command of the Court. Now, shall he be made the victim of the neglect of the Grand Jury?—Shall he suffer wrong and injustice in the loss of his fees, because others have not done their duty? The statute could not intend any such mischief. 206

This much is certain—the sheriff could not do otherwise than perform the services required of him, and in such case he requires a right against some party to his costs. To deny him that right, is to do him injustice. Now, to what party can he look for these costs? To none other than the State, for she was the party that failed before the Court. As there is no right without a remedy, and no remedy in this case but by *mandamus*, it seems clear that the Court below did not err in awarding it.

DOUGLAS. C. J.

This is a suit instituted in the Circuit Court of the Middle Circuit of this State, wherein Alfred A Fisher, Sheriff of Leon County, by petition complains, that at the October Term of that Court, in the year 1848, one Elijah B. Clark was indicted by the Grand Jury for an assault and battery; that the petitioner rendered whatever service was required of him in the prosecution of said Clark, for which service he was entitled to the fees given by the statute, which, according to his account annexed, amount to $58 52-100. That said Clark was acquitted, and said fees are properly chargeable to the State, there being no prosecutor endorsed on said indictment. That he, the petitioner, had presented the said bill of costs to Simon Towle, Comptroller of the State, to be audited and paid, but the said Towle refused to allow the same. Wherefore, he prayed the Court to grant a writ of *mandamus* to be directed to said Simon Towle, Comptroller, &c., commanding him to allow and pay the said bill of costs, or else to show good and sufficient cause why the same should not be allowed and paid.

It does not appear by the record whether the alternative *mandamus* so prayed for, was granted or not. But on the 9th November, 1849,

the said Simon Towle, Comptroller, filed his answer, admitting the facts charged in the petition, so far as related to the rendition of the services and the correctness of the account exhibited therefor, but denying that the State was bound to or ought to pay it, and shows for cause that the law requires "in all cases of assault and battery, trespass and libel, that a prosecutor shall be set at the foot of the indictment, who shall be liable for costs on failure in the prosecution." That the account of the relator was "for costs" in a case of assault and battery, coming precisely within the provisions of that law, that a prosecutor should, therefore, have been set at the foot of the indictment, and he would be the party liable to pay the account of the relator and not the State." The Circuit Court held the answer of the respondent insufficient, and awarded a peremptory *mandamus* against him the said Simon Towle, Comptroller, &c., commanding him forthwith to audit, allow and pay the said bill of costs of said petitioner, amounting to the sum of $58 52-100. From which judgment the said defendant appealed to this Court, and has assigned for error— 207

First. The Court erred in awarding a writ of *mandamus* in this case.

Second. The Court erred in deciding that it was a proper case for *mandamus*.

We deem it proper to state *"in limine"* in this case, that the Comptroller was right as to the requirement of the statute—that a prosecutor should be set at the foot of the indictment in such a case, nor is the provision, according to our view of the matter, merely directory; it is a positive requisition, and an indictment returned without a prosecutor endorsed upon it, is invalid, and might be quashed on motion; but if the defect escapes the notice of the defendant and his counsel—or if they do not choose to avail themselves of the error, and process issues upon it, the officer of the Court is not bound to inquire into the regularity of the proceedings; his duty is to obey the mandate of the writ. Tarlton vs. Fisher, 1 Douglas, 671. Camp. vs. Moseley, et al., 2 Flor. Rep., 195. Gott vs. Mitchell, 7 Blackford Reps., 270. Parsons vs. Loyd, 3 Wilson's Reps., 345, 376. In this last case, Lord Ch. J. De. Gray remarks in substance, that the plaintiff was illegally imprisoned under a judgment sued out against him, which is a mere nullity—he has been unlawfully injured, and must have a remedy—but he has none against the officer who is not to exercise his judgment touching the validity of the process in point of law, but is obliged to obey the commands of the Courts, &c. The case in 7 Black., 270, goes further, and shows, that if the Sheriff has notice of the irregularity of the process, still if the writ was legal upon its face and showed jurisdiction in the justice, the officer was bound to obey it. Here the process was regular, no question arose about it, the Sheriff was bound to obey it. To withhold the payment of his fees, for the cause assigned, would be to punish him for the wrong of some one else, if indeed any fault was committed, but *non constat*—that any was committed; the whole may have been the result of inadvertance. The fees of the Sheriff, at all events, so far as appear by this record, should have been allowed and paid, and the Comptroller, we have no hesitation in saying, came to a wrong conclusion, when he decided that the State ought not to pay these costs, and therefore reject the account. 208

But the more important question is, whether it is competent for this Court to correct the error—in other words, is it a proper case for a *mandamus*. "The principle is admitted (said Tucker, Justice, in the Attorney General vs. Turpin, 3 Hen. and Mun., 557,) by every writer on the law of Nations, that the Commonwealth can neither be made liable to its own citizens in its own Courts, beyond the tenor of its own engagements, nor be sued in its own Courts in any other manner than that expressly permitted by law. "But although a State cannot be called upon to defend itself in a foreign Court, or in its own Courts, without its consent, the honor and justice of every State require that an independent tribunal should be appointed within itself, to decide upon all claims against the public, and not leave them to the decision of a popular assembly, improper from the nature of its existence, as well as from their numbers, to decide upon contracts made, that is to say, to decide what the contracts are, and whether they will perform them or not. Pendleton, President in Comm. vs. Beaumarchais, 3 Call, 369. The Legislature of Virginia has provided such a tribunal, by allowing an appeal from the auditor of publice accounts to the judiciary. Ibid. That is, by a petition of the party who may feel himself aggrieved by a decision of the author, to the High Court of Chancery of the Superior Court of law holden in the city of Richmond, according to the nature of the case, for redress 2 R. C., 1819, page 2, sec.6. 1 Robinson's Prac., 33.

Towle *vs.* The State.—Opinion of Court.

209 The *mandamus* being in its nature what is termed a prerogative writ, issuing only from the tribunal which represented judicially the King himself, was extended originally to matters rather of a general public nature, than to such as affected the rights of a particular subject, as to cases of some breach of the peace, disobedience of law, or neglect of official duty, and, therefore, we are to construe, rather as an extension than as a restraint of its original uses, what is given by Comyn, Titl Mnadamus A. where he says, "The Court of King's Bench has power, by writ of *mandamus*, to correct all extra judicial errors which tend to a breach of the peace, oppression of the subject, or other mis-government." But long subsequently to Comyn, we find the Court of King's Bench, 3 Burr, 1267, remarking, that "within the last century, it has been liberally interposed, for the benefit of the subject, and the advancement of justice." This case, which was decided in 1762, was a *mandamus* to trustees, to admit a dissenting minister; (2 Term Rep., 259,) and Lord Mansfield observed, that "a *mandamus* is a prerogative writ, to the aid of which the subject is entitled, upon a proper case previously shown to the satisfaction of the Court. It was introduced to prevent disorder from a failure of justice, and defeat of police; therefore, it ought to be used upon all occasions, where the law has established no specific remedy, and where in justice and good government there ought to be one." This remark, however, is to be qualified by the contemporaneous observation of the same learned judge, which he frequently repeated, that "it was a very beneficial writ, but that the best mode of preserving it, was to be sparing in the use of it." And the fact that there is no other remedy does not seem to be sufficient in every case to justify the use of it; for in Rex vs. The Justices of Wilts, 2 Chittys' Reps., 257, where a *mandamus* was refused, Baley, Justice, in reply to the counsel, that there was no other remedy, said: "There are many cases where there is no other remedy against the Sessions, where we should not interfere;" and in Wilson vs. The Supervisors of Albany, 13 John. Rep., 414, the Court in refusing a *mandamus*, said: "It may be a hard case, and the party may be remediless, but that consideration cannot induce us to grant an unfit remedy." The principles which govern the Courts in issuing wris of *mandamus* (said Ch. Justice Tilgham, in Griffith vs. Cochran, 5 Binney's Reps., 103,) are well understood, and the counsel who argued this case
210 have not differed in that respect. Where a ministerial act is to be done, and there is no other specific remedy, a *mandamus* will be granted to do the act which is required; but where the complaint is against a person who acts in a judicial or deliberative capacity, he may be ordered by *mandamus* to proceed to do his duty, by deciding according to the best of his judgment; but the Court will not direct him in what manner to decide. This was the principle adopted by the Supreme Court of the United States, in the case of the United States vs. Lawrence, 3 Dallas' Reps., 42, where it was sought to compel a District Judge to issue a warrant to arrest an alleged deserter from the French naval service, under a treaty stipulation, and in which it was clear an unanimous decision of the Court that the District Judge, having acted judiciously in deciding that the evidence was not sufficient to authorize his issuing a warrant, the Supreme Court, however it might differ in opinion from the Judge as to the sufficiency of the proof, had no power to compel him to decide according to the dictates of any judgment but his own. In the case of the Life Insurance Company of New York vs. Adams, 9 Peters' Reps., 602, the same principle is recognized, and Chief Justice Marshal said: "On a *mandamus*, a Superior Court will never direct in what manner the discretion of an Inferior Court shall be exercised, but will in a proper case require the Inferior Court to decide. In the case of The Commonwealth vs. The Judges of the Common Pleas of Phila. Co., 3 Bin. Reps., 237 to 286, the Court held, that "a *mandamus* cannot go to an Inferior Court to compel them to make any particular decision, but merely to decide."—"Where a Judge acts in his judicial capacity, as in deciding on the propriety of issuing a warrant, the Supreme Court will not grant a *mandamus* to compel him to decide according to any judgment but his own." 6 Bac. Abr. Ed. of 1848, page 437, title Mandamus.

In this case, The United States vs. Lawrence, 3 Dallas, 42—Ex parte Roberts, 6 Peters, 216—Ex parte Davenport, 6 Peters, 661. Life & Fire Insurance Company of New York vs. Wilson, 8 Peters, 291—Ex parte Martha Bradstreet, 8 Peters, 588—Life & Fire Insurance Company New York vs. Adams, 9 Peters, 573—Postmaster General vs. Trigg, 11 Peters, 173—Ex parte Jesse Hoyt, 13 Peters, 279, were cited.

A Court may be compelled by *mandamus* to proceed to judgment, but it must exercise its discretion as to what that judgment shall be. 211
The Board of Police of Attala Co., vs. 9th Smedes & Mar. 90
Where the Court or officer has a discretion, the Supreme Court will not grant a *mandamus* to control that discretion. 6 Bac. Abr. Ed., 1848, page 420, title Mandamus, and authorities there cited.—In Ex parte Hoyt, 13 Reters, S. C. R., 290, Mr. Justice Story, delivering the opinion, said: "It has been repeatedly declared by this Court, that it will not, by *mandamus*, direct a Judge what judgment to enter in a suit, but only will require him to proceed to render judgment."

There seems to have been at one period much uncertainty and confusion in regard to the application of a writ of *mandamus*, but it arose from the character of the persons to whom the writ was to be directed, and the objects sought to be accomplished by it, rather than from the nature of the acts complained of. The broad distinction between a direction to an inferior tribunal to act, and a direction to it how to act, seems to have been at all times well observed, at least until very lately. Judges of Onedia C. P. vs. The People, 18 Wendell, 96.

We have noticed that in the case of The People vs. Superior Court of New York, 5 Wendell, 114, Mr. Justice Sutherland, who delivered the opinion of the Court, advanced the following propositions:

First. That a writ of *mandamus* lies where a party has a legal right, and no other appropriate remedy.

Second. That it does not lie to an inferior tribunal, where such tribunal has the right of exercising its discretion.

Third. That the discretion which the Supreme Court cannot control is one governed by no fixed legal principles.

Fourth. That in all cases where an inferior Court is bound to proceed according to established legal principles, and it is alleged that an error has been committed, the Court has power to issue a *mandamus*—and if error has intervened, the same obligation exists to issue the writ, as to reverse or affirm a judgment upon a writ of error.

This case, which was a *mandamus* to the Superior Court of New York, requiring it to vacate an order made by it for a new trial, on account of newly discovered evidence, is disapproved and overruled in the case of the Judges of the Oneida C. P. vs. The People, 212
above cited, and all except the second proposition—on which the Court in the last case bases its decision—triumphantly refuted. The former is said to be the first case in which a manifest tendency is disclosed to extend jurisdiction by *mandamus*, over the judicial acts of an Inferior Court, which was acknowledged as acting within the scope of its own powers; and the Court of Errors, in reviewing it, remark upon the fourth proposition, that where the action of a Court is prescribed "by established legal principles," it is not a case of legal discretion, but of legal necessity, and can only occur where questions of law, and not questions of fact, are involved.

The case of Decatur vs. Paulding, 14 Peters S. C. Reps., 521. was an application for a *mandamus* to the Secretary of the Navy, to compel him to pay to Mrs. Susan Decatur a pension which she claimed under a resolution of Congress. Mr. Justice Cranton, after stating reasons somewhat at length why the writ ought not to have been issued, said, "The origin of the opinion that public money could be reached through such instrumentality, is of recent date. Its history will be found in the case of Stockton & Stokes vs. the Postmaster General; money was not there asked in a direct form, and the Court put the case on the express ground that the defendant "was not called upon to furnish the means of paying any balance that was awarded against the Department by the Solicitor of the Treasury. He was simply (say the Court) required to give the credit," and this was no more an official act, than the making of an entry by the clerk, by order of a Court of Justice; it was in every just sense a ministerial act." Ibid, 516, and 12 Peters, 614. "Had it not been placed on this narrow ground the decision could not have been made."

In the case of Brasher vs. Mason, which was another attempt to compel the Secretary of the Navy, by means of a writ of *mandamus*, to pay a claim against the Government—the Supreme Court of the United States say, "In the case of Mrs. Decatur vs. Paulding, 14 Peters, 497, it was held by this Court, that a *mandamus* would not lie from a Circuit Court of this District to the Secretary of the Navy to compel him to pay a sum of money claimed to be due to her as a pension under a resolution of Congress. There was no question (say the Court) as to the amount due, if the plaintiff was properly entitled to the pension, and it was made to appear affirmatively on

213 the application, that the pension fund was ample to satisfy the claim. The fund was also under control of the Secretary, and the money payable on his own warrant. Still the Court refused to inquire into the merits of the claim of Mrs. D. to the pension, or to determine whether it was rightfully withheld or not by the Secretary, on the ground that the Court below had no jurisdiction over the case, and therefore the question is not properly before this Court on the writ of error. The Court say "that the duties required of the Secretary under the resolution were to be performed by him as the head of one of the executive departments of the government, in the ordinary discharge of one of his official duties; that, in general, such duties, whether imposed by the act of Congress or by resolution, are not mere ministerial duties; the head of an executive department of the government, in the administration of the important concerns of his office, is continually required to exercise judgment and discretion, and the Court could not by *mandamus*, act directly upon the officer and guide and control his judgment or discretion in the matters committed to his care in the ordinary discharge of his official duties." "The Court distinguish the case from Kendall vs. the United States, 12 Peters, 524, where there was a *mandamus* to enforce the performance of a mere ministerial act, not involving on the part of the officer, the exercise of any judgment or discretion." And the principle of the case of Mrs. Decatur was held to be decisive of that of Brasher vs. Mason. See 6 Howard's S. C. Reps., 101, 102; and so we deem it decisive of this case.

The comptroller of this State, in the administration of the important concerns of his office, is continually required to exercise judgment and discretion, and this Court cannot, by *mandamus*, act directly upon him and guide and control his judgment and discretion in the matters committed to his care in the ordinary discharge of his official duties. The question in the case of Mrs, Decatur, as here, was one purely of law, was she entitled to the pension claimed? there was no question as to the amount due, if she was properly entitled to the pension, and by reference to the case it will be seen that this question rested entirely upon the construction of an act and a resolution of Congress. To show that the Comptroller has discretion and judgment to exercise, it is only necessary to refer to the act creating the office, act of July 23, 1845, pamphlet laws, pages 16, 17. Thomp-
214 son's Digest, pages 31, 32, Nos. 5 and 6, by which it is made "the duty of the Comptroller to examine, audit, adjust and settle the accounts of all the officers of this State, and any other person or persons or corporation, in any wise entrusted with, or who may have received any property, funds or moneys of this State, or who may be in any wise indebted or accountable to this State for any property, funds, or moneys, and require such officer, person or persons, or corporations to render full accounts thereof, and to yield up such property or funds according to law, or pay such moneys into the treasury of this State, or to such officer or agent of the State as may be appointed to receive the same, and on failure to do so, to cause to be instituted and prosecuted, proceedings, criminal or civil, at law or in equity, against such person or persons or corporation, according to law."

"The Comptroller of this State may demand and require full answers on oath from any and every person, party or privy to any account, claim or demand against or by the State, such as it may be his official duty to inquire into, and such answers he may require to be in writing and to be sworn to before himself or before any judicial officer, or justice of the peace, or clerk of any Court of this State, so as to enable said Comptroller to decide as to the justice or legality of such account, claim or demand." To decide, of course requires reflection—the exercise of judgment and discretion; it is not a mere ministerial duty. Discretion implies "knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper, united with caution; nice discernment, and judgment directed by circumspection."

Coinciding in opinion with that high tribunal whose authority we have just now invoked, that it is not the province of the Court below or of this Court to control the exercise of that judgment and discretion, and that the remedy here sought is inappropriate, we are clearly of opinion that the judgment of the Court below should be reversed. The remedy of the party, if the views which this Court have expressed, and the reasons given for them, do not satisfy the Comptroller that he ought to pay this claim, is a memorial to the General Assembly, which has power to afford him relief. But we entertain the hope that what in right and justice appertains in this behalf, will be done without the necessity of the relator's restoring to that pro-

ceeding. And we take occasion further to remark that as the ques- 215
tions presented in this case had not before been so made as to be authoritatively decided in this State, it was proper that the Judge to whom application was made for the writ in this case should have granted it: that they might be brought here to be discussed and settled.

The judgment of the Court below is reversed, and the cause remanded with directions to that Court to dismiss the writ.

Per curiam.

JOHN B. DOGGETT, PLAINTIFF IN ERROR, VS. MARCELLUS JORDAN, DEFENDANT IN ERROR.

The 12th section of the act "to regulate judicial proceedings," gives to a plaintiff the option of proceeding to judgment against one or more defendants served with process, and dismissing as to others not served, or of continuing the cause for the purpose of perfecting service upon such as have not been summoned. A plaintiff cannot, however, take judgment as to one or more who have been served, and an *alias* writ for others not served.

The return by the officer, "Not in the County," does not warrant an abatement or discontinuance as to one or more of several joint defendants. The return required by the statute to authorize this proceeding must be in the words of the law—"Does not *reside* in the County."

Error to Leon County Circuit Court.

Judgment was rendered in the Court below in this case in favor of the defendant in error, at the Spring Term, 1849.

The question upon which it was brought up by writ of error to this Court, is one altogether of pleading and practice, and disconnected from the merits of the case. The nature of the question presented appears in the opinion of the Court.

Branch, for plaintiff in error.

Lang & Walker, for defendant in error.

LANCASTER, J.

This suit was brought by Jordan, the defendant in this Court, against the present plaintiff, John B. Doggett, and one Henry Doggett, jointly, as defendants below. A summons was regularly issued 216
against both defendants, and was afterwards returned by the Sheriff "Executed by serving a copy hereof on John B. Doggett. Henry Doggett does not reside in the county. April 16th, 1846."

Afterwards, the plaintiff, Jordan filed his declaration against both defendants, of a plea of trespass on the case on promises, &c. And afterwards, on the 25th day of May, 1846, on motion of the plaintiff, by his attorney, it was ordered that an alias summons issue for Henry Doggett, one of said defendants, returnable to the then next term of the Court. And afterwards the Sheriff, at November Term, 1846, made return on the writ issued in pursuance of the above order of the 25th of May, in the following words, to wit: "Not in the county." And it appears further on the record in this cause, that at April Term, 1849, judgment was rendered in favor of plaintiff, Jordan, against the defendant, John B. Doggett, for the damages assessed by the jury, and for his costs, &c.

The error assigned is, a departure in the judgment, from the writ and declaration, which renders said judgment reversable. That the writ and declaration being against John B. Doggett and Henry Doggett, and the judgment against John B. Doggett alone, there should have been some order or judgment of Court, showing what disposition had been made of said suit as to Henry Doggett.

In this case the declaration discloses a joint cause of action, and was filed, as appears by the record, after the original writ or summons was returned, and after it was shown by that return that Henry Doggett did not reside in the county.

The 12th section of the act to regulate judicial proceedings, of November 12th, 1828, Thom. Dig., 327, provides, "When an original writ or summons has been sued out against two or more defendants, and returned by the Sheriff or other officer, served upon one or more defendants, and that the other defendants do not reside in said district or county, as the case may be, it shall be lawful for the plaintiff at his option, to proceed to judgment against those upon whom process has been served, or to obtain from the Court time to perfect service, and to order additional originals and copies to be directed to the sheriffs of the counties in which the other defendants reside, to be served and returned as is directed in this act." After filing his declaration on the 25th of May, 1846, the plaintiff, by his attorney,

217 moved and obtained an order for an alias summons to issue against Henry Doggett, one of the defendants. This, under the legal option, extended to him by the section above recited, he had an undoubted right to move for and obtain. But it is conceived that a sound consideration of said section also includes the idea that by selecting to have an alias, he waived the right to proceed to judgment against the one on whom service had been perfected, for the option given implies—take which course you will, but you cannot pursue both. The return, as to Henry Doggett, was such an one that the plaintiff might have moved under the above recited section to dismiss as to him, and have proceeded to judgment against the other, but in that case he could not have had his alias writ against the other. He pursued the alternative of an alias, upon which the sheriff returned "Not in the county," which is plainly and materially different from "does not reside in the county," which last the law requires, to entitle the plaintiff to dismiss as to one, and take judgment against the other.

We have, moreover, been unable to discover any where in the record any order dismissing the suit as to Henry Doggett. It is laid down in 7 Cranch, 194, in the case of Barton vs. Petit & Bayard, that "the general rule certainly is, that if two or more persons are sued in a joint action, the plaintiff cannot proceed to obtain judgment against one alone, but must wait until the others have been served with process, or until the other defendants have been proceeded against, as far as the law authorizes, for the purpose of forcing an appearance. In England, the plaintiff must proceed to outlaw the defendants who have not been served, before he can proceed against those who appear." In the case in Cranch above referred to, it is stated in the opinion delivered, that a *certiorari* was awarded to the Circuit Court of Virginia, on a suggestion of diminution; it appeared, by the clerk of that court, that an alias *capias* issued against Thomas Fisher, which was not returned; but the plaintiff's attorney caused the suit to be abated as to the said Fisher, upon information he had received that said Fisher was no inhabitant of the District of Virginia—the Court say: "Had the marshal returned the writ, and stated this fact, the law would have abated it as to Fisher—in which case, the objection to the subsequent proceedings, as to Barton, would have been removed. But since the plaintiff could not have supported his action originally against one defendant
218 on a joint cause of action, where it appeared by his own showing, or by plea in abatement, after stating a joint cause of action, he ought not to be permitted to abate or discontinue his action against one, unless authorized to do so by the return of the process against that defendant. If he does so, it furnishes good ground for reversing the judgment.

The case of Barton vs. Petit & Bayard, from which we have extracted so copiously, is in almost every particular similar to this; it varies, however, in this: The plaintiff, from evidence satisfactory to him, by his attorney caused the suit to be abated, for the imputed non-residence of a co-defendant in the District of Virginia; but the Court said that the fact must appear by the return of the marshal, when the law would have abated it as to him. The return, "not in the county," does not warrant, by the law of Florida, an abatement or discontinuance as to one of two or more joint defendants. But the plaintiff never caused a discontinuance to be entered of record as to Henry Doggett; it does not appear as to him to be discontinued. If the fact be, that, at the time of the return of the alias summons, Henry Doggett was not a resident of the county, and the plaintiff desired to have a discontinuance as to him, he ought to have satisfied the sheriff of the fact, and procured an amendment of the return—have discontinued as to him, and then he might have proceeded against the other defendants. This has not been done, and he has taken judgment against J. B. Doggett alone—which is held in the case in 7 Cranch, referred to, to be error. Authorities to the same import might be multiplied, but they are not deemed necessary.

The judgment of the Court below must be reversed, and the cause remanded for further proceedings.

Note—Since the above decision was delivered, I have been shown a decision made by this Court at last term, to which the Court was not referred in the arguments of this case; but that decision was made on what then appeared to the Court to be a different state of the record. If there was any misunderstanding of the Court in that case as to the record, I cannot say—but by the statement of it, there made, the decision was right. This case shows a different state of record, and I cannot see that the decision ought to be changed.

James M. Gilchrist, Judge, &c., for the use of John M. W. 219 Davidson, Appellant, vs. Banks Meacham, Administrator of William D. Harrison, Deceased, Appellee.

A scire facias on a judgment on a guardian's bond, suggesting other and further breaches of the condition of the bond, and praying execution for the damages thereby sustained, is a continuance of the old suit.

In *scire facias*, therefore, against the administrator of a surety to a guardian bond, on a judgment rendered against such administrator for the penalty, he is estopped to set up any defence which existed anterior to the judgment.

Where the judgment recited in the *scire facias* was rendered in the spring of 1844, and the administrator pleaded a discharge from his administration, bearing date the 16th February of the same year—Held, that the plea was bad, because the matter of defence existed anterior to the rendition of the judgment.

Appeal from a judgment of the Circuit Court of the County of Gadsden, at Fall Term, 1849.

The nature of the proceeding in the Court below, of the defence set up, and all matters necessary to be stated, are set out at length in the opinion pronounced by this Court.

Thompson, for appellant.

This is a proceeding by *scire facias* on a judgment rendered May 8, 1844, by the Superior Court of Gadsden County, in favor of David L. White, Judge, &c., against the defendant, on a guardian's bond, for the penalty of $8,000—suggesting other and further breaches of the condition of said bond, and praying execution for the damage sustained by such breaches.

The defendant *inter alia* pleaded—

4thly. That he was discharged from his said administration on the 16th day of February, 1844.

5thly. That he was discharged from his said administration on the 16th day of February, 1844, and this suit is not brought within five years after the date of said discharge.

To which pleas, the plaintiff demurred, and the Court below overruled the demurrer, and gave judgment for the defendant, and this decision and judgment is now assigned for error in this Court.

The discharge set up in these pleas being alleged to have occurred 220 on the 16th day of February, 1844, anterior to the judgment set forth in the *scire facias*, we maintain, is not available to the defendant as a defence.

It is a maxim in law, that there can be no averment in pleading against the validity of a record—therefore no matter of defense can be pleaded, which existed anterior to the recovery of the judgment. 1 Chitty's Pleading, 521, 522. Tidd's Practice, 1130, 1131, and authorities cited in the margin. Moore vs. Bowmaker, 2 Marsh R. 392. McFarland vs. Irwin, 8 John. R., 61. Henriques vs. Dutch West India Company, 2 Lord Raymond, 1532. Allen vs. Andrews, Cro. Eliz., 283. Cook vs. Jones, Cowp., 727. 2 Saund. R., 72 —n.

The judgment of May 8, 1844, is conclusive upon the defendant—that he was then the administrator of the estate of William D. Harrison, and estops him to deny the fact. The plea sets up a discharge prior to the judgment, to wit: on the 16th February, 1844, which is inadmissible, because its effect is to impeach the verity of the judgment.

The demurrer should have been sustained by the Court below.

DuPont, for appellee:

This is a writ of *scire facias* to show cause why execution should not issue upon alleged breaches of a guardian bond, given by W. H. Wilder. A judgment had been recovered *for the penalty* of the bond against the defendant, as administrator of W. D. Harrison, deceased, who was one of the sureties on the said bond, and at the relation of two other parties interested in the said bond; and this proceeding is instituted under the provisions of the statute of 8 and 9 William 3d.

The pleas are as follows, viz:

1st. *"Nul tiel Record."*

2d. *"Non detinet."*

3d. *"Plene administravit."*

4th. "Discharge from office of administration."

5th. "Statutory bar by limitation."

6th. Partial payment, (special.)

Plaintiff took issue on the first, and demurred to the balance of the defendant's pleas. In the progress of the cause, the defendant with-

221 drew his *third* plea, and the plaintiff thereupon withdrew his demurrer thereto. The plaintiff also withdrew his demurrer to the sixth plea, upon the defendant having amended the same; so that the only question upon this appeal is in regard to the judgment of the Court upon the second, fourth and fifth pleas.

The grounds of demurrer to the second plea are as follows, viz:

1st. That the plea is inapplicable, the recovery set forth in the *scire facias* being the foundation of the suit.

2d. That the said plea is contrary to what is admitted by the judgment.

For the defendant, it is contended that the "covenants or conditions" of the bond, and not the *former judgment* for the penalty, constitutes the foundation of the suit; and in this connection it may be advisable to inquire into the history of "debt on bond," prior to the passage of the statute of 8 and 9 William 3d.

Prior to the passage of that statute, the plaintiff not only had judgment for the penalty of the bond; but was entitled to take out execution for the whole, without any regard to the damages which he had actually sustained by the breach of the covenants, and the only remedy of the defendant against so unconscientious a demand was by application to a Court of equity. It was to obviate the necessity for this application, that the statute was enacted, restricting the amount of the execution *to the actual damages sustained.*

The statute further provides that the judgment for the penalty *shall remain as a further security,* to answer to the plaintiff such damages as he may sustain for any further breach of the covenants contained in the bond. This provision in the statute was wisely inserted, as being absolutely necessary to avoid the plea of "former recovery" to any subsequent suit upon the same bond, for further breaches of the conditions thereof. Vide 1 Saund. R., 57, note 1. 2 Saund. R., 187, e.

The force of the objection urged to the plea, seems to lie in the assumption that the *"scire facias"* is but a continuation of the old suit, whereas we contend, as follows, viz:

I. That this present proceeding is of the nature of an original action. 8 Bac. Ab., 598. 2 Will. Black. R., 1226. Putteny vs. Townsend. 2 Williams R., 251. Grey vs. Jones. 6 John R., 106 Gorrigal vs. Smith, et al.

222 II. The *scire facias* is an action to which the defendant is entitled to plead. 8 Bac. Ab., 598, note b. 2 Will. R., 251. 2 W. Black. R., 1226.

III. The *words* of the statute of 8 and 9 Will. 3d, provides that the same proceedings shall be had upon the *scire facias* as in the original action. 1 Saunders R., 58.

If the foregoing positions are correct, then we are entitled to plead ——and if to plead, then the question arises, is the plea of *"non detinet"* applicable? In answer to this inquiry, we assume as follows, viz:

1st. That the record of judgment recited in the writ, is only "matter of inducement" and does not constitute the *foundation* of the action, and consequently that the plea is applicable. 1 Chitty's Pleadings, 485.

As to whether the original judgment is the foundation of the proceeding by *scire facias,* or only *"inducement,"* this seems to be the true distinction, viz: That if the writ be sued out to *revive a judgment,* or to obtain *execution for the original judgment,* then the original judgment constitutes the foundation; but to *assess damages under further breaches,* then it is only matter of *inducement,* and does not estop the defendant from making any defence which would have been admissible to the original action. Vide 8 Bac. Ab., 598, showing a distinction in the writs.

The grounds of demurrer to the 4th plea are as follows, viz:

1st. That the judgment against the said defendant, as administrator of W. D. Harrison, deceased, set forth in said *scire facias,* was recovered subsequently to the date of the said discharge in the said plea pleaded, and said defendant is estopped by said recovery to set up any matter of defence which existed anterior thereto.

2d. That the said discharge pleaded, doth not in law, release the defendant from a recovery against him as such administrator, to be levied of assets in hand.

3d. That the said plea is informal, &c.

IV. To the first ground of demurrer we reply.

1st. That a plea of "discharge," to be good, must set forth that it was obtained prior to the *commencement* of the action, and as the discharge pleaded did not in point of fact, exist at the time of the *commencement* of the original action, it could not have been pleaded to that action; and its having been obtained prior to the date of the original judgment, neither invalidates it, nor does it operate to impair 223 its weight as a defense to the present proceedings—it is analagous to the plea of *plene administravit.*

2d. That this objection is based upon the erroneous assumption that the present proceeding is but a *continuation* of the original action; whereas we have fully demonstrated that it is a substantive and original action of itself.

V. To the 2d ground of demurrer, we reply,

1st. That the *record evidence* of the amount of the recovery to be levied of assets in the hands of the administrator is limited to the amount of the *damages* assessed in the original action on the bond, and that the judgment for the penalty was no bar to the obtaining of his discharge under the provisions of the statute.

2d. The position assumed in this ground of demurrer, leads to this absurdity; that an executor or administrator under a judgment against him for the penalty of a bond, may protect himsel, *pro tanto,* from any distribution of the estate, even though the penalty, (*qua penalty,*) cannot be enforced against him.

3. If the position which we have assumed, viz: "that this proceeding is in the nature of an original proceeding," be correct, then this plea is good under the decision of our Supreme Court. 1 Florida Reps., 332, Gadsden vs. Jones.

The grounds of demurrer to the 5th plea, are as follows, viz:

1st. Same as first objection to last plea, and same reply.

2d. For that the said plea is *double* in setting up the matter of discharge and a limitation of five years.

3d. For that there is no limitation of five years provided by law in which suit shall be brought on judgments against executors rendered against them in their fiduciary character.

VI. To the second ground of demurrer we reply:

That the discharge and "limitation," though distinct *facts,* make up but one defence. Chitty's Plead., 531-2.

VII. To the third ground of demurrer we reply:

That a recovery in this case goes against the defendant *personally,* inasmuch as the execution will issue "against the goods and chattels in the hands of the defendant."

VIII. The whole force of the plaintiff's objections to the defendant's plea, is based upon the doctrine of "Estoppel." To this we reply, that matter of "Estoppel," to be binding, must be *mutual,* and 224 as nothing in the record of the original suit on the bond can be alleged against *these "relators"* by way of estoppel, neither will any thing therein be binding upon the defendant in this proceeding. Com. Dig., "Estoppel," B. and C. Co. Litt., 325—e. Gilb. Ev., 28. 2 John. R., 382.

DOUGLAS, C. J.

This proceeding was instituted by *scire facias* in the Circuit Court of Gadsden County by James M. Gilchrist, Judge of Probate, &c., for the use of John W. M. Davidson, administrator, &c. of Edward H. Wilder, deceased, against Banks Meacham, administrator of William D. Harrison, deceased, against which said Banks Meacham as aforesaid, thereto*fore*, to wit: At the Spring term of the Superior Court of said County, in the year 1844, David L. White, Judge, &c., the predecessor in office of the plaintiff in this suit, had recovered a judgment for a debt of eight thousand dollars, upon a certain writing obligatory bearing date the 15th day of April, in the year 1836, whereby the said William D. Harrison, with one William H. Wilder and one Ira Sanborn, became jointly and severally held and jointly bound unto the said David L. White, Esq., Judge of the County Court for the County of Gadsden aforesaid, and his successors in office, in the said sum of $8,000, to be paid, &c. under a certain condition, reciting, that, whereas the said William H. Wilder had that day been duly appointed guardian of the persons and property of Jesse W. Wilder, Betsy L. Wilder, Edward H. Wilder and Godfrey S. Wilder, minors and orphan children of Hezekiah Wilder, late of Gadsden County, deceased, it was declared that if the said William H. Wilder should well and truly perform the duties of guardian to said minors, agreeably to the statutes of the said (then) Territory of Florida in such case made and provided, then the said bond to be null and void, otherwise to remain in full force and virtue—which said sum so recovered was to be levied of the goods and chattels, lands, tenements and estate of the said William D. Harrison, deceased, in the hands of the said Banks Meacham, administrator, &c., as aforesaid, to be administered; and if the goods, chattels, lands, tenements and estate of said deceased whereon to levy could not be found, that then the same be levied of

Gilchrist, Judge, &c. vs. Meacham, Administrator.—Opinion of Court.

the proper goods and chattels of the said Banks Meacham; and that execution do issue on said judgment, to make the sum of fifteen hundred and two dollars and eight cents, to be levied as aforesaid, and the costs, &c., for the benefit of Lewis Gregory, guardian of Godfrey and Jesse Wilder; and said judgment to stand as security, for the benefit of others, who may be damnified by any past or future breach of the condition thereof; which said writ of *scire facias*, amongst other things, recited that the said William H. Wilder, (on the 25th of March, 1840,) as guardian, as aforesaid, presented his accounts and vouchers to the said County Court of Gadsden County, whereby it appeared to the said Court that he had received of the assets of the minors, as guardian as aforesaid, the sum of $2,222 97-100, and had accounted for the disbursement of $78 81-100, thereby leaving a balance due from him as such guardian in his hands the sum of $2,144 16-100, which he failed to pay, and was consequently by the order and decree of the Court displaced as guardian as aforesaid; and the said *scire facias* stating the transfer of the first named judgment into the said Circuit Court, according to law, further recites that "whereas it hath been and is duly suggested by the said James M. Gilchrist, Judge of Probate as aforesaid, and successor of said David L. White, Judge as aforesaid, in our said Circuit Court of the Middle Circuit for the County of Gadsden, as and by way of another and further breach of the said condition of the said writing obligatory, than the breach so assigned as aforesaid, that there was and is due to Edward H. Wilder, one of the wards of said William H. Wilder, out of the funds so found upon his account to be due from him to his wards, a large sum of money, to wit: the sum of $1,000, and that the said Wm. H. Wilder did not pay to said Edward H. Wilder, or his lawfully appointed guardian, in the life time of the said Edward; and the said Edward having departed this life intestate, and all and singular the goods and estate of the said Edward H. Wilder were in due form of law committed to John M. W. Davidson, of the County of Gadsden aforesaid; and the said William H. Wilder hath not, since the death of the said Edward, paid to the said John M. W. Davidson, administrator as aforesaid, the share or portion to which he, the said Edward, was and is entitled as aforesaid, and which said sum is still in arrears and unpaid, contrary to the form and effect of the said writing obligatory—for which said last
226 mentioned breach of the aforesaid condition of the said writing obligatory, the said James M. Gilchrist, Judge of Probate as aforesaid, suing for the use of the said John M. W. Davidson, administrator as aforesaid, hath humbly besought us to provide him a proper remedy. And we being willing that what is just in this behalf should be done, do, according to the form of the statute in such case made and provided, command you, that by honest and lawful men of your county, you make known to said Banks Meacham, that he be before us at a Circuit Court, to be held in and for the County of Gadsden, on Monday, the 21st day of May inst., (1849,) to show cause why execution should not be had and awarded against him upon the judgment so obtained as aforesaid, for the damages to be assessed by reason of the last mentioned breach of the said condition of the said writing obligatory, &c. To which said writ of *scire facias*, the defendant pleaded—

First. *Nul tiel* record.

Second. *Non detinet.*

Third. That he had fully administered, which he withdrew.

Fourth. That, on the 16th day of February, 1844, in the county aforesaid, he was by competent authority, to wit, by the order of the Judge of the late County Court of Gadsden County, duly and lawfully discharged of and from his administration of the said estate of the said William D. Harrison, deceased, as appears by the record remaining in the office of the Judge of Probate for the said County of Gadsden. And this, &c.

Fifth. The same discharge; and that this suit hath not been commenced within five years from the date of the said discharge, but that more than five years had elapsed between the date of the said discharge and the date of the commencement of the same. And this, &c.

Sixth. That there was assessed in the former suit a large portion of the interest of the said Edward H. Wilder, deceased, &c.

To the first plea, the plaintiff filed a general replication.

And demurred to the second, assigning for cause—1st. That the plea is inapplicable, the recovery set forth in the *scire facias* being the foundation of the suit. 2d. That the plea is contrary to what is admitted by the judgment.

The third plea was withdrawn.

To the fourth plea, the plaintiff demurred, and assigned the 227
following cause: 1st. "For that the judgment against said defendant, as administrator, &c., of William D. Harrison, set forth in the said *scire facias*, was recovered subsequently to the date of the said discharge in the said plea pleaded, and the said defendant is estopped by the said recovery, to set up any matter of defence which existed anterior thereto. 2d. For that the said discharge pleaded, doth not by law release the defendant from a recovery against him as such administrator, to be levied of assets in hand. 3d. For that the said plea is in other respects, uncertain, informal, and insufficient. To the fifth plea the plaintiff also demurred. and assigned the following causes: 1st. That the judgment against the said defendant, as administrator, &c., of William D. Harrison, set forth in the *scire facias*, was recovered subsequently to the date of the said discharge by the said plea pleaded, and said defendant is estopped by the said recovery to set up any matter of defence which existed anterior thereto. 2d. For that the said plea is double, setting up the matter of discharge and limitation of five years. 3d. For that there is no limitation of five years provided by law in which suits shall be brought on judgment against executors rendered against them in their fiduciary character. 4th. For that the said plea is in other respects, uncertain, informal and insufficient. To the sixth plea the plaintiff joined issue. And after argument, the plaintiff's demurrer to the fourth and fifth pleas were overruled. Whereupon judgment was entered that the plaintiff take nothing by his *scire facias, &c.* And the plaintiff thereupon prayed an appeal to this Court, which was granted accordingly.

The question presented for our consideration in this case is, whether the Court erred in overruling the plaintiff's demurrer to the fourth and fifth pleas of the defendant. And as to this, it is contended on behalf of the defendant, that a plea of discharge to be good must set forth that it was obtained prior to the commencement of the action, and as the discharge pleaded did not in fact exist at the time of the commencement of the original action, it could not have been pleaded to that action, and its having been obtained prior to the date of the original judgment, neither invalidates it, nor does it operate to impair its weight, as a defence to the present proceeding. That the objection to it is based upon the erroneous assumption that the present proceeding is but a continuation of the original action, and it is 228
insisted that the *scire facias* is not the continuation of the old suit, but is in the nature of an original action—that the *scire facias* is an action to which the defendant is entitled to plead. And from these propositions the conclusion is deduced, that the plea is a good defence to the action. Without admitting the correctness of this conclusion from the premises laid down, we may be permitted to examine as to the correctness of the proposition that the *scire facias* is not the continuation of the old suit. Why is it not? It is a proceeding instituted under the provisions of the statute of 8 and 9 William 3d, and it is admitted that the plaintiff, before that statute, not only had judgment for the whole penalty of the bond (in such a case as this) but was entitled to take out execution for the whole, without any regard to the amount of damages which he had actually sustained by the breach of the covenant or condition. To remedy this evil, and prevent the necessity of a resort to a Court of Chancery in such cases, that statute was passed, providing that the plaintiff might take out execution for the amount of damages which he might prove that he had actually sustained, and that the judgment for the penalty shall remain as a further security to answer to the plaintiff such damages as he may sustain for any further breach of the covenants contained in the bond. It is the same plaintiff, therefore, who sues for such further breach: it is the same defendant that is called upon to answer: it is the same judgment that is sought to be enforced: it is for damages sustained by the same party for a further breach of the same bond. And what is the remedy sought? Not another judgment for the whole penalty, but an execution on the same judgment to recover so much of the penalty of the same bond as the plaintiff may be able to show that he has sustained damages by a further breach of the condition thereof. It is true, the statute says the same proceedings shall be had upon the *scire facias* as in the original action; but surely this does not mean that another judgment shall be entered, for the whole penalty, upon the occurrence of any subsequent breach. Yet the judgment is a part of the original proceeding. The meaning and intent of the statute evidently is, that the defendant shall have a day in Court, as in the original suit: be permitted to make all proper defences, and that the same mode should be adopted to ascertain the damages as in the original suit, and that execution

229 should issue therefor as upon the first assessment of damages. The assumption, therefore, that the present proceeding is but a continuation of the original action not being erroneous, the objection to the further plea should have been sustained, and the Court erred in overruling the demurrer thereto.

And the same remarks are applicable to the fifth plea—for notwithstanding the plea sets forth an addition to the averment of the discharge as pleaded in the fourth plea, the limitation of five years—as the limitation is dependent upon the discharge, and dates from it, if the plea is not good as to that, it is bad *"in toto."* The radical defect of both these pleas, is, that they were filed too late; for it is a well settled principle, that the defendant cannot regularly to a *scire facias* to have execution of a judgment (which is precisely the case at bar) plead that which might have been pleaded to the original action; as where A., administrator to J. S., by virtue of administration granted to him by the Archbishop of Canterbury, brought debt against B., and had judgment to recover, and after the year brought a *scire facias* on the judgment—the defendant pleaded that the intestate had *nulla notabilia* in divers dioceses, and that after the judgment, the Bishop of London committed administration to the wife. Upon demurrer, it was held, that this was a matter he could have pleaded before, and that it was annulling a record, which is not sufferable. 8 Bac. Abr., Ed. 1848, pages 624, 625, and numerous authorities there cited.

So, where in a *scire facias* on a judgment, the defendant pleaded the statute of usury: it was held no plea, because he should have pleaded it to the original action. Ibid, and authorities cited. So, if a *scire facias* be brought on a judgment in assize for the office of Marshal, the defendant cannot plead that the plaintiff was an alien enemy, for that was pleadable to the assize. And as he admitted the plaintiff able to have judgment, he cannot now disable him to have execution. 2 Lord Raymond, 853. In the case of Wilson vs. Hurst's executors, 1 Peter's C. C. R., 441, the Court held, "that a payment which might have been pleaded in bar to an original *scire facias* to revive a judgment, cannot be pleaded or given in evidence on a second *scire facias.*" It is a maxim in law, that there can be no averment in pleading against the validity of a record, thought it may be against its operation; therefore no matter of defence can be pleaded
230 which existed anterior to the recovery of the judgment. 1 Chitty's Pleading, 522. See also, 5 Serg. and Rawle, 65, and McFarland vs. Irwin, 8 John. Reps., 61, 62, where this distinction is asserted, and the rule is held to be the same, whether the judgment was obtained by confession, or default, or upon plea. And see Henriques vs. The Dutch West India Co., 2 Lord Raymond, 1532. Allen vs. Andrews, Cro. Eliz., 283. 2 Saund. Rep., 72, Note T, and note V, and authorities there cited at page 229. 2 Tidd's Pr., 1131, and authorities there cited.

In the case of Sessions vs. Stephens, 1 Flor. Rep. 241, this Court said, "there can be no judicial inspection behind the judgment save by appellate power," citing Voorhees vs. Bank of the United States, 10 Peter's Reps., 499, and Grigons' Lessees vs. Astor, 2 How., 343. In a note in the case of Trethewy vs. Ackland, 2 Saund. Rep., 51, it is said that "It has been adjudged that the defendant, the executor may confess a judgment to a creditor of equal degree with the plaintiff pending the action, and plead it in bar, and though it be done for the express purpose of depriving the plaintiff of the debt, it is good both in law and equity," citing Waring vs. Danvers, 1st P. Wms., 295, which fully sustains this principle, and see 1 Saunders' Reps., page 333, d, note e and authorities there cited.

In Coleman vs. Hall, administrator, 12 Mass. R., 572, the Court said "It is perfectly well settled in the English Courts, that an executor or administrator cannot plead *plene administravit* to a *scire facias* on a judgment obtained against him." The learned counsel who argued the case for the defendant (in the Court below,) the appellee in this Court, held the plea of discharge to be analagous to the plea of *plene administravit*—if it be so, it would seem that it cannot be pleaded by an administrator or executor to judgment obtained against him since such discharge was granted. When it is said in the books that an executor or administrator may, to debt on judgment, plead *plene administravit*, it means according to our view of the matter, a judgment obtained against the testator or intestate in his life time, of which such executor or administrator had no notice before he had fully administered.

When an administrator is sued in England, if he does not dispute the justice of the demand, he has only to consider whether he has in his hands goods and estates of the deceased sufficient to pay the debt.

and whether there are any other creditors, whose debts have the 231
priority according to law. The amount of assets in his hands is necessarily within his own knowledge, and as to other creditors, he is not required nor authorized to retain funds for them, unless he have notice of the existence and nature of their debt. *Idem.* And our law is the same on this subject, except so far as our statutes may require the creditors of an insolvent estate to be paid *pro rata.*

The view which the learned counsel for the appellee took at the argument of this case, that the plea of discharge, to be good, must set forth that it was obtained prior to the commencement of the suit, is not, we think, in accordance with the principles assumed and maintained by the majority of this Court in the case of Gadsden vs. Jones, administrator, 1 Flor. Reps., 332 to 346, which we have again reviewed, and with the decision in which we perceive no cause to be dissatisfied. One of the positions most strongly relied on in that case, was, "that Jones, the administrator, having had notice of the plaintiff's (Gadsden's) demand, his duty, as administrator, was fixed by law, and from that responsibility it was not the design of the Legislature to release him; that it would have been no valid objection to the release contemplated by the statute for any creditor to object that he had not yet paid a debt of which he had notice:" The ready answer would have been, "I retain for it," (see page 334.) But the court held the plea of discharge good in that case notwithstanding the alleged notice, on the ground (see page 344,) that the discharge was a judgment of a Court of competent jurisdiction which we were not at liberty to disregard, and that such judgment was rendered "in a proceeding where the Court (after due notice) acts upon the application of the party to whom administration was granted, (and who seeks a discharge) and cannot grant such discharge until it shall appear that the said applicant has faithfully and honestly discharged the trust and confidence reposed in him or her." See page 339.

And after stating the evil, which, as the Court believed, led to the passage of the act, under the authority of which the discharge was granted, the Court said "The remedy intended by the Legislature was, we think, a speedy release from the duties of executor or executrix, administrator or administratrix, after a faithful and honest discharge of the trust, (page 341,) so far as regarded suits against executors and administrators as such." The Court in that case could 232
see no good reason why a person who had acted as executor or administrator, but who had obtained a discharge according to the provisions of the statute, after a full and faithful performance of all the duties of the trust which had been confided in him, after due notice, too, to all concerned, and without any concealment of fraud, should be harassed with suits; and it gave a liberal construction to the words of the act, "and the discharge so obtained shall be taken to operate as a release from the duties of executor or executrix, administrator or administratrix." "This language," said the Court, "is *in presenti;*" and in 8 Bacon's Abridgement, 624, title Scire Facias, it is said "that a release of all actions and executors is a good bar to a *scire facias.*" And "if any matter of defense has arisen, after an issue in fact has been joined, or after a joinder in demurrer, it may be pleaded by the defendant, as that the plaintiff has given him a release." 1 Chitty Pl., 695. And if the defendant became bankrupt, and obtained his certificate after isue joined, he may plead this defence, *puis darrein* continuance. 1 Chitty's Pl., 696, 697; so award and satisfaction may be pleaded *puis darrein* continuance.—Watkinson vs. Inglesby & Stokes, 5 John. Reps., 392; and where two actions are brought for the same cause, satisfaction of the judgment in one suit may be pleaded *puis darrein* continuance to the other writ. Bowne vs. Joy, 9 John. Rep., 222.

In the case of Parkhill's administrator vs. The Union Bank of Florida, the revocation of letters of administration, and the delivery of the assets to the sheriff under an order of the Court, was pleaded *puis darrein* continuance, and held good—1 Florida Rep., 123 to 129—and the Court in that case said: "That *eo instanti* letters of administration were taken from her, (the administratrix,) she became as to the suit *civiliter mortua.*" And in Gadsden vs. Jones, administrator, this Court held, "that it was the duty of the Judge of the County Court, before granting any discharge, (set up as a defense in that case,) to see that the defendant had well and truly administered, paid all the debts so far as the assets extended, and made a fair distribution of all the rest and residue of the estate according to law," (ibid, page 340;) "and that the discharge when thus obtained should be an immediate and effectual bar to suits instituted against the parties (charging them) in their fiduciary character." Ibid, 345. And

233 why should not such a discharge if obtained pending a suit, and after issue joined, be pleaded *puis darrien* continuance. The mere commencement of a suit establishes nothing; it is notice to the defendant of a demand, to be sure, and so far as this case is concerned, it is in that regard upon the same footing as that of Gadsden vs. Jones, administrator. It is to be presumed that due notice was given according to law, and that the plaintiff had a full opportunity to be present and contest the application for a discharge; if he did so, and was dissatisfied with the judgment, he had his right of appeal; if he did not choose to defend or appeal, he has no cause to complain; if the judgment is conclusive, and he did not care to avail himself of it as a defense at the proper stage of the proceeding, it was his own *laches*, and it cannot avail him now.

In Georgia, under a statute similar to our own, by which the condition of the discharge of an executor or administrator is, that he "has faithfully and honestly discharged the trust and confidence reposed in him, the Supreme Court of that State held the discharge a bar, both at law and in equity unless obtained by fraud—Carter vs. Anderson, 1 Georgia Reps., 517, 518—and that in a case where infant heirs were claiming three distinctive shares of the estate. And in Smith et al. vs. T. W. Oliver, &c., Dudley's Reps., 190, the Court, after stating the requirements of the statute to obtain a discharge, (which are the same as is required by our statute,) said, upon these requirements being fulfilled, the Legislature proceeds to enact "that the executor or administrator shall be forthwith dismissed and released from all his liability as executor or administrator." "There," says the Court, "is the *finale*, the legislative announcement, that the discharge is a release."

In Rhode Island, their Probate Court has the power to grant to executors and administrators a *quietus*, which is in effect a discharge; and Mr. Justice Story, commenting upon the exercise of that authority by that Court in the case of Taylor et al. vs. Delilias, et al., 4 Mason C. C. Reps., 133, said: "Much discussion has taken place as to the nature and effect of the *quietus* granted by the Court of Probate. I am not aware (he said) that it is any where denied that the Court of Probate has complete jurisdiction in the settlement of accounts of administrators, or that its decree, when rightfully made, is not binding authority. Indeed, it would be difficult to support such a denial upon
234 principles of general law, since it is a decree of a Court of competent and peculiar jurisdiction. If it has authority conclusively (and the statutes gives the authority) to settle his accounts, it certainly has authority to decree that the settlement is final, and to acquit him of further proceedings. This is the whole nature and effect of a *quietus* a process familiar in the Court of Exchequer, (3 Comyn's Dig., title Quietus,) and probably not unknown in the Ecclesiastical Courts."

The discharge being the judgment of "a Court of peculiar and competent jurisdiction," and being an immediate release—a release that might have been pleaded *puis darrein* continuance, is unless obtained by fraud, an effectual bar to any suit brought or pending against such executor or administrator in his fiduciary character, when properly pleaded, and is, therefore, such a defence as, if it exist before judgment against such executor or administrator, ought to be pleaded, if he intends to avail himself of it; and if he fails to plead it then, and thereby admits the plaintiff's right to have judgment, he cannot, after the judgment, plead it, to prevent him from having execution. The demurrer to the fifth plea should have been sustained.

The judgment of the Court below is, therefore, reversed, and the cause remanded for further proceedings in accordance with this opiinion.

Per curiam.

James M. Gilchrist, Judge, &c., for the use of Joseph W. Burnley and Wife, Appellant, vs. Banks Meacham, Administrator, &c. of William D. Harrison, Deceased, Appellee.

This is a proceeding also instituted by *scire facias* in the Circuit Court of Gadsden County; was submitted upon argument in the next preceding case; is understood to be like it in all its essential features, and that it was to abide the fate of that case, which has just been decided.

The judgment of the Court below is, therefore, reversed, and the same remanded for further proceedings not inconsistent with the opinion of this Court pronounced in that case.

Per curiam.

Henry Gassett & Co. Appellants, vs. Wilson & Brown, Ap- 235
pellees.

B., a member of the mercantile firm of B. & B., which had failed, made an arrangement with the creditors of said firm, by which he procured a promise of indulgence, upon an agreement on the part of the firm to pay within a certain specified time fifty cents on the dollar of their debts. He then formed a new connection with one N., upon the capital of N., and such credits as they could jointly obtain. This new concern, after having been in business for a short time, was compelled to sell out at considerable loss. B. then formed a partnership with one W. One of the creditors of the old concern of B. & B., having obtained a judgment against them, proceeded to levy execution upon the interest of B. in the concern of W. & B. *While the suit of the creditor was pending*, for the purpose of preventing any of the creditors of the concern of B. & B. from obtaining any advantage over the others by a sale of his aforesaid interest, declaring, at the same time, that one of the causes impelling him to the act was the pending of said suit—and for the avowed purpose, also, of paying N. what he owed him, and other creditors of the firm of B. & N., B. withdrew his capital in the concern of W. & B., and applied it to the payment of the debts due to N. and others, contracted since the failure of B. & B. The right to withdraw his capital at any time he might desire to close the concern, was stipulated and agreed upon in the articles between W. & B. Held—that such withdrawal was not fraudulent, having been made for the purpose of paying just and *bona fide* debts.

Appeal from a decree made by Judge Baltzell, at a Circuit Court for the County of Leon, on the thirtieth of October, 1849. The material parts of the bill, answers, exhibits, report of the master and proofs of the cause, are set out in the opinion pronounced by the Court—from which the following statement of the case is detached and inserted here:

"This is a suit in Chancery brought up by appeal from a decree of the Circuit Court of Leon County. The bill charges, that the complainants, on the 20th day of May, 1846, the Spring term of Leon Circuit Court, obtained a judgment against the firm of M. C. & J. W. Brown, of which the defendant, Joseph W. Brown, was a partner, and joint defendant, for the sum of two thousand six hundred and ninety-four dollars and fifty cents. That on the 26th June last, a writ of *fieri facias* was issued upon said judgment and placed in the hands of the Sheriff of Leon County, to be levied according to law, upon the 236 goods and chattels, &c., of M. C. & J. W. Brown. That defendants, Brown, had and have no property in their own name and possession, known to complainants, but are in failing circumstances, and not doing business in their own names. But it being notorious that defendant, Joseph W. Brown, had entered into partnership with defendant, Wilson, in a large and valuable store in the city of Tallahassee—that said Wilson & Brown had held themselves openly as joint partners, by public advertisement and notice, the Sheriff was induced to levy said writ of execution upon the undivided share and interest of said defendant, J. W. Brown, in the said store, and did on the 31st day of July, 1846, actually levy said writ upon the whole undivided share and interest of said defendant, J. W. Brown, in and to the store and commercial concern standing and being in the name of Wilson & Brown, in the city of Tallahassee, and after due advertisement and notice according to law, did on Monday the 5th day of October, instant, sell and dispose of the same by public auction to the highest bidder, and that they the said complainants, to save themselves from loss, did bid for said undivided claim and interest of debtor, J. W. Brown, and being the highest bidders became and were proclaimed the purchasers of the same for the sum of one hundred dollars. The bill also prays that an account may be taken of the interest so purchased, and that complainants may have a decree therefor, &c.

The answers of the defendants admit the partnership of Wilson & Brown, and the articles of partnership are annexed to the bill, as exhibit A, by which it appears that it was entered into on the 12th day of January, 1844. That Wilson put in as capital stock $1510 12-100 in merchandise, $1500 of which was included in a mortgage given to Messrs. Wilson & Herr, of the city of Baltimore, on the 13th November, 1843, for the purpose therein mentioned; and that Brown put in 1321 87-100 in merchandise, and it was stipulated "that the concern should be dissolved and each of the parties draw his proportion of the capital thereof, whenever either of the parties might wish to close the concern." Exhibit B is a memorandum of an agreement between the parties made on the 11th day of April, 1846, which recites that whereas Joseph W. Brown hath drawn on Wilson & Brown (the parties to this agreement) for sums of money

237 sufficient to cover his interest in said concern, to make payment of debts of said Brown disconnected with the business of Wilson & Brown, and the said Joseph W. Brown is no longer entitled, under the existing articles of copartnership between himself and Wilson, to share the profits of the concern of Wilson & Brown. And whereas the drafts of the said Brown have been accepted by Wilson & Brown, who are still liable for the same when they shall fall due respectively: and whereas the said David C. Wilson hath assented to the acceptance of the drafts aforesaid, and is willing that the said Joseph W. Brown shall continue a member of said firm of Wilson and Brown and receive a share of the profits of the concern, notwithstanding the drafts aforesaid for twelve months from the date hereof, and until the drafts shall be fully paid, and provided the said Joseph W. Brown continues to give his personal attention to the business of said firm. and continues to be jointly liable with said Wilson for any debts, contracts and engagements of the firm of Wilson & Brown, connected with their regular mercantile business. Now, therefore, it is mutually agreed, &c., (here follows an agreement in accordance with the foregoing recital.)

The answers of the defendants admit the recovery of the judgment, the execution, levy, sale of the property, and the purchase of it as stated in the bill, but allege that the sale was illegal, and that the complainants consequently acquire no title. And Wilson, in his answer, says that Brown was a partner of his on the 26th of June last, and up to the time of the sale—that the partnership continued under the articles contained in exhibit A, until the 11th of April last, when the said Joseph W. Brown, having withdrawn his capital under the provisions of the original articles, new articles were entered into extending the copartnership to a period of one year from that date, on the terms and conditions, specified in the articles contained in exhibit B. That on the 26th June last, said defendant, J. W. Brown, was indebted to the firm of Wilson & Brown in the sum of $240 70 according to the statement of his account with said firm, made up to that time, and marked exhibit C. That on the 31st day of July last. the defendant, Brown, was indebted to Wilson & Brown, in the sum of $1081 4-100, as per statement marked D, both of which are averred to be correct—that in addition, he is properly chargeable with his proportion (one-half) of the loss and discount on certain
238 counterfeit and uncurrent funds, on hand at the time of said levy. Also the loss and expenses attending the disposal of the stock on hand at the time of the levy—which stock, on the 18th of April last, amounted, as per inventory, to $6,396 73-100, but which amount was diminished by sales from 13th of April to 31st day of July last, to $5,000, on which Wilson claims a discount, on account of the goods being unsaleable, of not less than twenty per cent.

The defendant, Brown, in his answer, after admitting the facts charged as admitted in Wilson's answer, further says, that the motive and end of this defendant in altering the terms of the partnership, were no other than a disposition to provide for certain demands against that defendant, which he deemed it equitable and proper for him to provide for to the exclusion, if necessary, of the old liabilities of M. C. & J. W. Brown. That to provide for debts contracted since the debts due by M. C. & J. W. Brown, as hereinafter mentioned, he was advised that it was not only legal, but equitable and just under the circumstances. That M. C. & J. W. Brown were in business in 1842 and in 1843 at Cedar Keys and Port Leon, and in the gale of October, 1842, at Cedar Keys, and in the gale of 1843, at Port Leon, lost not only their stocks of merchandise, but also their books of accounts, and evidences of demands, except one day book, so much obliterated as to be of little or no service. That their misfortunes caused the failure of M. C. & J. W. Brown, and left them wholly unable to pay their outstanding obligations, of which the note of complainant on which said judgment is rendered, was one. That in the fall of 1846, the creditors of M. C. & J. W. Brown in view of their misfortunes, which no human power could avert, agreed to relinquish fifty per cent. of their claims. That upon the faith of the assurances of liberality on the part of his creditors, and convinced that they appreciated his misfortunes, he and one B. Nason, Jr., united in business upon the capital of B. Nason, of small amount, and upon such credits as they could obtain under the circumstances.

Brown & Nason purchased a stock of goods and offered them for sale in Newport, Florida, but as their fall purchases did not reach Florida in time for the business of the winter, they were compelled to sell out at a loss in the month of February, 1845. That in the fall of 1846, this defendant bought goods for Wilson & Brown, having previously united in business with said Wilson. That on the 13th day of April, 1846, he was indebted on account of business 239
transactions since the agreement with his creditors as aforesaid, to Taylor & Rich, of New York, to B. Nason, his former partner, and to J. C. Hanson, for whose benefit he drew on the firm of Wilson & Brown, for $750, $800, $1,000, respectively, as stated in the account current filed with the answer of David C. Wilson. This defendant further says, that on account of said agreement with his old creditors, and their said assurances, which have been kept sacredly by all save the complainants, he was enabled to procure credit, and to form and continue his business connections as aforesaid.

The testimony in the case is contained in the report of the master, to which no exceptions were taken, and consist princpally of the statement of these defendants, both of whom were examined by him.

David C. Wilson, one of these defendants, stated that the drafts of J. W. Brown, accepted by Wilson & Brown, as stated in No. 1 of exhibit C, were unpaid at the time of the levy of complainant's execution, on the 31st day of July, 1846, and remain yet unpaid.—That the first stated of these drafts was held last fall by Taylor & Rich of New York, who demanded payment of witness. That these drafts, when accepted by the firm, were delivered to J. W. Brown, and witness cannot, from his knowledge, say how they were afterwards disposed of, or who held them at the time of the levy, or now holds them. That the above acceptances were made, in order to enable J. W. Brown to withdraw his share of the capital and profits of the firm of Wilson & Brown, he declaring it to be his intention thereby to prevent any one of his former creditors from getting an advantage over others, by means of any execution or suit, and sale of his interest as above stated; and the suit of complainants then pending, and about to be carried into a judgment, was one of the claims, as witness understood, moving said Brown to the above course. The existence of this suit was known to witness at the time.

Brown, the other defendant, in his testimony taken before the master, states that the consideration of the acceptance given by Wilson & Brown, in favor of B. Nason, Jr., was his, witness', indebtedness to said Nason, on closing the affairs of Brown & Nason, (which was done at great loss,) for the money and capital brought into said firm by said Nason, beyond or exceeding any capital furnished by witness, 240
and that the amount of such acceptance, viz: eight hundred dollars, was in fact much short of witness' actual debt to said Nason, the full amount of his debt being at that time near fifteen hundred dollars. Witness further testifies that Taylor & Rich of New York, to whom the acceptance of Wilson & Brown for $750 was given, were the New York agents for the house of Brown & Nason, through whom their payments and settlements in New York were almost exclusively made, said agents being often in advance for witness' firm by acceptance or otherwise. That at the time the above draft on Wilson & Brown was made and accepted in favor of Taylor & Rich, they (T. & R.) agreed to take up and pay, and did actually, in consideration thereof, take up a note given by Brown & Nason to Perkins & Hopkins of New York, in the regular course of business, for the purchase of goods—which note, with interest, then amounted, as well as witness could estimate, to the sum of seven hundred and fifty dollars. Witness also stated that the third acceptance, set forth in his answer as made by Wilson & Brown, and held by J. C. Hanson, for one thousand dollars, was given in consideration of witness being indebted to said Hanson, on striking a balance of accounts between them for various matters arising in the regular course of trade, commencing chiefly in the month of February, 1845. That said Hanson furnished to witness various amounts in money, drafts on New York, &c., to enable witness to settle up with the creditors of Brown & Nason, and other debts due by witness. There was some other proof, but it does not materially vary the aspect of the case.

The master in his reports says he proceeded to examine the books and accounts of Wilson & Brown, more particularly to ascertain the basis upon which the general statement of profit and loss, and balance sheet of 13th April, 1846, was made out, and to look carefully into the account of defendant, Brown, as these are stated in exhibit C, to defendant, Wilson's answer. These books (he says) appear to be all fairly kept and the entries regularly made, and in the order of the several transactions recorded, besides being sustained by the oaths unimpeached by both the defendants. The master says he could discover no item on which rested any suspicion of fraud or unfairness. He believes, and so reports, that every item charged in the account

241 of J. W. Brown, (see exhibit C,) constitutes a fair and *bona fide* charge against him, in the regular course of business. The drafts, which constitute the three first charges in said account, (the drafts for $750, $800 and $1,000, above mentioned,) were passed over to three creditors, and intended as part payment of debts fairly and justly due by said Brown, as is fully stated in his answer, and again more fully explained in his testimony taken in the course of this reference; That account shows a balance due by the defendant, J. W. Brown, to the firm of Wilson & Brown, on the 25th July, 1846, of $240 74-100. But inasmuch (says the master in his report) as it is a question reserved, as exclusively belonging to the Court to determine, whether a debtor has a right to apply his property or assets to the payment of some creditors in preference to others, as appears to have been done by defendant, Brown, in the present instance; and because the Court may decide against his right to do so, and decree that his interest in the firm of Wilson & Brown has not been rightfully transferred, charged and balanced by these acceptances, but remained legally and equitably subject to complainant's judgment, &c.—the master restated the accounts, and made J. W. Brown debtor to the firm of Wilson & Brown for over drafts on 30th July, 1846, $1,524 50-100.

No exceptions were taken to the report of the master, and it, therefore, stands confirmed, according to Rule 83, See Rules of Practice for the Courts of Equity, page 61."

Randall, for appellants:

This cause comes up by appeal from a final decree rendered in the Circuit Court for Leon County, on the 30th October, 1849, dismissing bill of appellants, the complainants below, with costs, &c. The case was submitted below, on bill, answers, general replication, and report of the Master in Chancery, which contains all the proofs in the cause.

If the proofs do not present a case favorable to defendants, it is the fault of their cause, since all the testimony and evidence furnished, (with the exception of the not very material testimony of one witness—Rust,) are taken from their own answers to the bill, from their books and accounts filed, and from their examinations taken under oath before the master.

242 To the mere statement of the accounts and the facts reported by the master, we taken no exception, nor to any matter he professed to decide, though we do not acquiesce in all the inferences he drew on grounds and facts not reported by him.

On the 31st July, 1846, complainants having a valid subsisting judgment for the amount of $2694 50, against defendant, Brown, one of the partners of the firm of Wilson & Brown, and an execution then in the hands of the Sheriff, for the satisfaction of which no separate property of Brown could be found—they caused their execution to be levied on the share and interest of said Brown in the partnership concern. That share and interest was sold in due form of law by the Sheriff, and complainants became the highest bidder and purchaser for the sum of $100—defendant, Wilson, (as he admits,) bidding against them to within a trifle of that last bid. To have the benefit of that purchase, this bill for discovery and relief was filed. The course is in entire conformity with law, and has not been excepted to formally in any part of the proceeding.

And now we contend, that the drawing of these three drafts on the firm, and their acceptance by the partner, Wilson, in the name of the firm, was a direct, palpable fraud in law, so far as regards our claim in this suit, the same being done as avowed, "to hinder, delay and defeat," complainants', *creditors,* recovery under their judgment in a suit then pending. There is no dispute about the facts. Read the statement of Wilson under oath before the master, (page 19) where he directly admits "that the above acceptances were made in order to enable J. W. Brown to withdraw his share of the capital and profits of the firm of Wilson & Brown, he declaring it to be his intention, thereby, to prevent any one of his former creditors from getting an advantage over others, by means of any suit or execution and sale of his interest as above stated. And the suit of complainants then pending and about to be carried into judgment was one of the claims, as witness understood, moving the said Brown to the above course. The existence of this suit was known to witness at the time." See Brown's admission in his answer and examination to the same purport.

Now if the payment of these drafts followed their drawing, and had been consummated before the levy of our execution, this avowed purpose of both parties, by this scheme "to delay and defeat creditors," would in equity render them liable to reclamation. But in 243
the same statement Wilson further admits, that to that very day, the 20th April, 1848, more than two years after drawn, and more than one year after due—they were still unpaid. And up to that date he only knew the fate of one of them, or by whom held, and that a demand of payment of it by Taylor & Rich "had been made the fall before." "That for the others no demand had been made on witness. That they had been delivered when accepted, to Brown, defendant, and he (Wilson) cannot state from his own knowledge, how they were afterwards disposed of, or who held them at the time of the levy, or now holds them."

We hold this admission to be conclusive evidence to fix the charge of *fraud in law* upon these parties, and upon all whose rights they profess to represent as *agents,* and to invalidate and defeat this purposed appropriation of Brown's funds, with the express, avowed design and end "to prevent creditors from getting their debts by course of law." We assert without fear of contradiction, that not a case can be found either at law or in equity, when the purpose is avowed to be, to prevent, delay, or defeat creditors, that any assignment, transfer, appropriation or even payment, has been sustained against the claim of such creditors. And it matters not, whether such transfer, appropriation, or payment, has been consummated or not, when such is the avowed or proved motive. Nor is it material in such a case whether a good and sufficient consideration has been paid.

The right of a debtor to give a preference, by a *"bona fide"* payment or transfer of effects, to any one creditor, when no bankrupt law intervenes to change the relations and rights of parties, is admitted. We admit also, the right of a purchaser acting *"bona fide"* to wrest from execution property, real or personal, before *lien* attached, and although vendor's motive or purpose may have been, "to delay, prevent or defeat creditors." But if *"mala fides"* enter into the purpose of both, the transaction is "fraudulent and void."

The most favorable position for Wilson, is to regard him as a *purchaser for a valuable consideration,* of Brown's share of the capital and stock in the firm. Yet we shall show that if he had paid the price, "a full consideration," yet purchasing with the avowed motive and object "to delay, prevent or defeat creditors," all the books characterize the transaction "as fraudulent and void."

But in point of fact, he had paid nothing—parted with nothing, but 244
his *acceptances,* and they proved of so little account, that after more than two years he had not heard of two of them, and knew not who held them.

In the meantime, Brown's share and stock remain in the firm, and Brown in the receipt of all the profits accruing to him before such acceptance. To this day, then, for aught that is known to this Court, the whole of Brown's money, stock and effects, may be still in the firm—while by this petty financial contrivance, our legal right to recover is prevented, delayed, and defeated. For authorities to sustain the above propositions, we refer to Twyne's case, found at large in 1 Smith's L. C., p. 1. The transaction comes clearly within the 2d, 3d, 4th and 5th points of that case, stated as indicating fraud. In Cadogan vs. Kennett, 2 Cowp., 432, Lord Mansfield said: "The only question in that case was as to the purpose and intention"—here they are avowed.

In Wooley vs. De Mattos, 1 Burrows, 474, 475, Lord Mansfield said: "Valid transactions as between the parties, may be fraudulent by reason of covin, collusion, or confederacy, to injure a third person," and he instances—"if a man, knowing that a creditor has obtained a judgment against his debtor, buy the defendant's goods for a full price, to enable him to defeat the creditor's execution it is fraudulent," &c. The very case, as shown in this record, exhibits all these circumstances of "covin, collusion and confederacy, to injure complainants." This pretended purchase—*when no price has yet been paid*—when the day of payment is referred to the Greek Kalends—was made of defendant, Brown's, *goods* to enable him to defeat a creditor."

See, also, Crane vs. Drake, 2d Vernon, Doe, demise of Willis, vs. Menton, 4 T. R., 39. This case from 4 T. R. goes to the effect that fraud will vitiate any transaction, "though the principal do not take any part in it, if his agent do—for the principal is civilly responsible for the acts of his agent." Now, under this last doctrine—if these pretended or real payees of these drafts were parties to or interested in this controversy, (which they are not,) their claims would be equally invalidated or postponed by the fraud of their agent, Brown. See Hovenden on Frauds, 2d Vol., p. 222, and cases cited, for the principle.

245 While the contract or arrangement is executory merely—when (as in this case) no payment is made, or absolute assignment—the respective rights of the creditors are equitable merely, and the better equity must prevail. Beals vs. Guernsey, 8 John., 452, decides, "That the purchaser knowing of the judgment, must purchase with the view and purpose to defeat the creditor's execution, and if he does it with that purpose, it is iniquitous and fraudulent, notwithstanding he may give a full price. The question of fraud depends upon the motive. The purchaser must be *"bona fide* as well as on good consideration," &c. Refers to 7 Bur., 474. Cowp., 434.

Bridge vs. Eggleston, 14 Mass., 245. The law of this case is directly applicable. See opinion of Ch. J. Parker, 247. Damon vs. Bryant, 2 Pickering, 411. Adams vs. Page, 7 Pick., 542. Wadsworth vs. Havens, 3 Wend., 411. Reade vs. Livingstone, 3 John., 481. Hooper vs. Hills, 9 Pick., 435.

To these *facts* and *authorities*, what reply has been made? As to the *first*, it is contended, that under the original articles of agreement, Brown had a right to withdraw his capital when he saw fit, and to dissolve the partnership. We reply, that the course taken did not bring him within the terms of the stipulation of the articles. The act "of withdrawing capital" and "closing the concern," were to be concurrent acts. The concern was *not closed* on the 13th April, but kept afloat for another year. Neither was the capital in effect withdrawn. But if the acts had been concurrent and consummate, yet being incidents of and connected with a fraudulent purpose—an illegal design—the terms of the articles of copartnership could give no sanction to them. Wilson was under *no* legal obligation to aid in the scheme—he was a mere volunteer. How idle the pretext of withdrawing capital when nothing was in fact withdrawn! No account taken to ascertain amounts—to fix balances—but a large conjectural amount exceeding Brown's share—arbitrarily assumed! While Brown after this *simulated* withdrawal of all and more than his capital, is allowed by the new articles, to have the same share of profits as before. The artifice is too shallow to deceive. The articles exhibit B, of the 11th April, 1846, was a part of the fraudulent machinery designed to give color, and is entitled to no consideration.

But it is urged that this was the mere exercise of an acknowledged
246 right of a debtor to give a preference to one creditor over another. And Mr. Archer contends that such conduct was highly meritorious and honorable. That the preferred debts stood in a higher grade of merit than that of complainant's. For this last assertion there is not a title of reliable evidence. "Preferences," such as the gentleman speaks of, are *tolerated merely*—never approved of. They are admitted as of necessity, in the absence of bankrupt laws. But "priority" of debt—and next "equality," are the circumstances that gain favor at law and in equity. The principles invoked by the gentleman constitute the morals of the counting house and the stock broker's office—not of judicial tribunals.

In the beginning, I admitted this right as incontestible, but showed it was subject to all the conditions of being "on good consideration," *"bona fide,"* &c. All the cases cited by me which prohibit conduct such as that of appellees, recognize the right of giving preference—yet the argument of Mr. Archer would make it uncontrollable and free from all limitation or restriction. The only authorities cited by Mr. Archer to sustain his case were, first Holbird vs. Anderson, 5 T. R., 235. That case goes merely to establish the right of a debtor to give a preference, when the transfer or assignment (by judgment confessed) is consummate. It may go to show that the debtor's motive may be "to prevent or delay," but that unless both parties concur in that illegal and fraudulent motive and purpose, the design is not defeated. In that case, the preferred creditor did no more than agree to recover a just debt. He was no *volunteer purchaser to injure a third party*—to prevent or delay other creditors. But the case of Hodgson vs. Newman, cited therein with approval, goes to show a material distinction noted by Buller, Justice, which renders the principal case no authority against us.

The other case cited, was Brooks vs. Marbury, 7 Wh., 566, which does not the least resemble the present case. The principles involved were altogether different. There was no pretext that the deed in that case was purposed or designed "to hinder, delay, or defeat creditors." In truth, it was an assignment for creditors generally, with some preferences, but it was impeached on grounds of public policy. That the motive held out to grantor for making it was a promise of indemnity from criminal prosecution—that it was made to defeat the criminal justice of the country—to compromise a felony.

Henry Gassett & Co. vs. Wilson & Brown.—Argument of Counsel.

The rules of law applicable to it came under a different category 247
from that in which the present case is found. It has no point in common with this. There, the transfer and assignment were perfected and consummate. Here, no title or possession in the stock or capital of the firm was changed, no goods or effects transferred—nothing in fact given or made over, but a mere alteration, and that colorable merely, of a balance on the books of the firm of Wilson & Brown.

The *fund* sought to be withdrawn by these drafts, did not at the time, nor for two years after, *go to pay any creditor*. But it is strongly urged in this case, that we cannot charge these defendants or either of them, without doing injustice to Hanson, Nason and other supposed creditors of Brown, for whom these drafts were made. This arises from a misapprehension as to the nature of our claim.

To establish that, it is not necessary for us to prove that these creditors have no right to recover on these acceptances. In candor and truth, we must say that we do not believe they ever expect or have any right to recover, except in the event that Wilson can safely pay them out of Brown's funds.

That seems to be the opinion of the master, after closely examining into the case, and all the attendant and following circumstances corroborate that conclusion. Be this as it may, if Wilson accepted or *ever paid*, in fraud of our rights as creditors, he accepted and paid in his own wrong, and cannot set up the act to our prejudice.

When our levy was made, nothing had been paid—nothing in fact assigned—nothing but a future liability assumed—voluntarily assumed. We knew not until answers made and proofs taken, who were these foreign creditors, or that such existed. Knew not of such claims. How then could we make them parties? Why make them parties? We seek not to defeat their claims, whatever they may be, against Brown & Wilson. We ask not the delivery of these drafts to us—we leave them to their remedies at law—looking to ours in equity.

The firm of Wilson & Brown, or *"quocunque alio nomine gaudet"* is not insolvent—we are not disputing about equitable assets, but if we were, the citation above from Hovenden, would prove that we have the better equity, for their claim only takes its rise from a fraud perpetrated to our prejudice by their agent, Brown. Then as regards Wilson, if he *had paid full price*, consideration—according to 248
Lord Mansfield's doctrine in Cadogen & Kennett, & Wooley vs. De Mattos, he would, notwithstanding, have acted *"male fide,"* and have lost his money.

But Mr. Archer, in his written brief submitted, draws most liberally from what he terms my admissions as to the correctness of the master's report in general; and he thence deduces that I concur in all that the master infers or conjectures as to the statements of Brown.

Now I do not adopt all the master's views touching this transaction. But even the master, favorably as he seems disposed towards these parties, falls far short of the conclusions of Mr. Archer. He gives the testimony with some favorable glosses, but concludes nothing beyond verifying accounts, and reserves the effect of it for the Court. Yet the learned and ingenious gentleman infers that I admit that Taylor & Rich, Nason, Hanson, &c., were *"bona fide"* creditors when these drafts were drawn, &c., and that the drafts were in truth drawn in their favor, and went incontinently into their possession. Now I admit to no such thing—but believe and contend the opposite from the very circumstances of the case.

It was not needful for me to contend that these drafts were held in secret trust for Brown, or that the transaction was colorable merely. The facts do warrant and give rise to strong suspicion that, as regards part of them at least, such was the fact.

Now, every business man must know that such utter neglect—such oblivion manifested by *holders* of moneyed acceptances—such utter indifference and ignorance on the part of acceptors as to their fate, is most unprecedented in real business transactions. No man ever heard of such a case before amongst merchants.

Years after due—two of them never heard of—not traced to any holder by acceptor, the head of the house, the only responsible partner—never presented for payment; and this, too, after passing into the hands of defendant Brown, the drawer, for whose accommodation they were accepted! *"Credat Judeus appella, non ego."*—And yet the trivial circumstance is noted, that Wilson says he cannot state these things "from his own knowledge." And what then? If these drafts had ever passed out of Brown's hands into the possession of any *"bona fide"* holder and owner, must not, from the nature of things, some application have been made for payment—some

249 inquiry at least made touching them, and to the acceptor, the head of the house, who, by the articles of co-partnership, managed the home business. The opposite supposition is inconceivable; and would not Wilson thus have acquired some knowledge of his own?

It is not necessary for me to impute actual fraud—corrupt and impure motive and conduct, and I do not impute them; but I do say that Brown's answer and testimony are not consistent, and do not establish that, at the time these acceptances were made, all these persons named were the actual creditors of Brown.

In the case of Taylor & Rich, there appears, *then*, to have been no actual indebtedness, but only an engagement or promise to create it, by future advances. The proofs then, too, are that these drafts were drawn for conjectural amounts, without settlements or balances struck.

But the explanation made by the learned counsel, for this neglect ignorance and oblivion touching these securities, is, that, while this suit of complainants was pending, Wilson was justified in withholding payment; but this falls far short of explaining away the neglect and ignorance relating to the drafts—their ownership and possession—which Wilson acknowledges, though it may account for their not being paid. Wilson could not *refuse* to pay before payment was asked—nor after refusal to pay, could he have no knowledge of who held them. But the statement and explanation of the learned counsel goes to fortify and confirm the notion of the master, and the opinion I advance, that these drafts were never designed to subject Wilson to any absolute liability—that they imposed upon him no unconditional obligation to pay their amounts. If this be so, then there is an end to all pretext for regarding this as an absolute purchase or withdrawal of Brown's share of the capital, or payment, or equivalent debt created on Wilson's part. Nothing was paid, and nothing is likely to be paid by him, in consequence of our recovery, beyond the amount we may recover. If he can be permitted thus far to stave off all claim on these drafts, he can continue to do so.

In conclusion, I would respectfully suggest to the Court, the vital importance of preserving in their full force the salutary principles of our statute of fraud, borrowed from those of Elizabeth. While the Court may keep open and unfettered the ready transmission of property and effects, when directly, absolutely and openly assigned—
250 while they, in the absence of a bankrupt law, may allow these struggles amongst creditors for preferences on *"bona fide"* debts, they should watch with jealousy these secret attempts to withdraw property from its legitimate liabilities—more especially should a Court of Equity guard its process from contempt.

In vain do Courts of Justice hold out to suitors redress in their Courts, if, after protracted and expensive litigation, when they are in position to reap the fruits of their actions, parties may, with purpose avowed to delay or defeat their remedies, combine, under color of giving preference to A, to divest B. of his legal rights. This notion of giving preference is already too prevalent, and its practice regulated by caprice and partiality, and fraught with much injustice. It requires restraint rather than encouragement—for while it is obnoxious to abuse even amongst the honorable class of merchants, it prevails to a most vicious extent amongst stock-jobbers and speculators, and every class of gamblers, under the specious pretext of preferring "debts of honor."

J. T. Archer, for appellees:

The original articles of partnership between Wilson & Brown which are exhibited, bear date 12th January, 1844. They contain a provision that "the concern shall be dissolved, and each of the partners draw his proportion of the capital thereof, whenever either of said parties shall wish to close the concern."

By reference to the cause of action on which Gassett's judgment is founded, it will be found that M. C. & J. W. Brown were in arrears at the date of the partnership between Wilson & J. W. Brown. This circumstance verifies the allegation of Brown, that he was involved when he commenced with Wilson. There could be no other object on the part of Brown than to add to his resources, to enable him to retrieve his losses; and the circumstance of his connection with Wilson, though embarrassed himself, being avowed to the world, is proof against any fraud contemplated by such a co-partnership.

There was also propriety in this case in retaining to himself the *right* to withdraw his capital at any moment. He was in business under the indulgence of his creditors, and if any sought to press, as did the Gassett's, while the others remained indulgent, it would be inequitable to permit the pressing creditor to gain an advantage, by 251
obtaining *legal priorities*. To prevent the unjust appropriation of all his means to one *exacting* creditor, to the total exclusion of all other claims of a confidential nature and otherwise, was not only not inequitable, but his duty. Consequently, he reserved the right to control his capital—to withdraw it from the concern of Wilson & Brown, and to apply it to the payment of his creditors, according to his own sense of duty and justice. The privilege he exercised,—was compelled by duty to exercise, when he found the Gassetts, in the face of indulgence on the part of all others, seeking by suit to subject all his means exclusively to themselves. The claim of Taylor & Rich was for moneys advanced, and, according to the understanding of merchants, entitled to the position of a confidential claim, and as such entitled, by all just rules prevailing among merchants, to a priority over the claim of complainants. So, likewise, were the other claims preferred by defendant, Brown. He, therefore, preferred these to the claims of Gassett, and other claims against the old firm of M. C. & J. W. Brown. He drew upon the firm for his interest, procured their acceptances negotiable, and transferred the accepted drafts, to his preferred creditors. Was this fraud in fact or law? See 2 Kent's Com., 532, and note.

Suppose on the 13th April, 1846, Brown had assigned his interest in the firm of Wilson & Brown by a voluntary deed of assignment, preferring certain creditors, to the exclusion of Gassett & Co., would this have been a fraud? Is there one assignment in a hundred made by insolvent debtors, even pending suits, that does not give preferences? Is there anything unusual, unlawful, or fraudulent, in giving preferences in assignments? Do not all merchants recognize as essential to the business of merchants, that there may be confidential debts, and that the debtor has a right to discriminate? on this point, if it be necessary to cite authorities, see Harrison vs. Trustees Phillips Academy, 12 Mass., 456. Hatch vs. Smith, 5 Man., 42. Widgery vs. Haskell, 5 Man., 144. Marbury vs. Brooks, 7 Wheat., 566; also, 2 Kent, 532, before cited. Wilkes vs. Ferris, 5 Johns, 335. Phoenix vs. Ingraham, 5 Johns., 412.

What are all the drafts delivered to Taylor & Rich, to Nason and to Hanson, but assignments *pro tanto* of his (Brown's) interest—a withdrawal and appropriation of his means, for the purpose of providing for the claims of Taylor & Rich and others, in preference to 252
Gassett?

Such an assignment is not fraudulent, when the creditor actually pays or secures a *bona fide* debt due by him. A sale by an insolvent debtor of his property, to convert it into money, to prevent his creditors from reaching it, and to enjoy it himself, is a fraud; and if the purchaser knows his motives, he is involved in the fraud. But a sale or assignment to pay a just debt, in preference to the claim of a suing creditor, is not unlawful. In such case, the debtor *appropriates* his means to his creditor, and this is no fraud, though the suing creditor be disappointed. Had Brown withdrawn his capital, not to pay debts, but to conceal his means in his pockets, and beyond the reach of his creditors, it would have been a fraud—his motives being iniquitous would have established the fraud. But to withdraw his capital, for the purpose of paying *bona fide* creditors, is not a fraudulent purpose. The authorities cited by complainant's counsel do not, therefore, apply—as it does not appear that Brown withdrew his interest to conceal it from his own creditors, with a view to his own benefit; but, on the contrary, that he appropriated it for the purpose of securing the payment of just and *bona fide* debts, before the judgment of complainants was obtained against him. See Holbird vs. Anderson, 5 T. R., 235. Estwick vs. Caillaud, ib., 424.

How can Henry Gassett & Co. ask the appropriation of all Brown's means to their claim, to the exclusion of all others, and then say that a like appropriation by Brown to any other equally just claim is a fraud? How can they or their counsel denounce Brown for doing for certain creditors what they are seeking to do for themselves?

As before alleged, the claims preferred by Brown were of a confidential nature. Independent of this, there are circumstances which place the conduct of Brown in the most unexceptional point of view. From the testimony, it is clearly deducible that the firm of M. C. & J. W. Brown had failed—that, notwithstanding this failure, and the consequent embarrassment of defendant, Brown, he commenced business without concealment of his interest in the firm of Brown & Nason, and afterwards of Wilson & Brown. It also appears that Brown & Nason were liable under outstanding, unsettled demands against the firm. The credit obtained by J. W. Brown du-

253 ring his insolvency must, necessarily, have been from a confidence, not in his solvency, but in his sense of justice. Unquestionably, the debts to which he occupied such a position were eminently entitled to be classed as confidential. It was particularly his duty to see his more recent debts paid, rather than suffer the means he had acquired from such creditors to be appropriated to the liabilities of M. C. & J. W. Brown. In other words, the creditors of M. C. & J. W. Brown could not equitably claim of J. W. Brown any assets arising from the business of Brown & Nason, until the creditors of Brown & Nason were satisfied and a settlement was had between the partners themselves.

But under any circumstances, Wilson could not have refused his assent to the withdrawal of Brown's capital—for he was bound by his article of co-partnership to consent to a dissolution of the concern, whenever it was demanded by Brown; and a refusal to accept drafts for that purpose, would have rendered him liable in damages to Brown in an action at law. It was no fraud in him, but his legal duty to fulfil his contract with Brown. The relation between them was analogous to that of debtor and creditor; and no debtor has a right to refuse payment to a creditor, on the ground that the latter is suspected of an intention to make an inequitable disposition of his means, even if there were just grounds for such apprehensions. How can Wilson be chargeable with *"mala fides"* in complying with his agreement, when a refusal to do so would have been a breach of faith, and a violation of his contract?

The non-presentment of the drafts, which is relied on by complainant's counsel as ground to suspect fraud, is a matter which does not affect the merits of the defence, and which the defendants cannot be called upon to explain. The pendency of this very suit affords a reasonable conjecture as to the reason of the non-presentment of these drafts, and the complainants have not taken the proper steps for ascertaining the reason with any greater certainty than is afforded by conjecture. The cause of the delay could have been known, had the preferred creditors been made parties to the bill of complaint; and the complainants having omitted to make them parties, it certainly should not avail them to attempt to throw suspicion upon the transaction, on the ground that some of the circumstances connected therewith are not explained. It would be making the
254 defendants suffer the penalty of the complainant's omission—permitting the complainants to take advantage of their own neglect. The holders of the drafts should have been made parties on other grounds. The Court cannot render a decree against Wilson for the amount of Brown's former interest, while these acceptances are outstanding against him. Should a decree be rendered against Wilson, the same decree should order these drafts to be delivered up for cancellation; otherwise, Wilson would be subject to pay the same demand twice, which would be inequitable and unjust, but could not be avoided, should a decree be rendered against him, while the holders of the drafts are not before the Court.

I will only add to the foregoing, that complainant's counsel opens his argument by an avowal, *"in limine,"* that he takes no exceptions to the master's reports on the facts he professed to decide. These facts proved are simply that Taylor & Rich, Nason and Hanson, were *bona fide* creditors of Brown, and Brown & Nason; that his (Brown's) interest in the firm of *Wilson & Brown* was drawn for, in favor of the parties, *prior* to *Gassett's* judgments.

If these are the conceded facts, the only question arising is one of law:—Whether the drafts accepted take the fund, or the execution? and this involves the settlement of the rights of parties not before the Courts.

Unable, however, to sustain his case by authority, after this concession *"in limine,"* the counsel for complainants is compelled, in order to bring his case within the authorities cited by him, to gainsay his avowal at the outset, by contending that the drafts were not drawn to give *preference* to *bona fide* creditors, but are virtually held in secret trust for himself. The *delivery* to *bona fide* creditors is proved. There is no proof of a secret trust. That is not to be presumed; it must be proved by complainant.

The evidence relied on to establish a secret trust is the non-payment of the drafts. Wilson says he does not know *of his own knowledge* who held two of the drafts—Brown is not interrogated as to the reasons why the drafts have not been presented, or paid—the holders are not parties to answer for themselves. The bill is one of discovery, and the defendants are witnesses of complainants. *Brown* could only answer as interrogated by complainants, or cross-examined on *same* subjects—he was not asked why the drafts were not presented, or paid.

DOUGLAS, Ch. J. 255

This cause came on for final hearing in the court below, and was argued by counsel: whereupon it was ordered, adjudged and decreed, that the bill be dismissed, and that the complainants pay the costs, &c. The case has been ably argued in this court and the question presented for our consideration, is, whether the Court erred in making that decree. On behalf of the complainants it has been contended in an argument that evinces great labor and research, that the transaction between Joseph W. Brown and Wilson & Brown, was a sale made by said Brown, of his interest in the partnership, to Wilson, for the purpose and intent to delay, hinder and defraud his creditors, and especially the complainants, and is therefore entirely null and void according to the provisions of the statute of 13 Eliz., chap. 5, and our statute in relation to fraudulent conveyances, Thompson's Digest, page 215, which is almost identical in its provisions with that of 13 Eliz. on that subject. On the other hand, it has been argued with equal zeal and ability, that the transaction was entered into solely for the purpose of giving a preference to certain creditors over others, which Brown had the right (and under the circumstances) it was his duty to do, that Brown had suffered great losses before, and was consequently involved when he commenced business with Wilson—and that there should be no other object on the part of Brown than to add to his resources, to enable him to retrieve his losses—and the circumstances of his connection with Wilson (though embarrassed himself,) being avowed to the world, is proof against any fraud contemplated by such a partnership. That there was also a propriety in this case, in retaining to himself the right to withdraw his capital at any moment. He was in business under the indulgence of his creditors, and if any sought to press, as did complainants, while the others remained indulgent, it would be inequitable to permit the pressing creditor to gain an advantage by obtaining legal priorities. Let us see if this will bear the test of scrutiny.

The defendant, J. W. Brown, had been engaged in mercantile business, as a member of the firm of M. C. & J. W. Brown, previous to the fall of 1843, at Cedar Keys and Port Leon. In 1842, a gale of wind at Cedar Keys destroyed a portion of their effects, and in the month of September, 1843, another storm not only swept away the residue of their property, but all their books and evidences of debts due them, except one day book so much obliterated as to be of 256
little or no value, and left them almost entirely destitute: and it is a part of the history of the country, that it swept Port Leon itself and left it a desolation. During the period of their prosperity they had become indebted to twelve northern houses, as appears by the record, of whom the complainants were one, all of whom, prompted by that feeling of benevolence and humanity which is always characteristic of a highminded and honorable merchant, or for some other cause, agreed to renew all the notes of the firm of M. C. and J. W. Brown at the rate of fifty cents on the dollar, to be paid in three equal installments, six, nine and twelve months from date, with interest after six months—this agreement bearing date the 2d of September, 1844. What the amount of the whole indebtedness was does not appear—if, however, the other debts respectively, bore any proportion to the one here claimed, it must have been near $30,000, and if it were one third of that sum, no reasonable man could have expected it to be paid by M. C. & J. W. Brown, out of any business in which they might engage, situated as they were, within the time stipulated; and it seems not to have been expected by the other creditors, or considered within the spirit and meaning of the compromise, by the defendant, Brown, for he says in his answer (speaking of the old creditors) that these assurances (of indulgence) have been sacredly kept by all, save the complainants.

The judgment of complainants was obtained on the 20th May, 1846. The suit must have been commenced immediately after the last payment under said agreement fell due. There is no evidence that the embarrassments of J. W. Brown were concealed; it is alleged and not denied, that they were well known—it is not to be supposed that Wilson intended to involve himself in them, or that Brown could have obtained credit that would have enabled him to have carried on his business, except upon the assurance to (or at least the expectation on the part of) the new creditors, that they should be paid out of the avails of the goods they sold him. Was there any moral wrong under these circumstances, in his taking means to prevent the appropriation of all his means to these exacting creditors, to the total exclusion of all others, old and new? We think not, and are happy to find, upon reference to the brief of the learned counsel who argued this cause for complainants, that he does not

impute to these defendants actual fraud, or corrupt motives or conduct. He insists most strongly, however, that the transaction is a fraud in law. But in what does the fraud consist? Surely not in the payment of *bona fide* and honest debts. It is said, moreover, that the acceptances of Wilson & Brown, were made to enable J. W. Brown to withdraw his share of the capital and profits of that firm, he declaring it to be his intention thereby to prevent any of his former creditors from getting an advantage over others by means of any suit, or execution and sale of his interest as above stated; and that the suit of the complainants, then pending and about to be carried into judgment, was one of the claims moving said Brown to the above course. And from this it is argued that fraud must be inferred, and that if payment of these drafts had followed their drawing, and had been consummated before the levy of complainant's execution, this avowed purpose by both parties "to delay and defeat" creditors, would in equity render them liable to reclamation. Without pausing to inquire how far this proposition may have been true, had these drafts been handed over to a person or persons standing in a new relationship to the said J. W. Brown, or indeed to any one else without any valuable consideration, it is sufficient to say that it appears by proofs (and so the master has reported) that they were passed over to three creditors of said Brown, and intended as part payment of debts, fairly and justly due by him, and that these creditors were among those from whom he had made, or who aided him in making, his late purchases, or in paying therefor.

Again it has been urged that the holders of these drafts have not called for payment, and that a secret trust for the benefit of Brown must therefore be presumed; but this does not follow. They may abstain from feelings of kindness towards Brown, or from motives of policy, he being a customer, and we do not see that the complainants have any cause to complain because other creditors are not as exacting as themselves. It would work no injury to them, were payment never to be demanded. This transaction has been treated by the learned counsel for the complainants as a sale by Brown of his interest in the partnership to Wilson, but it was not so; it was a withdrawal of it under the original articles of partnership. After this withdrawal, he had no interest in the firm, until the new articles were made; and it was withdrawn for the purpose of giving preference to the creditors to whom the drafts were passed over, which the defendant, Brown, might lawfully do

In the case of Holsey, et al. vs. Whitney, et al., 4 Mason's C. C. R., 206, (which was a contest between an attaching creditor and a trustee under a general assignment for the benefit of all creditors,) Judge Story held that a general assignment is good, notwithstanding it does not purpose to convey all the debtor's property, and yet require a general release; or does not fully enumerate all the debts due, or describe the property generally, or give a preferenc to certain classes of creditors. A general assignment, said Lord Ellenborough, in Peckstock vs. Lyster, 3 Maule & Sel., 371, is to be referred to, as an act of duty and not of fraud, when no purpose of fraud is proved, and justice Le Blank added in the same case, "to hold such a deed fraudulent, would be contrary to Holbird vs. Anderson, 5 T. R., 325, and to all the cases which have decided that a party independent of the bankrupt laws, may convey away his property for the benefit of all his creditors." Justice Bailey gave full assent to the doctrine, emphatically observing "that this conveyance, so far from being fraudulent, was the most honest act the party could do." This doctrine was asserted in a case where the very object of the conveyance was to prevent a judgment creditor from obtaining satisfaction out of the property on execution." But the Court decided that it was not sufficient that the creditor was delayed and defeated by such a conveyance of his remedy under the execution; but the act must be fraudulent. Nor (said Judge Story, in Holsey, et al., vs. Whitney, et al., above cited) was there anything new in this doctrine. "It may be clearly gathered from prior cases, and especially from Estwick vs. Caillaud, 5 T. R., 420, Holbird vs. Anderson, 5 T. R. 235, Minx vs. Howell, 4 East. R., 528, and has since been confirmed even as against the crown in the King vs. Watson, 3 Price, Ex. Rep., 6. 1 Cond. Eng. Ex. R., 265 to 271.

"It would indeed," says Judge Story, "be somewhat strange if a debtor might *bona fide* prefer one creditor to another in the distribution of his property, and was not at liberty to prefer all his creditors to one,"—Ibid, 211. "The law allows the debtor to give a preference to one creditor (and I think to all creditors also) by a *bona fide* conveyance." Ibid, 213. In Estwick vs. Caillaud, 5 T. R., 278. it was held that "if a person having several creditors, convey by deed the legal interest in part of his real and personal property to a trustee in trust (after deducting expenses respecting the trust) out of the rents and profits, to pay half the surplus to the grantor for his own use, and the residue among certain creditors named in the schedule, such deed was valid." Lord Kenyon said there was nothing fraudulent either in the construction of the deed or the manner of carrying it into execution. It was neither illegal nor immoral to prefer one set of creditors to another. Ashurst said there is nothing illegal on the face of the deed, for there is no objection to a debtor's preferring one set of creditors to another. Ibid, 221. Indeed the right of a debtor to give a preference by a *bona fide* payment or transfer of effects to any one creditor, when no bankrupt law intervenes to change the relations and rights of the parties, was admitted by the learned counsel for the complainants in the argument, and he attempted to show that the transaction in this case was *mala fides*, relying in proof of that position, upon the statements of the defendants, that it was intended to prevent the complainants from obtaining a priority by their execution. But the case of Peckstock vs. Leyster, 3 M. & S., above cited by Judge Story in Holsey, et al., vs. Whitney, et al., 4 Mason 211, is an authority against that position, and so is Holberd vs. Anderson, 5 T. R., 235. In the last case, the facts are as follows: In Easter Term, 1791, Shepherd obtained a judgment against Charter, who brought a writ of error and delayed execution until Easter Term, 1792, when judgment was affirmed in Exchequer Chamber. On the 7th of May, the costs in that suit were taxed, and on the 8th of May, Charter, knowing Shepherd's intention to take out execution which he was entitled to sue out on that day, went to the plaintiff, Holbird, who was a creditor of his, informed him of the situation, and executed a warrant of attorney to confess a judgment, on which, judgment was immediately entered up and execution sued out, and delivered to the sheriff two hours before Shepherd's execution reached sheriff's office. The sheriff levied under Shepherd's writ and returned *nulla bona* to the plaintiff's. On this evidence it was contended on the part of the defendants, that the plaintiff was not entitled to recover, inasmuch as this was an undue preference given by Charter to the plaintiff for the purpose of defeating Shepherd's execution, and that the warrant of attorney given to plaintiff was fraudulent and void by the statute 13 E., C. 5. But Lord Kenyon being of opinion that there was no undue preference, the plaintiff had a verdict, to set which aside, Gibbs obtained a rule to show cause, which was fully argued; when Lord Kenyon, Ch. J., said "there was no fraud in this case—the plaintiff was preferred by his debtor, Charter, not with a view of any benefit to the latter, but merely to secure the payment of a just debt to the former, in which I see no illegality or injustice. The words of the statute, 13 Eliz., do not apply to this case, for the warrant of attorney was given on good consideration, and the other words in the act "*bona fide*," only apply to those cases where possession is not delivered or is only colorable; of the former kind, was Twyne's case, where the vendor continued in possession, and of the latter, Hodgson vs. Newman, where (as far as I recollect) the goods were removed from the vendor's houses and his wife continued in possession of them." Ashurst, J., and Buller, J., concurred, and the rule was discharged. We have cited this case very much at length, because it is a leading one, and identical in principle with the case at bar. And the doctrine contained in it is fully sustained by the opinion of the Supreme Court pronounced by Ch. Justice Marshal in the case of Marbury vs. Brooks, 7 Wheat. Rep., 556, 5 Peters Cond. Rep., 356, in which that Court says "that a debtor has a right to prefer one creditor to another cannot be denied, and that his private motives for giving this preference, provided the creditor has done nothing improper, cannot annul this right, is equally certain. On the other hand it will also be admitted, that any unlawful consideration moving from the preferred creditor, to induce this preference, may avoid the deed which gives it." There is no evidence in the case before us, of any such unlawful consideration moving from the creditors, to whom the drafts above mentioned were transferred, to induce the preference given.

The case of Brooks vs. Marbury came again before the Supreme Court in 11 Wheat., 78. 6 Peters' Condensed Reports, 223 to 236. Chief Justice Marshal again pronounced the opinion, and at page 227 said: "The preference of creditors of a particular description over others, being one which a debtor has a right to make, the sale of his property, and the payment of the proceeds to such favored creditors, being an act which the debtor may perform for himself, or his agent, we cannot conceive that the motives which may have induced the preference, although communicated to the agent, can in reason affect

261 the transaction, provided nothing has occurred on the part of the creditors, which is any degree exceptionable, either in law or justice." Nothing exceptionable appears on the part of the creditors here—nothing complained of, only that they have not pressed their claims on Wilson & Brown for the payment of the drafts, which works no injury to the complainants, and may have resulted from the cause suggested by the master, who says "the delay of payment appears to have been in consequence of the failure on the part of defendant, Wilson, to realize and collect a large sum of the accounts then (on the 31st July, 1846,) due, and supposed to be good, but which have since proved to be on parties in failing circumstances, or wholly insolvent."

Now, while it is not denied that valid transactions between the parties may be fraudulent, by reason of the covin, collusion, or confederacy, to injure a third person, as held in Wolley vs. De Mattos, 1 Burrows, 474, where "if a man, knowing that a creditor has obtained a judgment against his debtor, buy the defendant's goods for a full price, to enable him to defeat the creditor's execution, it is fraudulent," is instanced as cited by the solicitor for the complainants; and that fraud will vitiate any transaction, "though the principal do not take any part in it, if his agent do, because the principal is civilly responsible for the acts of his agent," as was held in Doe ex. dem., Willis vs. Martin, 4 Term. Rep., 39, also cited, we do not perceive that the principles there asserted touch this case. In the first, the purchaser was an indifferent person, not a creditor purchasing with a view to secure the payment of a fair and *bona fide* debt; and the latter does not seem to be applicable, unless we are to consider Wilson the agent of the holder of these bills, and engaged in a fraudulent transaction. But we do not look upon him as their agent—he was the partner of Brown, associated with him under articles, by one of which, Brown had a right, at any time, to withdraw his portion of the capital invested. The complainants are pressing Brown; he prefers others, whose claims are equally meritorious, and who, indeed, have stronger claims to these funds, from the fact that they had aided him to raise them; he draws for the amount of his portion of his capital stock to pay them. What right had Wilson to say aught against it? The law does not forbid it—the soundest principles of morality justify it. Wilson, if he could be consid-
262 ered in the light of an agent in this matter, was only aiding his principal to secure the payment of just and honest claims. Upon a full review of the whole case, therefore, we perceive no error in the decree of the Court below, and it is, therefore, confirmed.

Per totam curiam.

THE SOUTHERN LIFE INSURANCE AND TRUST COMPANY, PLAINTIFF IN ERROR, VS. JOHN D. GRAY, DEFENDANT IN ERROR.

A note made payable to the agent of a corporation, may be sued in the name and on behalf of the company, if it is proved to be the property of the corporation.

Error to the Circuit Court of the County of Franklin.

For a statement of the case—the principle involved, and the errors assigned, see the opinion delivered by the Court.

Thompson, for plaintiff in error.

This was an action in the Court below, brought by the plaintiff in error against the defendant, as maker of a promissory note, dated St. Joseph, November 7, 1839, payable thirty days after date, promising to pay James Ruan, agent of the Southern Life Insurance and Trust Company, or order, one hundred and fifty-eight 98-100 dollars.

The note was endorsed as follows: Pay to the order of George Field, President. James Ruan, Agent.

The plaintiffs proved that Ruan was its agent, and that George Field was its President. During the progress of the trial, the plaintiff struck out the special direction of the endorsement, as stated in the bill of exceptions.

The Court ruled out the evidence of the fact that George Field was the President of the plaintiff, which was introduced for the purpose of showing that the indorsement to Field in his official capacity, coupled with the possession by the plaintiff of the note, was intended to vest the property in the note in the plaintiff.

The Court then decided that the plaintiff was not in law entitled 263 to recover.

The errors assigned in this Court are:—

1. The Court ruled out improperly the evidence of the fact that George Field was president of the plaintiff.

2. The Court erred in deciding that the plaintiff is not in law entitled to recover.

1. It was competent to show by evidence that the word President, attached to Field's name, was a transfer to him in his official capacity of an officer and servant of the plaintiff. Church vs. Barlow, 9 Pick. R., 547. State vs. Boies, 2 Fair. R., 474. Barker vs. Prentiss, 6 Mass. R., 430. See, also, Mott vs. Hicks, 1 Cowen R., 513. Folger vs. Chace, 18 Pick. R., 63. Spear vs. Ladd, 11 Mass. R., 94.

The right to strike out special endorsements, where no right of property is intended to be conveyed thereby, such as to agents of the true owner for collection, or any other purpose is a familiar principle, and has been often recognized. See Morris vs. Freeman, 1 Dall., 193. Thompson vs. Robertson, 4 Johns. R., 27.

2. Upon the facts proved, we hold, the plaintiff was in law entitled to recover. The note was payable to Ruan, as agent of the plaintiff, and he endorses it over to another officer also the agent of the plaintiff, and the instrument is in the possession and control of the plaintiff. No evidence is offered by the defendant of any interest in Ruan or Field, adverse to the plaintiff, in regard to this note, or the debt secured thereby.

Archer, for defendant in error.

DOUGLAS, Ch. J.

This is an action of *assumpsit* instituted by the plaintiff in error in the Circuit Court of Franklin County against the defendant in error. The declaration contains two counts. The first upon a promissory note, and the second on a bill of exchange.

The defendant put in a plea of *non assumpsit,* which was filed before the adoption of the new rules. The following bill of exceptions is set forth in the record, viz:

"Be it remembered, that on this day came the parties by their attorney, and by consent of the said parties, the questions of law and 264 fact in issue were submitted to the Court, without the intervention of a jury, and thereupon the plaintiff introduced in evidence the promissory note sued upon.

"St. Joseph, November 7, 1839.

$158 99-100. Thirty days after date I promise to pay to James Ruan, agent of the Southern Life and Trust Company or order one hundred and fifty-eight 98-100 dollars for value received.

"JOHN D. GRAY.

"Endorsed—Pay to the order of George Field, Esq., Pres't.

"JAMES RUAN, Agent."

The plaintiff's counsel having, at the trial, stricken out the special direction—pay to the order of George Field, Esq., Pres't—the said plaintiff also proved that James Ruan was at the date of said promissory note, the agent of the plaintiff, and that George Field was at the same time the President of the Southern Life Insurance and Trust Company, the plaintiff herein, to the admission of which evidence, as to George Field being President, the counsel for the defendant objected, and the plaintiff offered no other testimony. The Court considered the introduction of the evidence, as to the fact of George Field, Esq., being President of the plaintiff, as improper, the same is ruled out, and the Court proceeding to give judgment on the facts of the case, adjudges that the plaintiff is not in law entitled to recover. Therefore it is considered by the Court that the plaintiff take nothing by its writ, and that the defendant go thereof without day, and recover his costs by him, in and about his defence in this behalf expended, &c. To which opinion, ruling, and judgment of the Court, the plaintiff by its counsel excepts, and prays that his bill of exceptions may be signed, sealed and made a part of the record in this cause, which is done. Signed, &c.

The errors assigned are

First—The Court erred in ruling out the proof that George Field was President of the plaintiff.

Second—The Court below erred in adjudging that the plaintiff is not entitled to recover.

No question was raised upon the second count in the declaration, no evidence seems to have been offered upon it. In the case of Ward & May vs. Bull & Shine, 1 Florida Reports, 280, where a jury had been waived, as in this case, this Court said: "We must

look at the finding of the Court, as though it had been the finding of a jury," and as upon a demurrer to evidence, such conclusions as a jury might justifiably draw, the Court ought to draw. Pawling, et al., vs. The United States, 2 Cond. Reps., 92.

So, in this case, the Court should have drawn the same conclusions from the evidence as the jury might justifiably have drawn. The main question in the case is, had the plaintiff a right to maintain its action upon the note sued upon, and what is the fair legal inference from the proof, as to the ownership of the note in question? It was payable to James Ruan, agent of the Southern Life and Trust Company. No notice seems to have been taken at the trial that the word Insurance was left out of the description of the company—no objection was there made, nor is any made here, on that account: we may therefore, we think, properly take the description as that of "The Southern Life Insurance and Trust Company." Are these words merely a *descriptio personarum*? If so, then the note was by its terms the property of the said James Ruan, and he would have been entitled to sue upon it, but if they are to be taken as words of substance, indicating that the note was taken by him as the agent of the Company, (whose agent the proof shows he then was) then the fair and legitimate inference is, that the note was the property of the Company, and it did not require any endorsement to enable it to sue upon it: for "if the instrument is not under seal, it seems to be the general principle that the party for whose sole benefit it was evidently made, may sue thereon in his own name, although the engagement be not directly to him." 1 Chitty's Pl., 4-5, and authorities there cited. In the case of the Trustees of Ministerial and School fund in Levant vs. Parks, et al., a note of hand payable to George Waugh, Treasurer of the Ministerial and School fund in Levant, or his successor in office, was held to be rightly sued in the name of the corporation of which George Waugh was treasurer. 1 Fairfield's Reps., 441 to 446. The State vs. Bans et al., 2 Fairfield's Reps., 474-475, was upon a promissory note in the words following, to wit: "For value received we jointly and severally promise James Irish, Land agent of Maine, to pay him or his order, one hundred and twenty-five dollars in three years, and interest annually. (Signed) James Bans, Ichabod Russell." Martin, Ch. Justice, said: We perceive no difference between this case and that of Irish vs. Webster, et al.,
5 Greenleaf, 171. In that case, the note was not negotiable; in the present, it is so. The principle ground is, that the land agent is the servant of the State, making contracts in behalf of the State. A note payable to such an agent, is in legal contemplation payable to the State. In Dugan, et al., Ex'rs., vs. the United States, 3 Wheat. Reps., 172, 4 Peter's Cond. Reps., 224 to 226, it was held, that where a bill of exchange was endorsed, Thomas Tudor Tucker, Treasurer of the United States, who received it in that capacity, and for account of the United States, and the bill had been purchased by the Secretary of the Treasury with money of the United States, and was afterwards endorsed by T. T. Tucker, as Treasurer of the United States, to Messrs. Wilhem and Jan Willink and N. and J. and R. Van Staphorst, and by them presented to the drawees for acceptance, and protested for non acceptance and non payment, and sent back by W. & S., to the Secretary of the Treasury, held that the endorsement to T. T. Tucker, Treasurer, &c., passed such an interest to the United States as enabled them to maintain an action on the bill against the first endorser. In Alston vs. Hartman, Treasurer, &c., 2d Alabama Reps., 699-701, it was held, a promissory note payable to the Treasurer of the Manual Labor Institute of Alabama, is a contract with the corporation, and no action can be maintained thereon in the name of the Treasurer, and Collier, Ch. J., in delivering the opinion of the Court, said: "Where a contract appears to have been made with a corporation, though agents are employed to effect it, and there be a written promise to pay the agents *eo nomine*, it has been held that the corporation must sue for the breach of such a contract, citing Gilmore vs. Pope, 5 Mass. Reps., 491. African Society vs. Varick, 13 Johns. Reps., 381. Penn. Reps., 115, and Bowin vs. Morris, 2 Taunt. Rep., 387.

And to the same effect is Arnold et al vs. Lyman, 17 Mass. R., 400 to 404. Porter vs. Yale College, 3 Conn. Reps., 59 to 63. In Ewing vs. Medlock, 5 Porter Reps., 82, a promise in writing was made to the treasurer of an unincorporated association of individuals, and it was held "the contract was not with the individual who might be treasurer, but with the association." James Ruan was proved to have been the agent of the plaintiff, when the note on which the first count in the declaration in this case was founded was made, and all the reasoning employed in these several cases goes to show that this suit is properly brought, unless there is something in the endorsement which prevents their application. If the note in question was at its inception the property of the plaintiff, (and we deem that the fair inference from the testimony,) it is difficult to perceive now the title to it was changed by its being endorsed to its President.

It is alleged as error that the Court ruled out improperly the evidence of the fact that George Field was President of the plaintiff, at the time when the endorsement of the note to him as such was made. If the view we have taken of this case be correct, it is not, perhaps, very material; but it seems to have been pertinent to the issue, and upon the whole, we think, should have been admitted. It would have helped to explain the transaction, and, taken in connection with other evidence, it might have had some weight; and it is a general rule, that the parties to a written agreement are not precluded from proving facts consistent with such-agreement, though not expressed in it." 3 Starkie Ev., 1047.

The situation and circumstances of the parties may be shown by parol evidence, for the purposes of aiding in the construction of the writing. 1 Phil. Ev., 417. That was the very purpose, it would seem, for which this testimony was offered, and, therefore, it could not properly be excluded. The position assumed by the counsel for the plaintiff in error, that the holder has a right to strike out the special endorsement on a note or bill of exchange, where no right of property was intended to be conveyed by it, such as to an agent of the true owner for collection, or for any other purpose, appears to be consonant to reason and justice, and well sustained by adjudged cases. In Morris vs. Freeman, 1 Dallas Reps., 192, the Court held that "the plaintiff in an action upon a bill of exchange, might strike out a special, as well as a general endorsement on the bill." And the same principle is asserted in Thompson vs. Robertson, 4 John. Reps., 26 to 31. The special endorsement having been stricken out, the note was left as it stood when it was first made, in effect the property of the plaintiff, or the property in it passed by the blank endorsement to the plaintiff, and in either case it might sue upon it.—A note endorsed in blank is like one payable to bearer, and passes by delivery, and the holder may constitute himself or any other person assignee of the bill. In the case of blank endorsements, possession is evidence of title. Thornton vs. Moody, 2 Fairfield's Reps., 256. 3 Kent's Com., 59, 60. 1st Kinnie's Comp., 80, 84, and
authorities there cited.

This case comes within the rule laid down in the case of Ward & May vs. Bull & Shine—1 Florida Reps., 276—"that where mixed questions of law and fact are presented to the Court for its decision, no writ of error lies, unless the Court is called upon to decide questions of law, or such question of law necessarily arises out of the facts, and is distinctly presented to the Court upon them, so that the decision of the point of law will decide the merits of the case," and the decision of the Court is wrong.

Here, besides the rejection of the testimony, which, we think, should have been admitted, a question of law arises out of the facts of the case, as presented by this record, decisive of its merits; and upon that question, the decision of the Court below, according to our view of the matter, was wrong.

The judgment is, therefore, reversed, and the cause remanded for further proceedings, in accordance with this opinion.

Per curiam.

NOTE—The Chief Justice said it might be proper for him to observe, that he had heretofore declined to try or decide contested cases, in which this company was a party, because some of his relatives held stock in it, although it is very doubtful how far this creates an interest in them—that stock being deemed valueless; but in this case, it is understood that the learned judge who decided it below doubts whether his ruling in it was right, and the counsel for the defendant in error declined arguing it, because he deemed that ruling wrong. Under these circumstances—there being no contest in it—there seemed to be no good reason to delay the case, by his adhering to that rule of conduct; and without him, there was not competent Court here to decide it.

269 JAMES M. HUNTER, ADMINISTRATOR OF A. R. S. HUNTER, vs RICHARD BRADFORD, ADMINISTRATOR OF LEIGH READ, DECEASED, ET AL.

HIRAM HUNTER AND RICHARD B. CARPENTER AND WIFE, vs. JULIA McBRIDE, EXECUTRIX, ROBERT B. HAUGHTON, RICHARD H. BRADFORD, ADMINISTRATOR, &C., AND JAMES M. HUNTER, IN HIS OWN RIGHT, AND AS ADMINISTRATOR OF A. R. S. HUNTER.

An answer asserting the ignorance of the defendant as to the truth of the allegations and charges of a bill, but averring that he does not believe them to be true, is not sufficient to warrant the dissolution of an injunction which has been granted as a proper auxiliary to the relief sought. Where the insolvency of an estate is charged in a bill, the answer of the administrator that he is ignorant of such insolvency is not a sufficient denial of the charge.

Courts draw a distinction as to claims for equitable interposition, between contracts *executory* and contracts *executed*. It is well settled, that where the purchaser takes a deed with warranty, and enters and remains in undisturbed possession of the land conveyed, (the purchase money having been paid,) if there is no fraud in the transaction, he cannot, before eviction, ask and obtain the aid of the Court of Equity, in order to have the contract rescinded, or the purchase money restored to him, on the ground of defect in the title. In such case, his remedy is at law upon the covenants in his deed of warranty.

But if the purchaser is in possession, under a mere agreement to convey and make title, as where a title bond has been given, and the vendor is not able to make a clear and perfect title, he has the right to resort to a Court of Equity to rescind the contract—to restrain the collection at law of the purchase money, and to obtain restitution of whatever sums have been paid by him on the faith of getting a title from the vendor.

In the case of an executed contract, where the conveyance has been made and accepted, Courts will interpose to rescind the contract, where it is rendered proper and necessary, by reason of the fraud or insolvency of the vendor.

On the 22d December, 1839, Leigh Read and Archibald R. S. Hunter entered into an agreement for the sale and purchase of land, negroes and other property, amounting to $27,500. On the 2d of January, 1840, Read executed a title bond for the land, conditioned to make title on the 1st of January, 1843. The land and negroes
270 sold to Hunter by Read were mortgaged to the Union Bank of Florida, by deed of mortgage bearing date September 3, 1839.

On the day of the sale, Hunter executed three promissory notes to Read for the sum of six thousand one hundred and sixty-six dollars and sixty-six and two-third cents each, payable one, two, and three years after date.

At the time of the purchase, Hunter held an obligation of Joseph McBride, given by him on the 30th of January, 1838, on the occasion of his, McBride's, purchase from A. R. S. Hunter and James M. Hunter, and A. R. S. Hunter, guardian of William H., Hiram S. and Grace F. Hunter, minor heirs of Adam Hunter, late of the county of Gadsden, deceased, of "all the land, negroes, stock and every other thing or things upon or belonging to the plantation," owned by their father, the said Adam Hunter. In May, 1840, this obligation was transferred to Read by A. R. S. Hunter, one of the joint obligees, acting for himself and the other heirs of Adam Hunter, in part payment of the property purchased from Read, or as collateral security for the payment of the notes executed by him. A. R. S. Hunter and Leigh Read both died in the spring of 1841—but before their death, Hunter had paid large sums of money on the aforesaid purchase from Read.

In May, 1844, James M. Hunter filed his bill of complaint in the *then* Superior Court of Leon County, as administrator of A. R. S. Hunter, against Richard Bradford, administrator of Leigh Read, deceased, Julia McBride, executrix of Joseph McBride, deceased, and Robert B. Haughton, agent of Mrs. McBride—setting forth the aforesaid purchase, payments and transfer—the execution of notes for the purchase money by Hunter—the insolvency of the estate of Read, and its consequent inability to make a good title to the property sold by him in his life time to complainants' intestate—by removing the incumbrances thereon, consisting of the aforesaid mortgage to the Union Bank, to secure one hundred and twenty-seven shares of stock in that institution, and $8,466 of borrowed money, and praying that Bradford, the administrator of Read, be perpetually enjoined from collecting any further sums on the notes given by complainants' intestate, and that the said Julia McBride, and R. B. Haughton, her agent, be perpetually enjoined from paying any part of the obligation of Joseph McBride to the said Bradford.

In December, 1845, the complainant filed a supplemental bill, 271
stating that, since the filing of the first bill in 1844, Bradford, as administrator of Read, had recovered judgment against him, as administrator of A. R. S. Hunter, for the sum of $9,432 34-100, the balance due on the notes given by his intestate, and praying that the said Bradford be perpetually enjoined, for the reasons stated in the original bill, from collecting any part of said judgment. The injunction prayed for was granted on the 10th December, 1845—after which, Bradford filed his answer.

On the ninth day of June, 1847, Hiram Hunter and Richard B. Carpenter and wife, (Carpenter having intermarried with Grace F. G. Hunter, one of the heirs of Adam Hunter) filed their bill of complaint in Leon County Circuit Court against Julia McBride, executrix and sole heir of Joseph McBride, deceased, Robert B. Haughton, Richard R. Bradford, administrator of Leigh Read, James M. Hunter, in his own right, and also as administrator of his brother, Archibald R. S. Hunter—setting forth, that Grace and Hiram are two of the children of Adam Hunter, and as such, entitled to a distributive share of his estate—that in order to ascertain the share to which they were entitled, proceedings were instituted in the County Court of Gadsden County, which resulted in allotting to them certain specified portions of said estate on the 27th January, 1838—that at that time, they were minors, and that A. R. S. Hunter was their guardian, and continued to be such until his death, in the spring of 1841.

The bill then states the purchase by Joseph McBride, on the 30th of January, 1838, from A. R. S. Hunter, of the whole estate of Adam Hunter, including the shares allotted to complainants, and assigned to them as their separate and specific property, their guardian agreeing as specified in the McBride obligation, to pay them the prices at which said allotted shares were valued. The indebtedness of A. R. S. Hunter to Leigh Read is then set forth, and the delivery of the McBride obligation to the latter as collateral security for said indebtedness. The bill charges, that before the delivery of said obligation, a part of it had been paid to A. R. S. Hunter, and that still further payments have been made since that time, but that some six thousand dollars are still due and unpaid. That the obligation was due in equal portions to the heirs of Adam Hunter—that the amounts paid exceed the shares of Archibald, James M. and William, and that the balance will not be sufficient to pay the shares of complain- 272
ants who allege that they have never received any part of the same. The estate of Read is alleged to be insolvent, and if so, that the estate of Archibald R. S. Hunter will be insolvent also. Complainants therefore, allege, that the balance due on the McBride obligation ought to be paid to them, and that Bradford and James M. Hunter ought to be enjoined from collecting or receiving any part of it. The prayer of the bill is in accordance with and framed upon this statement of facts.

The answers filed by all the defendants in these cases, (which were consolidated and tried together,) and the exhibits and proofs in the two cases, do not present a different state of facts, or vary materially the facts presented and the case stated in the bills of complainants. The questions raised and presented for adjudication are stated in the opinion of the Court.

On the 29th July, 1847, complainants moved the Court for an interlocutory decree against Julia F. McBride and Robert B. Haughton, who admit in their answers that they are indebted upon the obligation mentioned in the pleadings in the sum of $3957 and 25-100 with interest thereon since the first day of May, 1838. But inasmuch as Richard H. Bradford claims the fund as belonging to the estate of Read: It was therefore ordered, adjudged and decreed, that Julia F. McBride, executrix and sole heir of Joseph McBride, and Robert B. Haughton, pay to the clerk of the Court, as receiver, the said debt and interest, on or before the first day of April, 1848. This decree was made without prejudice to the rights or claims of the parties claiming the fund, and the money so paid to the clerk, as receiver, was to remain in his hands subject to the further order of the Court.

On the 20th of January, 1849, it was ordered, adjudged and decreed, in the Court below, that the bill of complaint of Carpenter and wife, and Hiram S. Hunter, be dismissed, and the judgment obtained against Hunter's administrator by Read's administrator, was referred to the master to calculate and ascertain the amount actually due upon said judgment in accordance with directions given by the Court as to the manner in which such calculation was to be made, and the balance due to be ascertained. And on the 22d January, 1849, the report of the master having been made and confirmed, it was ordered, adjudged and decreed, (the parties consenting that a final decree may

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273 be rendered at this time) that the injunction heretofore granted in this cause, restraining Richard H. Bradford from proceeding at law upon the judgment *quando acciderent*, rendered against James M. Hunter, administrator of A. R. S. Hunter, in favor of said Bradford as administrator of Leigh Read, deceased, in Leon Superior Court on the 27th day of February, 1845, for $9432 34-100, and restraining said Bradford from proceeding to receive or collect any sum of money from the estate of Joseph McBride, still due from said estate upon the obligation mentioned in the pleadings as having been transferred to Leigh Read by A. R. S. Hunter, be dissolved, and the bill dismissed—and that each of the parties pay their own costs.

From the decree rendered in these cases, the complainants appealed.

Walker argued the cause for appellants.

Stephens & Baker, for appellees, argued and maintained at great length the following propositions:

This is the ordinary case of a purchaser seeking relief upon the ground of an outstanding incumbrance. The incumbrance consists of a mortgage in favor of the Union Bank of Florida, evidenced by deed duly recorded, of which the complainants' intestate not only had constructive but actual notice.

1. It is well settled that, when the purchaser with full knowledge that the title is defective, enters upon the purchase, takes possession of the property, binds himself to pay the purchase money by a given day, and takes the usual covenants for title, a Court of equity will afford no relief. 2 Kent. Com., 471. 2 John. Ch., 519. 1 John. Ch., 213. 1 A. K. Marsh, 288. 7 Smedes and Marsh, 256.

2. There is neither fraud, concealment, or eviction alleged in the bill. In 2 John. Ch., 523, Ch. Kent says: "I kr w of no case in which this Court has relieved a purchaser where there was no fraud and no eviction." In Bumpus vs. Platner, 1 John. Ch., 213, the same Chancellor says: "It may be safely said that there is no case of relief on this ground (failure of consideration) after the agreement is executed, when the possession has passed and continued without any eviction at law under a paramount title. A purchaser buying with full knowledge of the defect in the title, will not, for that defect, be relieved in equity." 3 A. K. Marsh, 288. See also, Royster vs. Shackleford, 5 Litt.. 299. 2 Edwards, 37.

274 "The principle is fully established, that in cases free from fraud, a purchaser of land who is in possession cannot have relief in Chancery against his contract to pay on the mere ground of a defect of title without previous eviction." Vick vs. Perry, et al., 7 Smedes & Marsh., 268. Anderson vs. Lincoln, 5 How., 284.

3. When the purchase money became due, the vendee should have tendered the same to the vendor and demanded the title deeds. If the vendor refused to make titles, the vendee might have filed his bill in equity asking a specific performance, and the Court would have compelled the vendor to make titles or release the purchaser from the contract.

4. If it should be contended that the vendor in this case was bound by his contract to make title on the 1st January, 1843, that the day had passed when the bill of complaint was filed, and no title made, we say that although the vendor has not a good title, when the land according to the terms of the contract ought to be conveyed, yet if he can at any time before final decree, make a good title, the Court will compel a specific performance. If the purchaser had asked a specific performance and tendered the purchase money, or paid it into Court, a title could have been procured before final decree. Wynne vs. Morgan, 7 Ves., 403. Mortlock vs. Bullock, 10 Ves., 315. Langford vs. Pitt, 2 P. Wms., 629, 630. Coffin vs. Cooper, 14 Ves., 205. Hepburn vs. Auld, 5 Cranch, 262. Same vs. Dunlap, et al., 1 Wheat, 179. Cooper vs. Dennis, 1 Ves., 565, note 6.

Time, in this case, was not of the essence of the contract. The vendee has waived his right to insist upon relief upon this ground by not making the objection promptly on the day. Waters vs. Travis, 9 John., 46. Seaton vs. Slade, 7 Ves., 265, note 7. Wynne vs. Morgan, 7 Ves., 203. Fordyce vs. Ford, 4 Br. Ch., 371. Sugden on Vend., 281 to 288. 2 Story E., 776. Marquis of Hertford vs. Bowe, 5 Ves., 718, note a. Rogers vs. Saunders, 16 Maine R., 99. Brasier vs. Gratz, 6 Wheat., 207. Garnet vs. Macon, 6 Call, 308. Runnels vs. Jackson, 1 How. Miss., R., 358.

5. The defendant, in his answer, offers to make title whenever the complainant will comply with the covenants of his intestate. These covenants (as the proof shows) were all violated; he has therefore no right to complain. 2 Story Eq., 771. 4 Rand., 481. 7 Conn., 53. 6 Conn., 13.

6. There was no eviction at the time the bill was filed. The 275 complainant then, according to the principles asserted in the cases cited, has no claim to the aid of a Court of equity, but must be left to the remedy which he elected for himself—the covenants of the deed.

7. If it be contended that, although neither fraud, concealment, or eviction be alleged in the bill, yet that an eviction by the Union Bank is proved by an exhibit in the cause—then we insist that an eviction in 1848 cannot be used for the purpose of helping out the case made by the bill in 1844. At the date of the bill, the complainant was in the undisturbed possession of the property.

8. The proof shows that only a part of the property purchased by Hunter of Read was sold by the bank in 1848, viz: the land and a part of the negroes. The complainant retains possession of the balance.

9. It is by no means clear that Archibald Hunter owned any of the property (except the land) when it was sold by the bank. It appears from the deposition of J. M. Hunter, that he had purchased the whole of the Read property of his brother by verbal contract—land, negroes, &c. Pages 32 and 33 of printed record The contract, not being reduced to writing, of course passed no title to the land; but the contract being upon sufficient consideration, and possession being delivered, the title to the personal property passed to the purchaser. The consideration is stated to be the payment of certain debts assumed by James for Archibald—page 33—and the payment to the heirs of what was due them—page 32. He bought subject to the bank incumbrance—pages 34, 35. The contract was made in March, 1841, and he was in possession in 1847. If James Hunter failed to pay the heirs what was due to them or the other debts which he had assumed, this is an affair to be settled between himself and the estate of Archibald Hunter. It is sufficient for us to show that he made the purchase. It devolves upon him to prove that he was released from his contract by Archibald Hunter in his life time. If James M. Hunter purchased the negroes and personal chattels of Archibald Hunter for a consideration, which the latter deemed adequate, then Archibald Hunter could not resist the payment to Read's estate, upon the ground of "failure of consideration."

10. Is Archibald Hunter's administrator entitled to recover the balance due on the McBride obligation? We insist that he is not, unless he has made such a case by his bill as would entitle a pur- 276 chaser to recover back the purchase money. The obligation was transferred to Read by Archibald Hunter, in part payment of the property purchased. He cannot retain the property, and recover back the purchase money. The proof shows that he was in possession when his bill was filed—he neither asks for a title, offers to pay for one, nor does he offer to surrender the property.

11. Are the complainants, Hiram Hunter and Carpenter and wife, entitled to recover the balance due on the McBride obligation? It appears from the record, that it was transferred by Archibald Hunter to Leigh Read, in part payment of property purchased by said Hunter, for the joint benefit of himself and the minor heirs of Adam Hunter, Hiram and Mrs. Carpenter being two of them. 7 John. Ch., 155, and cases cited.

12. The transfer was made in good faith by the guardian, and for the benefit of the wards. There is no fraud alleged or pretended. The wards, after they became of age in 1842, ratified the act of their guardian in making sale of their property in Gadsden, by giving bills of sale to the purchaser—and they ratified the act of their guardian in making the transfer of this obligation by more than five years of acquiescence after full age, with a perfect knowledge that the transfer had been made, and of the purpose for which it was made.

"Minors, when they attain full age, must express their dissent to the act of their guardian within reasonable time." 2 Kent's Com., 195, 6. 6 Con., 506. 2 Kent's Com., 237. 11 John., 539. 14 John., 124. 8 Taunton, 35, 39. "Assent of the minors may be inferred from circumstances, without an express act of ratification." See authorities above cited.

M. A. Long, for appellants:

The argument on the other side is totally irrelevant to the case stated in the bill. The object of the bill is not to rescind the contract, nor to have a specific performance thereof. The contract cannot be rescinded, and both parties put in *statu quo*, because Read is dead and wholly insolvent, and, therefore, cannot return to Hunter the thirteen thousand dollars paid towards the purchase money. A specific performance cannot be had, because Read is dead and

277 wholly insolvent, and therefore cannot remove the bank incumbrance, so as to be able to make a good title. The facts stated in the bill and admitted in the answer show this fully.

On the contrary, the bill prays that the payment of the balance of the purchase money be perpetually enjoined, because Read's estate can neither make title to the property sold, nor answer in damages for failure therein. The existing incumbrance on the property, at the filing of the bill, and the death and total insolvency of Read, make this naturally, and, therefore, legally certain. Therefore, Hunter's recourse at law, upon the covenants of warranty as to the slaves, and for title to the land, was and is wholly worthless. This is the ground upon which relief in equity is claimed. The proof shows that what the bill alleged would actually happen, without the possibility of doubt, has, since the filing of the bill, actually occurred—the land and negroes having been sold under the bank incumbrance. The human mind can scarcely conceive of a case of more flagrant injustice than to allow Read's estate to receive the balance of the purchase money from Hunter's estate, when it is admitted that Hunter's estate has lost the property, and can never collect any damages at law therefor, because of the hopeless insolvency of Read's estate. This proposition is too self-evident to be capable of being made more obvious by argument. The accidental and unforeseen death and insolvency of Read, the vendor, will, unless relieved against, work an injury to Hunter's estate. This is one of the most familiar heads of equity jurisprudence. Story's Eq., 93.

"It may, therefore, be truly said, that the concurrent jurisdiction of equity extends to *all* cases of legal rights, *where, under the circumstances,* there is not a plain, *adequate* and *complete* remedy at law:" says Mr. Justice Story, 1 Con. 94.

Hunter's remedy at law, upon his covenants, upon which it is said he must wholly rely, is not *"complete,"* because it is admitted that any judgment for damages which he may recover, *can never be paid,* and, therefore, is wholly *"inadequate"* to compensate him for the loss of the property which he purchased.

On the same page, (994,) Mr. Story says: "By the term *accident* is here intended, not merely inevitable casualty, or the act of Providence, or what is technically called *vis major,* or irresistible force; but such unforeseen events, misfortunes, losses, acts or omissions,
278 as are not the result of any negligence or misconduct in the party." And on page 115, (sec. 100,) the same author, speaking of cases of accident, says, "they all proceed upon the same common foundation, that there is no *adequate* or *complete* remedy at law under all the circumstances—that the party has rights which ought to be protected and enforced; or will sustain injury, loss, or detriment, which it would be inevitable to throw upon him." The application of this principle to the case at bar, is so plain that comment would seem useless. Hunter buys land and negroes on credit for $27,500. Of this sum, he is to pay nine thousand in cash notes, to be executed by Joseph McBride's executors and others—and for $18,500, he executes three promissory notes, payable one, two and three years from date. For the negroes, he takes a bill of sale, with warranty of title; and for the land, a bond for title, to be made prior to the falling due of the last of the said purchase money notes. The covenants are thus made independent, by fixing different times for the performance by each party of his part of the contract. Hunter pays upwards of thirteen thousand dollars in cash upon the notes, before that sum is due upon them, and delivers to Read an obligation on the estate of McBride for a part of the cash notes. At this point of time, both Read and Hunter suddenly die. Read's administrator brings suit upon the notes, and puts Hunter's administrator to prove all payments made thereon. This he does, to the extent of $13,040, or more, and a judgment, *quando acciderint,* is rendered against him for the balance, near ten thousand dollars. It then becomes manifest that Read's estate is insolvent, and of course can never become otherwise. Hunter's administrator finds that the property in possession of his intestate is mortgaged to the bank, and subject to be sold upon a stock note judgment of Read. What was his duty in the premises? Ought he to have paid the judgment for the balance of the purchase money and the cash notes? We say, certainly not, because his remedy over upon the accounts was wholly inadequate—the estate of Read being insolvent, and obliged ever to remain so. If the administrator of this insolvent estate was permitted to collect from Hunter's estate the amount of the judgment against it, and from the McBride estate the amount of the cash notes, it was obvious that Hunter's estate would suffer irreparable injury thereby. To prevent this mischief, he has applied to a Court of Equity. If the

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mischief had only been *probable,* and not *certain,* as in this case, he 279 would have had this right.

Speaking of bills *quia timet,* Mr. Story says: "They are ordinarily applied to prevent wrongs or anticipated mischief, and not merely to redress them when done. The party seeks the aid of a Court of equity because he fears (*quia timet*) some future probable injury to his rights or interests; and not because an injury has already accrued, which requires any compensation or other relief. The manner in which this aid is given by Courts of equity, is, of course, dependent upon circumstances. They interfere, sometimes, by the appointment of a receiver to receive rents or other income; sometimes by an order to pay a pecuniary fund into Court, and sometimes by the mere issuing of an injunction; thus adapting the relief to the precise nature of the particular case, and the remedial justice required by it." 2 Story's Eq., 130, and authorities there cited.

It will be seen from the record, (page 12,) that on the 10th of December, 1845, an injunction was granted as to the judgment, and a receiver appointed to collect and pay into Court the money due from the McBride estate, in literal conformity to the above authority.

It will also be further apparent from the evidence in the record, that every fact stated in the bill, as the ground for granting this relief, has been fully proven, without the least conflict of evidence as to any one fact; and the Court below would, doubtless, have rendered a final decree for complainant, but for what it considered evidence of other facts, offered by way of confession and avoidance.

Upon this point, I think a few words will make the error of the Court below quite glaring.

Bradford offered the evidence of Bembry to prove that Read was not bound to remove the Bank incumbrance, incurred by the stock mortgages, bond and note executed by Read; but that Hunter was, by the contract, bound to remove this incumbrance. Now, we say, that this proof was wholly inadmissible, could it have been made, because it was in direct contradiction of the written contract itself. That written contract is in the record, and will be found just as I have hereinbefore stated the same, and I trust that there can be no reason at this day to hunt up authorities to prove that written contracts, under seal, may not be contradicted, enlarged, or in any manner altered by parol evidence. My colleague has sufficiently dwelt upon this point.

But when the evidence of Bembry is examined, it will be found 280 that he does not pretend that any body told him, even, that by the original contract, Hunter was to assume and pay the Bank insumbrance. He states the contrary positively, and that on the Tuesday before Read's death, near a year and a half after the date of the contract, Hunter told him that he had then agreed upon a settlement with Read, which made them about even, whereby Hunter was to assume the payment of the Bank debt, and Read was to assign his stock to Hunter. Now, both parties died without executing this verbal agreement, if any such was made, and Read's administrator, instead of treating the matter as concluded, refused at all times to convey the stock, and sued upon the purchase money notes. The Court below was not justified therefore, in saying that Hunter was bound to remove the Bank incumbrance, and in decreeing accordingly. There was no pretence for this. It was nothing less than enforcing an unexecuted parol agreement, made without any consideration, in favor of a party who had himself totally failed to comply with the same, and in his answer swears that, although requested, had continued to refuse to do so, up to the moment of trial. The decree, as will be seen on pages 50 and 51 of the record, undertakes to *adjust* the judgment at law, by a new and independent calculation, to be made by the clerk and master. This was neither prayed for in the bill or answer. The calculation is accurately made by the clerk, according to the data prescribed by the decree, and instead of diminishing the judgment, would have increased it near one thousand dollars. This was a result unexpected to the Court, it is obvious from the latter part of the first paragraph of the decree, in which it is stated that "the balance so found due by the aforesaid calculations, shall be deducted from the aforesaid judgment, and the balance, after such deduction, will be the true amount due by Hunter's estate to Read's estate, and *all the rest of said judgment, except said balance, shall be perpetually enjoined.*"

Now, I respectfully submit that the Court had no authority to attempt to re-adjust this judgment. It was for the true amount, according to the showing of both parties, and the only question was, whether it was against equity and good conscience, under the circumstances, to collect the same. But because the Court committed the error of hearing parol proof to contradict a written contract under

Hunter, Administrator, *vs.* Bradford, Administrator.—Argument of Counsel.

281 seal, and no such evidence appearing, it seized upon parol proof of a subsequent unexecuted agreement, a *nudum pactum,* and fell into the further error of setting up the same, in lieu of the original valid contract, under which the defendant had himself acted, by suing upon the purchase money notes.

It is plain that this was the point upon which the decision of the Court below turned. For it is manifest that if the judgment at law should have been enjoined, for the causes stated in the bill, namely, the death and insolvency of Read, that the McBride obligation should have also been delivered up. But if Hunter was bound to remove the Bank incumbrance—for that is the whole question—then he had no right to complain that Read had failed to do so, and being dead and insolvent, that damages could not be recovered therefor. That such was not the contract, is plain from all the proof, and is pre-supposed by resorting to parol evidence of the subsequent unexecuted agreement, spoken of by Bembry, the witness.

I have not taken the trouble to examine all the books referred to in the brief on the other side, on the various questions therein mooted. But in no solitary case cited, which I have been able to examine, is there one word militating in any degree against the positions which I have here assumed and quoted from Story. The counsel seem to have fallen into the error of overlooking the facts of the case, and thus raising questions which are not here involved.

I have never seen a case in which it was denied that where a party was remitted to his remedy on his covenants of warranty, by the general rules, that the insolvency of the vendor did not constitute a good reason for enjoining the collection of the purchase money. The thing is too obvious for argument. Cases may sometimes be found where the question of fact—of whether the vendor is so insolvent as to render the remedy on the covenants worthless—has been raised. Such is the case in Mississippi, reported in 5 Smedes & Marshall's Rep. There the injunction was refused because the allegation of insolvency was disproved by the evidence. But this principle was only necessary in this case so far as the covenant of warranty as to the slaves was concerned. For it is said by the Supreme Court of Tennessee, in the case of Buchanan vs. Slade, 8 Hump., 518, 19, "Where the purchaser has taken a deed with covenant of general warranty, under which he has entered and remains in the undistur-
282 bed possession of the land conveyed to him, if there be no fraud in the transaction, he cannot before eviction, *on the mere ground of defect in title,* claim relief in equity, either against the payment of the purchase money, or to have the contract rescinded, or restitution of the purchase money. In such cases, he must seek his remedy at law, upon the covenant of warranty in his deed," citing 3 Hump., 16. 2 John. Ch. Rep., 519. 13 Ves., 114.

And because we knew this to be the law as to the slaves, to which we had a bill of sale with warranty, and the quiet possession, we have not come into equity *on the mere ground of defect of title,* but have shown, beyond dispute, that if we do not seek our remedy at law upon the covenant of warranty on the deed, that our search will be fruitless—our remedy will be incomplete and inadequate, because we cannot collect the judgment which may be awarded for breach of the warranty.

The same Court, in the same cause, lay down the doctrine as well established, that where title has not been made to land, the payment of the purchase money may be resisted in equity, upon the ground of mere defect of title. Immediately after the passage above quoted, the Court proceed to say: "But it is otherwise where the purchase money has not been paid and the title made. If the purchaser is in possession under a mere equitable title, as a *title bond or covenant to convey,* he has a clear and *well established right in equity to resist the payment of the purchase money,* or to have the contract rescinded and the purchase money advanced refunded to him, on the ground of defect of title in the vendor. He will not be required to complete the purchase, or to accept a conveyanec, unless a title can be made according to his contract." &c., citing 11 John. Rep., 525. 4 Mad. Ch. Rep., 122. 2 Sim., 29.

This doctrine is also fully laid down in Sugden's Law of Vendors, 345, in these words:—"Where an incumbrance is discovered previously to the execution of the conveyance, and payment of the purchase money, the vendor must discharge it, *whether he has or has not agreed to covenant against incumbrances,* before he can compel payment of the purchase money"—citing anon. 2 Free., 106.—Vane vs. Lord Barnard, Gilb. Eq., 6. Sergeant Maynard's case, 2 Freeman, 1. 1 Vesey, 88. 2 Vesey, 394. 2 Vesey, Junior, 441, and 4 Bro. C. C. Reports, 394.

If it should be said that Hunter had the use of the cultivated part 283
of the land, which the proof shows to have been less than half, there having been nine hundred and forty acres in all, and the use of the negroes, about one-half being capable of labor, and there being twenty in all, from the date of the contract, (2d January, 1840,) until they were sold for Read's debts by the sheriff, 1st December, 1847, a period of near seven years, for which compensation ought to be given, we have an answer which is deemed very satisfactory. That answer is, that Read had upwards of thirteen thousand dollars in cash from Hunter for nearly that whole period, as well as the three years which have elapsed since—say nine years. The simple interest on this sum would amount to about ten thousand dollars—making in all about $23,000 received by Read—a sum equal to about $3,300 per annum.

That we should be in earnest in resisting the payment of the balance claimed of nearly twenty thousand dollars, under these circumstances, as grievous and unjust in the highest possible degree, cannot, we submit, be a matter of wonder.

If the foregoing view of this subject be correct, we need add nothing in relation to the claim of Hiram Hunter and his sister, Mrs. Carpenter, to the money due from the McBride estate, except that it should be decreed to them, instead of James M. Hunter, the administrator of their guardian, Archibald R. S. Hunter. But we will simply on this point call the attention of the Court to two important facts in the record, which must be decisive of the question in their favor, whatever may be the result as between the two estates, namely, those of Read, and Hunter.

No money was demandable from the McBride estate, on account of the shares of Hiram and Grace of the property sold by the heirs of Hunter, until after the death of both Read and Hunter, or until they came of age and made bills of sale, namely, on the first of January, 1842. The agreement (page 20) says, "and the said McBride binds himself in the sum of twenty thousand dollars to give, or cause to be given, the above described notes, whenever the parties aforesaid shall make, or cause to be made to him, good and sufficient titles and bills of sale for the before described property."

From this it is plain that Read acquired no right to the price of the shares of Hiram and Grace by any transfer of the obligation to him, if any such was made; and if he otherwise would, (which we deny,) 284
for the reasons stated in the argument of my colleague, *there was no obligation as to these shares, until that was created by the act of the parties*—consequently, there was none to transfer.

Another fact is, that both Hiram and Grace were infants when Read got possession of this obligation, and were, therefore, incapable of agreeing to its transfer by their brother for his debts, if they had attempted to do so. They were infants at the death of their guardian. The only evidence on the point is that of James M. Hunter, who states that *he* did not know when the McBride obligation was passed to Read, and that neither Hiram nor Grace knew the fact until long afterwards. See his deposition, pages 35, 36, 37.

I contend, in conclusion, that the decree in this case should be reversed, and this Court, proceeding to render such decree as the Court below should have done, do now, by decree, perpetually enjoin the enforcement of the judgment *quando* against the administrator of Hunters estate, and order the judgment, confessed by Mrs. McBride and Robert B. Haughton, to be paid in equal portions to Hiram S. Hunter and to Richard B. Carpenter and wife, and that defendant, Bradford, pay all the costs of this cause.

HAWKINS, J.

We will take up the cases in the order in which they stand.

First. The question raised by the pleadings is this—Is James M. Hunter, the administrator of his brother, Archibald R. S. Hunter, entitled to equitable relief from a Court of Chancery under the circumstances of this case? It must be borne in mind, that this is not a bill for specific performance or the rescission of the contract. In the first instance, the party asking such specific performance "must show that he has been in no default in not having performed the agreements, and that he has taken all proper steps towards the performance of his part." 2 Story's Equity, 81. Nor does he ask a recission of the contract, but only asks an injunction against the collection of any further sum due upon the judgment obtained at law against James M. Hunter, administrator, on the promissory notes given by Archibald Hunter in his life time, to Leigh Read. It will be seen by reference to the statement of the case, that these notes were given to secure the payment for the land and negroes purchasd by A. R. S. Hunter from Read.

285 The bill in this case charges, that there are heavy incumbrances upon the land, that is to say, a mortgage executed by Leigh Read, on the 3d September, 1839, to the Union Bank of Florida, to secure one hundred and twenty-seven shares of stock, amounting to $12,700 and $8,468 borrowed money, for which he gave what is usually known as a stock note.

The bill further charges, that the estate of Read is hopelessly insolvent, and alleges that unless relief is had in a Court of equity, he will be remediless, as the resort to the covenants in his bond by action at law, would be futile and nugatory. The supplemental bill further states, that on the 27th of February, 1845, a judgment was obtained against James M. Hunter, administrator, upon these promissory notes for $9,432 34; and it is to restrain the collection of this money that the bills are filed.

The answer denies that there is any other incumbrance upon the land sold by Read to Hunter than the mortgage given to secure the one hundred and twenty-seven shares of stock, and as to the insolvency of Read's estate, declares that it "cannot admit or deny it," and cannot say whether the estate is solvent or insolvent, owing to circumstances which are set forth. The answer further asserts that at the time of the sale of Read to Hunter, he, Hunter, had full knowledge of the incumbrances, was bound to this knowledge, and that he must seek his redress at law upon the covenants in his bond for title.

As to the answer of Bradford, in relation to the insolvency, we do not deem it a denial of the charge of insolvency contained in the bill. In Apthorpe vs. Comstock, Hopkins' Chancery Reports, 148, the Court say: "Where a defendant thus states his ignorance of the principal allegations of the bill, and merely asserts that while he is ignorant he does not believe them to be true, such an answer can hardly be deemed a sufficient denial of the facts alleged in the bill to dissolve an injunction issued as proper auxiliary to the relief sought." The case is like that of Roberts vs. Anderson, 2 John. Ch. H., 204, in which the Court continued an injunction after a similar answer. So, too, Chancellor Kent uses this language: "With respect to the sufficiency of the answer, the general rule is, that to so much of the bill as is material and necessary for the defendant to answer, he must speak directly, without evasion, and not by way of negative pregnant.
286 He must not answer the charges merely literally, but he must confess or traverse the substance of each charge positively and with certainty, and particular precise charges must be answered particularly and precisely, and not in a general manner, even though a general answer may amount to a full denial of the charges." "Indeed," as Lord Eldron observes, "the policy of the pleadings in this Court is, that a general denial is not enough, but that there must be an answer to the sifting inquiries upon the matter charged. If a fact be charged which is in the defendant's own knowledge, he must answer positively and not to his remembrance or belief, and as to facts not within his knowledge, he must answer as to his information or belief and not to his information or hear say merely, without stating his belief one way or the other." 1 Harr. Ch. R., 302. Mitford, 246, 247. Cooper's Eq. Pl., 313, 314. 1 John. Ch. Rep., 107, Woods vs. Merrell. In Ward vs. Vanbokkelin, 1 Paige R., 100, it is laid down, that an injunction on coming in of the answer, will not be dissolved, unless the defendants deny all the equity of the bill.

Governed by thees principles, we must think that the answer of Bradford is not a denial of the allegation in the bill as to the insolvency of Read. Being the administrator of his estate, he could certainly have formed some estimate, some idea as to the solvency or insolvency of the estate. And the facts as to this question being presumed to be peculiarly within his knowledge, his answer should have been explicit, and not being so, must be regarded as an admission of the charge of insolvency. This question, as will be seen, is of importance in the consideration of the case at bar. It is contended that the complainant in this case, is not entitled to relief, because his intestate bought with knowledge of the incumbrance upon the property, took possession of it, and that there has been no eviction and that his remedy must be upon his covenants for title. There can be no doubt as to the correctness of this as a general principle, in cases where a deed has been given, and the contract executed. In Abbott vs. Allen, 2 John. Ch. R., 519, it was decided that a purchaser of land who has paid part of the purchase money and gives a bond and mortgage for the residue, and is in the undisturbed possession, will not be relieved against the payment of the bond or proceeding on the mortgage on the mere ground of defect of title, there being no allegation of fraud in the sale, nor any eviction, but must seek his

remedy at law upon the covenants in the deed. This decision is in 287
accordance with the case of N. J. & S. Bumpus vs. Platner, et al., 1 John. Ch. R., 213, and many other cases. Courts draw a distinction as to claims for equitable interposition between contracts *executed* and *executory* contracts, a distinction, we think, founded upon good sense and justice. We will cite some of them, giving the language of the Judges pronouncing the decisions. In the case of Buchanan vs. Slade, 8 Humphreys, 518, the Court say: "Where the purchaser has taken a deed with covenant or general warranty, under which he has entered, and remains in undisturbed possession of the land conveyed to him, if there be no fraud in the transaction, he cannot, before eviction, on the mere ground of defect of title, obtain relief in equity, or have the contract rescinded, or restitution of the purchase money. In such case, he must seek a remedy upon the covenant of warranty in his deed. But it is otherwise when the purchase money has not been paid and title made." If the purchaser is in possession under a mere equitable title, as a title bond, or covenant to convey, he has a clear and well established right in equity to resist the payment of the purchase money, or to have the contract rescinded, and to have the purchase money advanced, refunded to him on the ground of defect of title in the vendor. He will not be required to complete the purchase or accept a conveyance, unless a title can be made according to the contract." So, in a case reported in Monroe, 202, it is said "A vendee will not be compelled to accept a conveyance under an executory contract, until the vendor exhibits a regularly deduced title, free from incumbrances, and apparently sufficient to assure the estate according to the contract. But a vendee who has accepted a deed and the possession with a covenant of warranty is presumed to have inspected the evidences of title and to have been satisfied with assurances, and to have received the title papers."

The case at bar is one entirely executory in its character. It is an agreement to convey, and not a conveyance *as to the real estate*. In 5 Wendell, 29, Jackson vs. Moncrief, it is laid down that, although the instrument contains words of present purchase and sale, yet those words must be construed in reference to the whole instrument; and if further conveyances were to be made, it would be an agreement to convey, and not a conveyance—and until these conveyances were made, the agreement was inchoate. The contract in 288
this case being executory, we see no good cause why a Court of Equity should not interfere to restrain the further collection of the purchase money, for which judgment is had at law, when it is very clear that the covenants entered into by the vendor cannot be complied with, although the incumbrance was known by the vendee to exist. Yet if the contract was to the effect that the vendor should make good and lawful rights, the Courts will not compel him to accept a defective title in the teeth of his covenants. If the rule were otherwise, no course would be open to a vendee, who desires to secure himself against known defects. Jackson vs. Ligon, 3 Leigh, 161. 3d Munford, 68. And further, that, although the day of payment may have arrived, a vendee is not bound to part with the purchase money, unless a title is made or tendered, according to the terms of the contract. 4 Mun., 12.

The first of these propositions is certainly not in accordance with the more rigid rules of the English Courts, in which it is held that possession by the vendee is equivalent to a waiver of any objection to any incumbrance which may exist; but without positively adopting the rules of the Virginia cases, we must say they are based on justice and propriety. A person entering into an agreement for a purchase of land, knowing of an incumbrance, feels assured, that when he takes a bond from the vendor to make him a perfect title, on the payment of the purchase money, that he will be protected, in the language of Judge Tucker, "against known, as well as unknown incumbrances." Jackson vs. Ligon, case before cited.

But resting the case upon the principle that the party in the present instance must seek his redress at law, upon the covenants in his bond—in that redress adequate, or complete? The record, on the contrary, shows that, owing to the insolvency of the estate of Read, no redress whatever could be effected by a suit upon the title bond; besides, supposing that the administrator of Hunter was now to pay the balance of the purchase money to the estate of Read, why compel him to seek his redress at law, and put him to this circuity of action, where a Court of competent powers can give him direct redress, should he present a proper case.

In relation to the question, whether the insolvency of the vendor is a good ground for an appeal to the equity side of the Court, we

quote the following language used by the Court in the case of Vance vs. House's heirs, 7 Munroe, 541; and while we give the quotation our decided approbation, it will be observed that it was in case of an executed, and not executory contract. "But passing from this preliminary suggestion, we would proceed to remark upon the merits of the controversy, that this is the case of an executed contract, where the conveyance has been made and accepted, with warranty of title, and possession delivered and uninterruptedly enjoyed, without eviction or molestation. In such a case, a bill for the dissolution of the contract cannot be sustained, and the payment of the consideration enjoined, except in case of fraud, *insolvency*, or non-residency of the vendor, and a palpable and threatening danger of immediate or ultimate loss, without legal remedy, by reason of the defects of the title conveyed, and the inability of the vendee to protect himself against eviction under it. And to sustain such a bill, after the vendee has accepted the conveyance, the *onus* lies upon him to establish, to the satisfaction of the Chancellor, that the defect of title and imminent danger of eviction and loss exists."

There had been an injunction granted in this case, but the bill was dismissed, because it contained no allegation of fraud, insolvency, or non-residency. In Morrison's administrator, vs. Backwith, 4 Munroe, an injunction was granted, upon showing the insolvency of the vendor. Hieronymous vs. Hicks, 3 J. J. Marshall, 701. 6 Munroe, 232. 1 Dana, 305.

In the case of Vick vs. Percy, et al., 7 Smedes & Marshall, the Court hold the principle as laid down by Chancellor Kent, in the case of Abbott vs. Allen, 2 John. Ch. R., 519, but it remarks, "that the only two grounds alleged for the interposition of equity are *fraud* and insolvency of the defendant. These are denied by the answer, and there is no proof to establish either. The complainant being in possession, under a deed with warranty, with no fraud made manifest, and with nothing to show that the covenanter is not able to pay any damages that may be recovered against him, has no right to call his vendor into a Court of Equity to litigate an adverse title—he must rely on his covenants, if he should be evicted." This Court here virtually admits that insolvency would be a cause for equitable interference. In Hunter vs. O'Neil, 12 Ala. Rep., 37, the Court lays down the following propositions: "An obligation to make a deed to
290 certain lands, when the price contracted for is paid, is in law a covenant to make a good title, when the condition is performed by the purchaser. When the vendor entering into such a contract, becomes insolvent before the price is paid, and the purchaser shows an outstanding incumbrance created by the vendor, he will be entitled to relief in a Court of Equity but unless the money is actually tendered, upon condition that a title is made, the only relief is to enjoin the vendor from proceeding for the price, until he gives indemnity against the outstanding incumbrance."

After these adjudications, we are clearly of opinion that the insolvency of the vendor is good ground for equitable interposition, upon the principle that Chancery will lend its aid, whenever there is not a full, complete, or adequate remedy at law. As to the personal property sold by Read to Hunter, it requires no argument or authority to show that an implied warranty as to title followed the sale, though the record shows there was an absolute warranty.

It is urged that Hunter was bound to tender the money due upon the purchase, and if he had, the incumbrance would have been removed—but is this a *sequitur?* The amount due upon the contract would not have been sufficient to have removed the incumbrance, and what guarantee would the vendee have had that it would have been so applied? Again: Why tender the balance of the purchase money, if it was clearly ascertained and settled that the vendor could not give a title in accordance with his bond? In the language of the Court, in Fisher vs. Bridges, 4 Blackford, 518, "the utter inability of the defendant to convey, dispensed with the necessity of the demand, as the law does not require a vain or nugatory thing to be done."

It is contended by counsel for defendant, that Hunter agreed to pay the stock note of Read, and Read was to transfer the Union Bank stock to Hunter. By reference to the record, we cannot perceive that any such arrangement was positively entered into. There was a negotiation pending, no doubt, as to this subject, but it seems never to have been carried into operation, owing to the several deaths of Read and Hunter, and was altogether of an inchoate nature.

Bembry says: "They had agreed to come to a settlement, which was prevented by the sudden death of Read." In his second examination, he says: "Archibald has told me that he and Read were to have a settlement, and that there would be a small difference be- 291
tween them, but in whose favor he did not know." A Court could not consistently enforce an imperfect and incomplete verbal agreement between parties, at variance with the solemn obligations in writing, and when there is no evidence to show that it was executed in part or in whole by either of the parties.

Before closing this branch of the subject, it will be seen, by reference to the evidence, that the land sold by Read to Hunter, and the negroes, except one or two, were sold under an execution against the estate of Read, in favor of the Union Bank, to satisfy Read's stock note. This having occurred since filing the bill by complaint, no mention is made of it; but by looking at page 50 of record, we see an agreement in these words: "It is agreed by the parties by their solicitors, that the property sold by the execution of the Union Bank vs. Read's administrator, brought $5,079, $4,754 of which was recovered by the Bank, in full satisfaction of their execution against Read's estate, and of their lien upon the property sold by Read to Hunter."

Although as a general rule, evidence is inadmissible, unless relating to the issues made up in the pleadings—still, the evidence as to the fact of sale being before the Court by consent of counsel, we feel authorized to advert to it. The sale in this case brings the suit substantially within the rule laid down in Abbott vs. Allen.

Here was a judgment at law—execution and property sold—a sheriff's deed, no doubt, given, under which possession could have been enforced at law, unless the party in possession submitted, and covenanted to give up possession. It would have been idle and futile for complainant to have litigated further as to the land, and we see, in 3d J. J. Marshall's Reports, 378, it is not the duty of a party so situated to do so. The Court say: "If the party submits to the judgment, it is equal to an actual eviction by the *habere facias*. No other evidence of a legal eviction is required than the judgment of the Court."

Upon a review of the facts of the case, it would be, we deem, extremely hard and inequitable that there should be a further collection of the purchase money against the estate of Hunter. It has expended upwards of thirteen thousand dollars, and does not seek by the present proceeding a recovery of any part of this sum against the estate of Read—the property for which this amount was paid—and other liabilities incurred, has been sold under execution against the 292
estate of Read, and goes to pay its debts. There may have been *laches* on the part of the estate of Hunter, no doubt, in not offering to complete the sale, though as we have seen, it would have been a mere form, owing to the insolvency of Read's estate.

The estate of Read, on the other hand, was bound to remove the incumbrance on the property sold, by the first day of January, 1843, which it did not do, and was equally, if not more at fault, than the estate of Hunter. The loss sustained by the latter estate is far greater than that sustained by Read's, and we are disposed to let the parties remain where they now are.

It is therefore, ordered, adjudged and decreed, that the decree rendered in the Court below, be reversed, and that the injunction heretofore granted in this case be made perpetual.

RICHARD B. CARPENTER AND WIFE, AND HIRAM HUNTER, VS. JULIA MCBRIDE, EXECUTRIX, ROBERT B. HAUGHTON, RICHARD H. BRADFORD, ADMINISTRATOR OF READ, AND JAMES M. HUNTER, DECEASED

Where a guardian or any other person acting in a fiduciary capacity, transfers an obligation securing the payment of money to a third person, and it is manifest on the face of the paper that minor heirs or *cestui que trusts* are interested in the fund secured to be paid, a Court of equity will follow the fund into the hands of the assignee, or interpose to prevent its payment to him. And this is done on the familiar and well established principle, that trusts are not only enforced against those persons who are rightfully possessed of the trust property as trustees, but against all persons who come into possession of the property bound by the trust with notice.

HAWKINS, J.

The complainants in this case come into Court and claim the proceeds of what is termed the McBride obligation, transferred by A. R. S. Hunter to Leigh Read, in part payment for lands and negroes sold by Read to Hunter. This instrument is in the following words:

EXHIBIT F.

Condition of a bargain and sale made and entered into between Archibald R. S. and James M. Hunter, and A. R. S. Hunter, guardian of William H., Hiram S., and Grace Fenton Hunter, minor heirs of Adam Hunter, late of the County of Gadsden, deceased, of the one part, and Joseph McBride, of the County aforesaid, (all of the Territory of Florida) of the other part, witnesseth: That the said parties of the first part have sold to said McBride all the land, negroes, stock, and every other thing or things upon or belonging to said plantation and premises belonging to said estate, and hereby bind themselves in the sum of 20 thousand dollars to make or cause to be made to him good and sufficient titles to the property aforesaid, as soon as it can legally be done; and said McBride shall give them (or deposit in the clerk's office) his notes (with security) for fourteen thousand dollars (deducting or settling what they may owe him) payable at the following times, viz: six thousand dollars on the 1st of May, 1839, two thousand on the 1st of May, 1840, two thousand the 1st of May, 1841, two thousand on the 1st of May, 1842, and two thousand on the 1st of May, 1843, all with interest from the 1st of May, next; and said McBride binds himself in the sum of twenty thousand dollars to give or cause to be given the before described notes whenever the parties aforesaid shall make or cause to be made to him good and sufficient titles and bills of sale for the above described property. Witness our hands and seals this 30th day of January, A. D. 1838. Test, J. D. Edwards.

Signed, A. R. S. HUNTER, [SEAL.]
JAMES M. HUNTER, [SEAL.]
ARCH. R. S. HUNTER, [SEAL.]
Gnardian for the Minors,
JOSEPH McBRIDE, [Seal.]

I hereby certify that A. R. S. Hunter has made me a deed to the land, which if I cannot get a legal title to the whole of the property, I am to deed back to him again. Witness my hand, this 3d April, 1838. (Signed) JOSEPH McBRIDE.

Test—H. Doggett,
D. S. McBride.

They set forth in their bill that Grace F. and Hiram Hunter, are two of the children of Adam Hunter, deceased, and as such entitled
294 to a distributive share of the estate of their father—that on the 27th January, 1837, they wer minors, and A. R. S. Hunter was at that time the guardian, and so continued until his death, in 1841. That a partition of the estate of their father was had, as will be seen by reference to the report of the commissioners upon the record, and that by this partition a separate and perfect title was made to said property. That on the 30th day of January, 1838, Joseph McBride purchased all the estate of their father, and gave the obligation as before set forth, never having executed the notes, but duplicate originals of it were retained by said McBride and by A. R. S. Hunter, their guardian. That said Hunter, on becoming indebted to Leigh Read, the intestate of R. H. Bradford, delivered, as they are informed that said Bradford contends, the said obligations to said Read as collateral security for certain notes, which said Read held against him. That they believe a part of said obligation had been paid to A. R. S. Hunter before it was delivered to Read, and further payments afterwards. That there is about six thousand dollars due still on said obligation. The whole obligation was then due in equal portions to the complainants, and their three brothers, A. R. S., James M., and William A. Hunter—the latter has since died without wife or child. That the whole of the money collected amounted to more than the shares of the three brothers and has been used by James M. and A. R. S. Hunter, and the complainants have never received any portion of the money due on said obligation. They now claim the balance due on said obligation, which they state is claimed by Bradford, administrator of Read, and charge that this balance belongs to them, being part of the consideration for which the property was sold. That on their coming of age they have made bills of sale of their portion of the said property to the executor of McBride.

The answers of Mrs. McBride and Haughton and the answer of James M. Hunter, admit the allegations of complainants' bill to be true, whilst that of Bradford, not denying the matters and things set forth in said bill, nevertheless insists that the McBride obligation belongs to the estate of Read, he having received it in his life time by regular transfer from A. R. S. Hunter, in part payment for the land and negroes purchased from him by Hunter for himself and the other heirs of Adam Hunter, and that therefore the bill is without equity.

The first question here is, had A. R. S. Hunter a legal right to 295
transfer the obligation to Read so as to convey the interests of the complainants', at that time minors, and he their guardian? It is unnecessary to enter into an elaborate statement as to the duties which a guardian should perform to his wards. That subject was fully discussed by the bench and the bar in the case of Williams vs. Mosely, 2 Florida Reports, 304. He can do nothing to prejudice his ward. Considered as a trustee, he cannot alien the trust fund in payment of his own debt, 5 Rand., nor alter the destination of the fund for which it was originally intended. 4 Dess., 154. Hill vs. Simpson, 7 Vesey, 152. When a Court can pronounce a contract to be to the prejudice of the infant, it is void. Maule and Selwyn, 282. 2 Mason, 82. Chancellor Kent, speaking of the rights of guardians, uses this language: "Though it be not in the ordinary course of the guardian's administration to sell the personal property of his ward, yet he has the legal right to do it, for it is entirely under his control and management, and is not obliged to apply to this Court for direction in every particular case." "The case of third persons dealing with executors and administrators in their representative character, is analagous and throws strong light on the subject." Lord Kenyon, the Master of the Rolls, admitted that in general, the purchaser from the executor, of the testator's assets, was not bound to see to the application of the money, but if upon the face of the assignment of the property it appeared to have been in satisfaction of a private debt of the executor, the sale was fraudulent against the persons interested under the will, and equity could relieve. The same doctrine is held in Scott vs. Tyler, Dickens, 712. And Lord Thurlow held that if one concerted with the executor to obtain the effects of an estate in extinguishing the private debt of the executor, or in any other manner, contrary to the duty of the office of executor, the purchaser would be liable. In Hill vs. Stephens, 7 Vesey, 152, Sir William Grant made a decree setting aside the transfer of assets by an executor to secure a debt of the executor under circumstances of gross negligence, though not of direct fraud in the creditor, to whom they were transferred. The decisions in the above cases, are sustained by Chancellor Kent, who uses this language: "I have looked pretty fully into the decisions in the analagous case of a purchaser from an executor of a testator's assets, and they all agree in this, that the purchaser is safe, if he is no party to any fraud in the executor, and has 296
no knowledge or proof that the executor intended to misapply the proceeds, or was in fact by the very transaction, applying them to the extinguishment of his own private debt." 7 John. Ch. Rep., 151, Field vs. Scheiffelin, et al.

It is superfluous to remark, that, under the circumstances of this case, Read was fully aware that the transfer of the McBride obligation to him was to pay a debt of Hunter, the guardian—that, on its very face, it contained notice of the fiduciary character of Hunter; and the transfer to him being out of the ordinary duties of the guardian, he took the obligation at his peril, and was guilty of negligence in not ascertaining whether Hunter had the right to assign the obligation to him. Of course, we refer only to the interest of complainants secured by the obligation. It was a trust fund in the hands of Hunter, the guardian, and it is a familiar rule of Courts of Equity, that all persons acquiring property bound by a trust shall be considered as trustees. "If a trustee purchase property with the trust funds, there is a resulting trust for the *cestui que trust;* so that he may either claim a beneficial right to the property, or at his election, claim a lien upon the property, for the security of the money invested in it; and if the trustee sell, the purchaser from him, with notice of the trust, stands in the shoes of the trustee." Turner vs. Street, 2 Rand., 408. "Trusts are not only enforced against those persons who are rightfully possessed of the trust property as trustees, but against all persons who come into possession of the property bound by the trust, with notice of such trust." Adair vs. Shaw, 9 Sch. & Lefr., 262.

Even if this fund secured by the obligation has gone into the hands of Read, equity would follow it, and hold it subject to the claim of complainants; and, *a fortiori*, will it restrain its taking the direction asked for by Read's administrator, unless there are equitable circumstances rendering it proper that it should do so?

James M. Hunter says that there was no understanding that the Read property was purchased for the benefit of all the heirs and does not know whether Hiram and Grace knew of the transfer of the McBride obligation, but is inclined to think that they did not know it at the time. But whether they knew of it or not is immaterial, as they were infants, and on their coming of age, they might affirm or disaf-

297 firm the transfer. James M. Hunter further says, that the complainants have never received from him, or his intestate, in property or money, any portion of the McBride obligation, and that it never was agreed between him and A. R. S. Hunter that he should pay complainants their share. The complainants cannot now look to the property purchased by A. R. S. Hunter, for their portion of the debt secured by the McBride obligation; and though they might have recourse upon the bond of their guardian, still that is matter at their option, and they have a right to pursue the trust fund, that being the legitimate source from which they can derive payment. It is true the complainants, on obtaining their majority, affirmed the sale to McBride, but this cannot, by any means, be regarded as a confirmation of the transfer of the obligation, so far as their portion was concerned, to Read; and, indeed, after a careful inspection of the record, we can see no act on their part that actually or impliedly ratifies this assignment by Hunter to Read, or that goes to show any intention on their part of relinquishing the claim upon the trust fund. Deeming their equities therefore in this behalf perfect and far superior to that of the estate of Read, we think that they should be the recipients of the balance of the proceeds arising from the McBride obligation, it appearing that this amount does not exceed the sum to which they are entitled as their share of that obligation.

The Court, therefore, directs the following judgment to be entered, to wit:

Be it remembered that this cause being heard upon a transcript of the record of Leon Circuit Court, by appeal from the decree rendered therein, and the same being fully considered by this Court, it is ordered, adjudged and decreed, that the decree of the Circuit Court of Leon County be, and the same is hereby reversed. And this Court, proceeding to render such decree as should have been rendered in the Court below, doth further order, adjudge and decree, that complainants are entitled to the benefit of the decree heretofore rendered in this cause against Julia F. McBride, executrix of Joseph McBride, deceased, and Robert B. Haughton, on the 29th day of July, 1847, and that the proceeds thereof be paid to them, respectively, in equal portions; and that complainants recover from Richard H. Bradford all their costs expended in this cause, and that said Bradford pay all the costs of this cause, incurred by reason of the appeal to this Court.

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298 JOHN A. SUMMERALL, PLAINTIFF IN ERROR, vs. DANIEL THOMS AND WIFE, DEFENDANTS IN ERROR.

The circumstance that a person has wishes or a strong bias in reference to the subject matter of a suit, is not sufficient to disqualify him as a witness. He must have a direct interest in the event of the suit, and not merely a collateral interest, which last only goes to his credibility, and ought therefore to be carefully weighed by the jury.

In an action of detinue brought to recover a slave where the defence set up by the plea of the defendant, is, that the slave sued for never was the property of the plaintiff, evidence introduced by the plaintiff to establish his title which shows a verbal contract or arrangement that could not possibly have been performed within the year, upon which contract or arrangement the title of the plaintiff depends, the Court ought to instruct the jury to disregard such evidence, as only tending to prove a contract upon which, by the statute of frauds, no action could be sustained.

Where the persons of the same family dwell together, the possession of slaves living with them, will be presumed to be in him or her who has the right of property. And where one has had the possession of a slave for five years or more, under claim or assertion of right, and this claim of right is known to the other members of the family, such length of possession under such circumstances, constitute a good prescriptive right to the slave, and the claim of the others by suit, after such lapse of time, is barred by the statute of limitations.

This was an action of detinue for the recovery of a slave, brought in the Circuit Court of Duval County. The jury, under the instructions of the Court, returned a verdict for the plaintiffs, and the defendant brought the case to this Court by writ of error.

The nature of the case—the points ruled by the Court below—the instructions given——and the testimony of the witnesses, are set out with precision and exactness, in the opinion delivered by a majority of the Court.

Thompson, for plaintiff in error.

I. As to the first error assigned—the Court below should have sustained the objection to the competency of Joseph Summerall as a witness.

It clearly appeared from the testimony that he held property which he claimed by the same title. A recovery by the defendants in error

would have estopped them from the assertion of claim by them against 299
him. The general rule is laid down in 1 Greenleaf on E., § 386, *et seq.*

II. The Court erred in the refusal to instruct the jury as prayed for by complainant in error—

1. As to the statute of limitations. The limitation of our statute of 1828, is five years in actions of detinue. Thomp. Dig. 441, 442. Under similar statutes in Virginia and Kentucky, five years peaceable possession of a slave acquired without force or fraud, will entitle a plaintiff who has lost such possession to recover. Newby vs. Blakey, 3 Hen. and Munf., 57. Shelby vs. Guy, 6 Peters Cond. Reps., 345. Smart vs. Vaugh, 3 J. J. Mar., 363. Clark vs. Butler, 7 J. J. Mar., 194.

In the case at bar, the possession of plaintiff in error was certainly with claim of title, as tenants in common with the defendants in error, if not adverse. It was peaceable, and not acquired by force or fraud.

2. As to the question of the statute of frauds. The agreement to divide the issue of Phœbe as they were successively born, was one which, from its very nature, could not have been performed within the year after the making thereof, and should have been reduced to writing. Thomp. Dig., 218. Peter vs. Compton, 1 Smith Lead. Cas., 143, and notes thereto.

The parties to the suit and Joseph Summerall, who are alleged to have entered into this agreement to divide, were all infants. Joseph says he was too young to understand it.

III. As to the instructions given to the jury.

1. Statute of limitations. This is clearly erroneous, there being no proof in the record of any bailments or delivery by Mrs. Thoms to the plaintiff in error, or indeed proof of any possession in her distinct from plaintiff in error, and adverse to him. However correct it may be in point of law, it is erroneous as applied to the facts of the case presented in the record.

2. In reference to the statute of frauds. Upon this question the Court charged the jury, that the action is not based upon the agreement entered into between Petty and wife and the Summeralls—if it was not so based, then the statute of frauds would apply, provided the contract was executory, &c.

This was clearly a misdirection of the Court. The question was 300
one of title, and *was* based upon the agreement. The property in Phœbe, the mother of the slave in dispute, was proved to be in the plaintiff in error, and in Mrs. Thoms and Joseph Summerall. The slave in dispute, therefore, belonged to the owners of Phœbe, and the right was in all as tenants in common, unless they or some of them had subsequently parted with the title. Mrs. Thoms, as one of the tenants in common with John, could not sue him at law in this action to recover the possession from him. If she has any right of possession or property independent of, or adverse to John, it can only be based upon an agreement to make partition as set up. It is true, the defendants in error did not declare upon the agreement, i. e., count upon it, yet they give evidence of it as a link in their chain of title, and as proof of the severance of the tenancy in common.

The Court, however, finally informed the jury that this question could not be considered on the ground that the statute of frauds should be specially pleaded. It seems to me that the rule of Court on this point was misapprehended by the Court, and it does not apply to a case like this. If the action had been for damages for the non performance of the agreement, then the defence should have been specially pleaded, but in this action, which is detinue, the issue was upon the title, and the verbal agreement set up was offered as proof of the title necessary to maintain the action. When offered as evidence, it was competent for the other party to oppose the statute of frauds to the effect of the evidence.

As to the question, whether the agreement was executed or executory. An executed contract is one performed on both sides; this was not such case—there is no proof of performance on either part. There is no proof of any distinct and independent possession of Mrs. Thoms. Neither was there any part performance by Mrs. Thoms within the year, or afterwards.

3. As to possession. The charge or instruction is, that where *several* slaves belong to *several* persons of the same family, the possession is in all.

The proof is possession by plaintiff in error, distinct and separate from the other members of the family since 1841. Plaintiff in error, Mrs. Thoms, and Joseph have not formed one family since 1835—they have lived separately since that time.

Summerall vs. Thoms and wife.—Opinion of Court.

301 *Long & Walker*, for defendant in error:

1. The general rule is, that "a witness is disinterested, who can gain nothing by the event of the suit." 8 Comyn's Dig., 1055. Joseph A. Summerall could have gained nothing by the event of this suit, and, therefore, first error is not well assigned.

2. The next objection is, that the husband should not have been joined as co-plaintiff in this action; but "in a suit for a cause of action accrued to the wife, done in her own right whilst single, she must be joined." 2 Comyn's Dig., 230, note e. Gould's Pleading, 198.

3. As to the statute of limitations. "Adverse possession required to bar the assertion of a legal title by the owner, must be an actual, continued, visible and *hostile* possession." 4 Kent, 446. 2 Kent, 504. "Where there is a doubt whether the possession is *adverse*, or merely permitted by the owner, it is a question of fact for the jury." 2 Starkie Ev., 887.

4. The statute of frauds has no application to a contract which has been fully performed. 1 Kelly, 355—citing Barton vs. Collier, 4 Bing., 309. Shaw vs. Woodcock, 7 B. & C., 73.

LANCASTER, J.

This was an action of detinue, brought by Thoms and wife, to recover possession of a female slave named Sue. There are two counts in detinue. The first charges a delivery of the slave to the defendant, to be re-delivered to the plaintiff, Eliza Thoms, when required. The second charges that, before the intermarriage of the said Eliza and the other plaintiff, Daniel Thoms, that she casually lost the slave out of her possession, and that the said slave came to the possession of the defendant by finding; and the usual breaches are assigned to both counts. There is a third count in debt, for the use and hire of said slave.

The defendant pleaded first to the 1st and 2d counts, *non detinet*.

2dly. That the girl Sue, mentioned in the 1st and 2d counts of the declaration, is not the property of plaintiffs, or either of them.

3rdly. That the said Eliza Thoms was not lawfully possessed of said slave, as is in the 1st and 2d counts of the declaration alleged.

4thly. As to the third count in the declaration, the defendant pleads, never was indebted in manner, &c.

302 5thly. A plea to all the counts of the declaration, that the said several causes of action did not accrue within five years next before the commencement of this suit.

On all which pleas, issue was joined.

The testimony given on the trial of the case is set out in a bill of exceptions, and made a part of the record, as well also as the instructions given by the Court.

George Petty, a witness, testified that he sold a negro woman, Phœbe, and her child, Peter, to the children—John A. Summerall, Joseph E. Summerall and Eliza Summerall, (now Eliza Thoms.) There was a bill of sale made to the children of the woman and her child, Peter; the purchase money was three hundred dollars, and the grandfather of the children acted as their guardian, to divide the children of Phœbe between them, after the following manner: John A., the defendant, being the oldest, was to take Peter, and Joseph was to have the next, and Eliza the next, in succession as they were born. Phœbe had other children afterwards—the next after Peter was Peggy, (Joseph's,) the next Patience, (Eliza's). Peter took sick, and died shortly after or just before the birth of Patience. The next child of Phœbe was a girl, Flora, (owned by John Summerall, or called his). A little while afterwards, there was a boy, Simon, (under the agreement, Joseph's). Flora died. The next child of Phœbe was Sue, (Eliza's); the next Cornelia. All agreed that the children should be divided in this way, in order as they came. He did not know whether the contract was changed—if it was, he did not know it. He supposed that John Summerall claimed and owned Cornelia. He knew nothing to the contrary, but that the children agreed to the division at the time of the purchase. It was over twenty years before witness testified that Phœbe was sold to the children, John, Joseph and Eliza; and the agreement above set forth, made to divide in succession, was by parol. At the time of the agreement to divide, all the children were under age. Peter, Flora and Cornelia are dead.

Witness thinks Eliza had possession of Sue—Eliza kept house for John for some time. Sue was with her sometimes—called Sue her's; Sue went to John's house frequently, where Eliza was. It is more than ten years since Eliza lived with John.

Other witnesses were sworn, whose testimony does not materially vary the testimony above stated, and among others, Joseph E. Summerall, one of the distributees under the above stated agreement, who testified that John had Simon, (one of Phœbe's children). Witness once disputed claim to Simon, and always regarded him as his own. The three that fell to John died. Was present at the arrangement to divide, but too young to understand. Peter was two or three years old when he died—John claimed him. Flora was three or four years old when she died; Cornelia also was a boy. None of the heirs claimed Peter, Flora and Cornelia. Old Simon, the husband of Phœbe, bought her for $750—which was divided among them. 303

There is testimony of several witnesses, varying in character, concerning the length of time during which John the defendant, has had Sue in possession.

Joseph E. Summerall testifies that all the negroes have been in possession of John. Himself and Eliza lived with John, and the children were in possession of all, and at the disposal of each of the owners. After witness and his sister Eliza quit John, he, witness, took one of the children of Phœbe, and Eliza took one. John married in the year 1838, and Eliza has not lived with him since. Sue was an infant at the time, and stayed some time longer. Sue lived with Phœbe until the early part of the year 1844—then went to John's and stayed. Witness thinks he quit staying with John in 1843 or 1844.

Joshua Fennamore testifies that when John, Joseph and Eliza lived together, he used to be at the house of John, and heard him say Sue, or Susan, belonged to Eliza. John was of age, and Eliza kept house for him at the time, and Sue was small. It was eight, ten, or twelve years ago—before John was married.

Hagans, a witness for plaintiff, testified: Don't know as to the title to Sue. Knew Peter—John claimed him. Peter died—John spoke of having lost one of his negro boys. John has had Sue about five or six years. Peter died a good many years ago—John was not of age at the time.

S. Vandergriff testified: Sue has been in defendant's possession since 1841—was at defendant's house, and saw her there then—does not know when she, Sue, left Phœbe. Was all round defendant's kitchen—Sue slept in negro house. Phœbe lived near John Summerall's. She (Sue) was not called Mrs. Thoms property, but undivided property—heard so from Joseph E. Summerall and John's 304
wife. Thoms and wife married on the 7th of October, 1845.

George Petty, the first witness, says: Phœbe lived within gun shot or hailing distance of John, the defendant's house, but not on his place. At the birth of twins by Phœbe, (which was after she had been sold), Sue was permitted by Eliza to go and nurse the twins, and afterwards Sue went to John Summerall's. Sue staid with her mother before the birth of the twins—Sue is worth $400. Understood always that Joseph exercised ownership over young Simon.

The first question raised on the record on these proofs is, that there is a misjoinder of plaintiffs in the action—it being shown by testimony, that they intermarried after the passage of the act of 6th of March, 1845, entitled "An act to secure certain rights to women." Counsel for appellant did not insist on this point, and waived it. We do not, therefore, decide it.

The first error assigned is—the Court erred in admitting Joseph E. Summerall to testify, as a witness on behalf of the plaintiff below; and the ground of objection is his interest. The witness testifies that John, the defendant below, has possession of Simon, one of Phœbe's children. Witness once disputed his claim to Simon, and always regarded him as his own.

George Petty says, "he understood always that Joseph exercised acts of ownership over young Simon, and from this, it may be presumed he feels an interest in the establishment of the parol agreement for the partition of Phœbe's children, in the manner testified to by George Petty—as it appears that all those who, under that agreement, could be claimed by John, had died quite young, and two, at least, before the Summeralls were of lawful age. And that thereby, while John, by such a division, would get nothing, Joseph and Eliza would each get two; but this is not a direct interest in the event of the suit, and only a collateral interest in the establishment of the agreement by parol, under which the plaintiffs seek to predicate their right of property in the slave Sue in controversy. No question was asked the witness as to whether he was interested in the event of the suit; and it is not enough that he has wishes, or a strong bias on the subject-matter of the suit, or that he expects some benefit from the result of the trial. 1 Phill. Ev., 47. Stewart vs.

Kipp, 5 Johns. R., 256. Such circumstances may influence his mind, and affect his credibility—they are, therefore, open to observation, and ought to be carefully weighed by the jury, who are to determine what dependence they can place upon his testimony, but they will not render him incompetent—1 Serg. & Rawle, 32. Griswold vs. Sedgwick, 1st Wendell R., 126—and we do not see any error under the circumstances in allowing him to testify. This objection is, therefore, overruled.

The other errors assigned are—

2d. The Court erred in refusing to instruct the jury, as prayed by the defendant below.

3d. The Court erred in their instructions given to the jury.

And this again refers us to the bill of exceptions and the instructions given, and the instructions refused. The defendant objected to the evidence of the agreement to distribute the negroes (the children of Phœbe) as they might be born, among the children, John A., Joseph E., and Eliza Summerall; and that said agreement was void under the statute of frauds as an agreement not to be performed within a year from the making thereof, and not in writing. The Court decided this defence could not be set up under the pleadings in this cause, but that the defendant, to have availed himself of that defence, should have pleaded specially; and the Court charged the jury:—"the action is not based upon the agreement entered into between Petty and wife and the Summeralls; if it was so based, then the statute of frauds would apply, provided the contract was executory; if the contract was executed, then the statute of frauds cannot apply; and as to the fact whether the contract was executed or not, that would be a question for the jury. The rules of Court, however, settle summarity the question. The rule in relation to detinue is explicit." To all of which defendant excepted. The rule referred to in this instruction and decision is in these words: "The plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not the plaintiff's property therein, and no other defence than such denial shall be admissible under that plea." But *non detinet* was not the only plea filed to the counts in detinue of the plaintiffs, by defendant. There is a second plea, which says, the girl Sue (sued for) was not at the time of the commencement of this suit, and is not now, the property of the plaintiff or either of them.

And there is yet a third plea which says, that the plaintiff, Eliza C. Thoms, was not lawfully possessed of the said negro Sue, as in the first and second counts of her declaration is alleged. There is still a remaining plea to the whole declaration, which says, the several causes of action in the plaintiff's declaration, or any or either of them, did not accrue within five years next before the commencement of this suit. To these pleas, general replications were filed, so that if any one of them is true, it forms a bar to the plaintiff's action. The statute of frauds does provide that no action shall be brought whereby to charge any person upon any agreement that is not to be performed within one year from the making thereof, unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized. Tho. Dig., 218. This was an agreement made by the friends of these minor children, at a time when, according to the testimony of the second, *he* was not old enough to understand, and when a breeding woman, Phœbe, the property of the minors, had but one child, to divide her children among the minors, as they should be born, giving the one already born to the oldest, her second to the second, and third to the third, and her fourth then back again to the first minor, and so through again, and this repeated as often as her fruitfulness would permit.

Now it seems difficult and even impossible to suppose, admitting the minor children at the time to be bound by this agreement of their friends, that it was in the contemplation of any one that this agreement could be performed within one year from the making thereof, but on the contrary, it was intended to extend to the time of Phœbe's death, or that point in her life when she should cease breeding, or until the minor children, her owners, should arrive at lawful age. Now suppose Peter, the first child of Phœbe, had lived, and in a few days after this agreement was made, *she* had died, would, or could it be contended, that John, the defendant, was to have the whole avails of her purchase and his brother and sister be penniless? Suppose she had a second child, and died or stopped breeding, then John and Joseph would get a little negro each, and Eliza would go with nothing, even though Phœbe lived; for we have seen that at the sale of Phœbe, she was regarded as joint property, and the proceeds divided among them.

This contract is just such an one as the statute of frauds does provide no action shall be brought upon, whereby to charge any person—it is therefore not evidence to support an action, and ought not to have been admitted. The Court below decided this defence could not be set up under the pleadings in this cause, but the defendant, to have availed himself of that defence, should have pleaded it specially. The plaintiffs count on a right of property, and of having been lawfully possessed, &c. The defendant takes issue by his pleas before noticed, on both these allegations; but there is nothing said in the declaration of this right of property, derived through a verbal agreement made by the friends of the parties, when some, if not all, were too young to understand, and to be executed upon a contingency in a series of years. If a count setting up such right of property had been filed in the cause, it would have been demurrable, but not being there, there was no ground of demurrer, nor can we see what manner of plea could have availed the defendant to defeat the effect of this verbal agreement, as testimony against him. By his pleas, he has met the substantative issuable allegations contained in the declaration, and we think he is not bound to go farther and plead to any supposed allegations that may be framed by proof. If improper proofs are sought to be admitted, they should be objected to; and if proof of any agreement, void by the statute of frauds, is introduced, the jury ought to be instructed to disregard it. But a contract void by the statute of frauds, by reason of its not having been reduced to writing, while it remains executory, may nevertheless be made valid, having been executed by the parties bound by it.

And this leads us to consider, that at the time the agreement in proof in this case was made, the parties in interest were all minors, and at least some of them too young to understand. The doctrine is, that the contracts and acts of an infant are in general voidable, and capable of confirmation when he comes of full age; those alone being treated as absolutely void, which are certainly, and in their nature prejudicial to his interest—2 Greenleaf Ev., 292, Sec. 367; or incapable of being ratified. There is a distinction, however, between those acts and words necessary to ratify an executory contract and those which are sufficient to ratify an executed contract. In the latter case, any act amounting to an explicit acknowledgment will operate as a ratification, as in the case of a purchase of lands, or goods—if after coming of age he continues to hold the property, and treat it as his own, he will be liable for the purchase money. But in order to ratify an executory agreement made during infancy, there must not only be an acknowledgment of liability, but an express confirmation or new promise (or agreement) voluntarily and deliberately made, by the infant on coming of age, and with the knowledge that he is not legally liable, or bound by the original executory agreement. See 2 Greenleaf Ev., 293, and authorities there cited. The jury ought therefore to have been instructed that unless they believed from the testimony, that after these minors all arrived at full age they all expressly agreed to ratify and abide by the verbal agreement in proof with the knowledge they were not legally bound by it, that they must find for the defendant. In other words, unless the jury believed from the testimony that after the arrival at full age of these parties, they ratified the verbal agreement made in their behalf by Mr. Petty and his wife and their grandfather, [and the making a distribution among themselves of Phœbe's children belonging to them, or an express confirmation or new promise to abide by the agreement, would be evidence of such ratification,] that a plaintiff, Mrs. Thoms, has no separate right of property in the slaves sued for, and cannot recover in this action. There was also some proof going to show that none of the heirs claimed Peter, Flora, and Cornelia, the three who died, and who by the parol arrangement of the friends of the children would have been assigned to John, and also going to show that John had then in possession of all the negroes, while his brother and sister remained with him, and they have never been delivered to them. If the testimony sufficiently established these facts, of which the jury should be left to decide, then there was no sufficient evidence of an executed contract, and the jury ought to have found for defendants, and ought to have been so instructed. The decision and instruction of the Court below, so far as it is in conflict with the opinion and principles hereinbefore advanced, seems to a majority of this Court to be erroneous.

Defendants urged before the Court that five years' possession of the negro Sue, as in proof, was sufficient evidence for defendants to support the plea of the statute of limitations in issue in this case. The Court decided it was not, and defendant excepted. The Court charged the jury "that the statute of limitations applies where the posses-

309 sion is adverse. Mere possession is not enough. If the jury are of opinion that the defendants had possession adverse to the claim of property of Mrs. Thoms for five years anterior to the bringing of the suit, then the plaintiff cannot recover. But if the possession in defendant has been adverse, he setting up no claim but possession merely by permission of Mrs. Thoms, then the statute of limitations does not apply. And further, that where several slaves belong to several persons of the same family, the possession is in all." To all which the defendant excepted. The defendant urged that five years possession of Sue by the defendant, as in proof, was sufficient evidence of title, &c., to support the plea of the statute of limitations. The Court decided it was not. We think the position of the defendant in this particular, if allowed by the Court, would take from the jury their province of determining, from the testimony, whether in fact the defendant had had five years' possession of the slave Sue, before suit brought for her. And the Court rightly said the statute of limitations applies where the possession is adverse. To determine whether the possession was adverse, however, depends on circumstances not contained in the instructions. Where persons of the same family dwell together, the possession of slaves living in the same family will be presumed to be in him or her who has the right of property. And if their right of property be joint, the possession of one will be the possession of all. But if they live asunder and in different families, the possession of one is not necessarily the possession of another. It may or it may not be so; that depends upon the circumstances of the possession, in relation to property claimed in severalty, but it is adverse if such possession has been commenced and continued under an assertion of right on the part of the possessor.

We think, therefore, the charge to the jury should have been—If, from the testimony, they believed the plaintiff, Eliza D. Thoms, and the defendant, John A. Summerall, had not resided together in the same family for five years or more, next before the commencement of the suit; and if the jury further believed from the testimony, that the defendant had, during that period, held possession of Sue, the slave in controversy, under an assertion of right—that then the plaintiff cannot recover in this action, being barred by the statute of limitations. But if they believed from the proofs, that the plaintiff, Eliza C. Thoms, was at any time, within five years next before the
310 commencement of this suit, in the actual possession of said slave as her own separate property, then they ought to find for the plaintiff.

In the last of the charge, the Court says: "Where several slaves belong to several persons of the same family, the possession is in all." This charge is of a nature to defeat the plea of the statute of limitations, where one member of a family sues another, though the latter had held slaves under a claim of separate property with the full knowledge of the former, for any number of years. And if the jury understood by it that the possession of the defendant was also, necessarily, the possession of Mrs. Thoms—they being persons of the same family—they were or might have been thereby misled on the subject of possession; and it is not perceived why such an instruction, *ex proprio vigore*, would not defeat the plea. But a majority of this Court are not able to see the legal propriety of this instruction. Where the possession of property is in several persons, it is a joint possession, or tenancy in common, and destroys the idea of separate property in any one. In this case, if the possession still remains in all the claimants, then there has been no executed contract of partition, and consequently Mrs. Thoms, who sues in severalty, has no right to recover in her separate action against her co-tenant. This instruction is, therefore, erroneous.

The opinion and instruction given by the Court below, being in some parts different from those herein contained, it is ordered and adjduged, that the judgment rendered by the Circuit Court in the premises be reversed and set aside; and it is further ordered, that a *venire de novo* be awarded, and further proceedings be thereon had in conformity with this opinion.

BALTZELL, J., dissented.

I do not concur in the decision pronounced in this case, nor in the reasons given by the majority of the Court for its reversal.

The bill of exceptions presents the questions for consideration, and the proper inquiry is, did the Circuit Court err in the instructions given to the jury, or in refusing those asked by the defendant below?

"The defendant urged that five years' possession of the negro, as in proof, under the statute of limitations, was sufficient evidence of title in him—the Court decided that it was not." The opinion admits this to be right—as it says, "if allowed, it would take from the jury 311 their province of determining from the testimony whether defendant had five years' possession of Sue before suit." We do not differ in holding that there was no error in this ruling.

"The defendant also *objected* to the *evidence* and *proceedings*, on the ground that it appeared by the evidence of the agreement to distribute the negroes, the children of Phœbe, as they might be born, amongst the children—that said agreement was not valid under the statute of frauds, as an agreement not to be performed within a year from the making thereof, and not in writing." A conclusive answer to this objection is, that it makes no motion, and presents no definite proposition.

Objection is made to the *evidence* and *proceedings*. On this ground alone, the application was properly refused. Its object would seem to be—and this is what with propriety may have been done—to induce the Court to instruct the jury to overrule or disregard the agreement, as being irrelevant or incompetent—these being the only grounds for such a motion. 2 McLean, 596. It cannot be pretended that the evidence was obnoxious to either of these exceptions. The Court decided that this defence could not be set up under the pleadings in this case, but should have been pleaded specially. In this, I do not concur. If the agreement was void under the statute of frauds, and there was no evidence of its execution, the plaintiff must have failed for want of evidence to sustain his case. It is sufficient, however, that the objection was not tenable—it was properly refused, for other causes to be hereafter stated.

The Court charged the jury that "the statute of limitations applies, where the possession is adverse. If the jury are of opinion that defendant had possession, adverse to the claim of Mrs. Thoms, for five years anterior to the bringing of the suit, then plaintiff cannot recover; but if the possession in defendant has not been adverse, he is setting up no claim but possession merely by permission of Mrs. Thoms, then the statute of limitations does not apply." This, also was excepted to. If there be error in this, it is in being too favorable to the defendant. The true doctrine on the subject of possession conferring right under a statute of limitations, is contained in the opinion of the Supreme Court of the United States, in Zellers lessee vs. Eckert, &c., sustained as it is by numerous authorities. It is there said—"as the possession was originally taken and held in sub- 312 serviency to the title of the real owner, a clear, positive and continued *disclaimer* and *disavowal* of the title, and *assertion* of an *adverse right*, and to be brought *home* to the party, are *indispensable* before any foundation can be laid for the operation of the statute. Otherwise, the grossest injustice might be practiced—for without such notice, he might well rely upon the fiduciary relation upon which the possession was originally taken and held, and upon the subordinate character of the possession, as the legal result of those relations." 4 Howard's S. C. R., 296. The instruction, then, should have been, not only that adverse possession, but a clear, positive and continued disclaimer and disavowal of the title on the part of plaintiff, and assertion of adverse right to be brought home to the plaintiff, were requisite to sustain the plea of the statute; nor was such an error a ground for reversal at the instance of the plaintiff in error—it was an injury to his adversary, the plaintiff below, of which he alone can complain.

The Court charged the jury—"the action is not based upon the agreement entered into between Petty and wife and the Summeralls. If it was so based, then the statute of frauds would apply, provided the contract was executory. If the contract was executed, then the statute of frauds cannot apply; and as to the fact whether the contract was executed or not, that would be a question for the jury."

I am of opinion that the statute of frauds has no application to the case. The statute very clearly contemplates contracts between independent parties, and not the case of severance or partition between joint owners, which is rather the dissolution of an existing agreement, than the making of a new one, and so do the books treat it. "The joint tenants' estate in realty may be destroyed, without any alienation, by merely disconnecting their possession; and, therefore, if two joint tenants agree to part their lands, and hold them in severalty, they are no longer joint tenants, for they have no joint interest in the whole, but only a several interest, respectively, in the several parts." 2 Black. Comm., 185.

Boyd vs. Graves, decided by the Supreme Court of the United States, was the case of a division and ascertainment of the dividing line between the proprietors of adjoining lands, by consent of both parties, and the lands held for many years. An effort was made to

313 assert a claim adversely by one of the parties, on the ground of the statute applying, the Court say—"it is not a contract for the sale or conveyance of lands—it has no ingredient of such contract. There is no *quid pro quo*, and the Court do not consider it as a conveyance of title from one person to another.' 4 Wheaton, 513. 4 Cond. Rep., 525.

Again: "A parol partition will be enforced." 25 Wendell, 434 5 Brevard, 97.

In the case under consideration, the increase of the negroes was, no doubt, looked to, like the crop of the planter—the parties concluding to divide as they did, in preference to waiting until all the children should be born—just as three joint owners of a plantation should agree that the proceeds of the crop for the first year should be appropriated to A., the next to B., and the third to C. Such a case is to be found in 16 Vermont, 169, between owners of a mill, to occupy severally, in proportion to their interests.

The first position is, that the action is not based on the agreement—as it obviously was not—there being other evidence in the case equally important and essential to plaintiff's recovery. It is not material to inquire, whether the statute would apply to an executory agreement—the more correct position is, that, independent of the statute, a joint owner cannot maintain an action upon a mere agreement to divide.

The last position is, that 'the statute of frauds cannot apply if the contract is executed." This proposition is plain to be questioned An agreement executed is the case of a "sale and delivery of an article for a price paid," to use the language of Chancellor Kent in his Commentaries, 4 Kent., 450. The point is also expressly decided in Craig vs. Vanpelt, 3 J. J. Marshall, 489.

The third proposition asserted is, that "whether the contract was executed or not was a question for the jury." Whether the agreement was in fact carried into execution, depended upon the testimony of witnesses, some of whom differing in their statements, it became the duty of the Court to refer the question to the jury. In this I perceive no error.

The remaining instruction is, that "where slaves belong to several persons of the same family, the possession is in all." This also, I think, is erroneous. The general rule is, that the property of per-
314 sonal chattels draws to it the possession, and this whether the owner reside separately or in the same family. The instruction, however, was favorable to defendant below, and to the prejudice of his adversary, and for the reason already stated is not the ground of reversal.

It is insisted by counsel for plaintiff in error, that "there is no proof of performance on either part—none of any distinct and independent possession of Mrs. Thoms." There is no instruction asked which can raise this question in this Court—it was not presented in the Court below by a motion for a non-suit, or for instructions to the jury to find for the defendant, or that the plaintiff was not entitled to recover. We have seen that the instructions given were not erroneous. Where, then, is the authority for raising a question of fact not presented by the bill of exceptions? There is none. In Zeller's Lessee vs. Eckert, the Supreme Court say, so far as error is founded upon the bill of exceptions incorporated in the record, it lies only to exceptions taken at the trial to the ruling of the law by the judge, and to the admission or rejection of the evidence. 1 Bac. Ab., 279. Bull, N. P., 316. Beyond this, we have no power to look into the bill on a writ of error, as it is the creature of the statute and restricted to the points stated. *We have no concern* in a writ of error, *with questions of fact, or whether the finding of the jury accords with the weight of the evidence.* The law has provided another remedy for errors of this description, namely, a motion in the Court below for a new trial on a case made. 4 Howard S. C. R., 297. The point was directly presented to the same Court in the case of Garrard vs. Lessee of Reynolds. "This Court is not called upon to express an opinion whether as matter of law, there was any evidence to be submitted to the jury going to establish the intermarriage at or before the time mentioned, because, although this ground was taken by the counsel in the course of the trial below, on motion for a non-suit, and was overruled, no exception was taken to that decision. The point is therefore not before us." 4 Howard S. C. R., 126.

In Binney vs. The Chesapeake and Ohio Canal Company, the Court say: "the counsel for defendant have insisted, that if the cause cannot be decided upon its supposed real merits, it ought to be remanded to the Circuit Court for the purpose of receiving such modifications as will bring before the Court those questions of law on which the rights of the parties depend. Where error exists in the proceedings of the Circuit Court which will justify the reversal of its 315 judgment, this Court may send back the cause with such instructions as the justice of the case may require. But if, in point of law, the judgment ought to be affirmed, it is the duty of this Court to affirm it. We cannot reverse a decision which conforms to law, and remand a cause for further proceedings. By C. J. Marshal, 8 Peters, 219.

The same enlightened Court, in the case of Hepburn vs. Dubois, on this subject, use the following emphatic language: "In urging upon this Court a review of the parol evidence in the record, we think the counsel of the plaintiff in error have asked us to transcend the limits prescribed to our action on questions of fact, by an uniform course of decision from the first organization of this Court, which has been repeatedly defined during the present term, unanimous in our opinion on the law, though sometimes differing in its application to particular cases. This Court is committed in language which it neither can nor desires to recall, because that power which we are bound to obey has spoken to us and all the Courts in the United States in terms most imperative. The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the seventh amendment proposed by Congress, and which received an assent of the people so general as to establish its importance as a fundamental guaranty of the rights and liberties of the people." 12 Peters, 376.

It must be admitted that the power of reversal has been carried to a greater extent in this Court, especially in the cases of Ponder vs. Parkhill's administrators and Camp vs. the same, decided in 1848. The defence mainly relied upon in these cases was matter of estoppel, sustained and controverted by a number of witnesses on both sides. It was submitted to the jury by the Court below with instructions predicated upon this variance in the testimony, who found in favor of plaintiff and against the defense set up. The Supreme Court find no error in the instructions, as they do not notice them, but "looking at the facts" and coming to a conclusion in conflict with that which the jury, in their exclusive province, had deliberately at- 316 tained, they set the verdict aside, and reversed the judgment. They even go farther—if that indeed be possible—as if the entire case had been submitted to them by consent of parties, to be tried without a jury—they adjudicate without any pleading, instruction, or exception justifying it, that "the right of property in the slaves in contest passed by the sale to the defendant," p. 275. Other cases, scarcely less exceptionable, but asserting the same power in a form not so obvious, have also received the sanction of this Court. I cannot but think that the course of the decision in this case is subject to the same exceptions.

Instructions are directed to be given by this Court on a new trial to be had in the Court below, which I propose to consider. The first is, that if, from the testimony, the jury believe that the plaintiff Mrs. Thoms, and defendant, John A. Summerall, had not resided together in the same family for five years or more next before the commencement of this suit, and if they further believe that the defendant had during that period, held possession of Sue, the slave in controversy, under an assertion of right, that then the plaintiff cannot recover in this action, being barred by the statute of limitations. But if they believe, from the proofs, that the plaintiff, Mrs. Thoms, was at any time within five years next before the commencement of this suit, in the *actual* possession of said slave as *her own separate property with the knowledge and consent of defendant*, then they ought to find for the plaintiffs. Now why the difference in the application of the rule of law between these parties? Why this most evident advantage under like circumstances, in favor of defendant over his sister? On his part, *possession for five years under an assertion of right*, is made to defeat her suit and secure the property to him. To entitle her to it *actual possession as of her own separate property*, with the *knowledge and consent of the defendant*, is required. If assertion of right, with possession, give right of property to one joint owner, why not to the other? If actual possession as of separate property with the knowledge and consent of his co-tenant, is made indispensable as to one joint tenant, does not the same rule prevail as to the other? But an obvious objection to the first instruction is, that there is nothing on the record to justify it. Not a single witness testified as to any assertion of right on the part of John Summerall.

317 The witness depose to a distinct admission and assertion by him, that the property was in his sister—his own witness, Vandergriff, deposes at most, that she was called undivided property, that is, not the property of John, but of all the brothers and sisters. These instructions are clearly opposed to the case of Zeller's Lessee vs. Eckert, as to the possession under the statute of limitations, the only pretence of title set up for John A. Summerall. But where is the authority for granting any instructions after the Court has, in this particular point of adverse possession, sustained the instruction given by the Court below? It is not the practice nor within the power of an appellate Court to frame variant and contradictory instructions according to their own suggestions, except in case of a reversal of the instructions given. If the instruction had been declared erroneous, then the authority exists; otherwise I regard it as an act of original jurisdiction not justified by law, but obnoxious to all the objections raised against a Court deciding on the controverted facts of a case.

The same objection applies with increased force to the other instructions directed to be given, that "unless the jury believed from the testimony, that after these minors all arrived at full age, they *all* expressly agreed to ratify and abide by the verbal agreement in proof, with the knowledge they were not legally bound by it—in other words, unless they believed that, after the arrival at full age of these parties, they contracted and agreed to be bound by the verbal agreement made in their behalf, and in pursuance of such agreement, actually made a distribution amongst themselves of Phoebe's children belonging to them—that the plaintiff, Mrs. Thoms, had no separate, but a joint right of property sued for, and cannot recover in this action." Now, the defence of infancy had not been raised in the pleadings by the instructions below, nor by the bill of exceptions, nor has it a connection with the instruction which gives rise to it, which was in reference to the statute of frauds. A party may waive a defence, and it is not, I respectfully submit, the province of this Court to set up and impose upon him such as he has waived.—The instruction is still more objectionable, in assuming a position at variance with the fact—the testimony in record—in deciding that the agreement and evidence showed a contract executory, and not executed. Now, this subject was expressly submitted to the jury, and they found it executed. How, then, can the Court assert a different
318 conclusion? Is it lawful thus to pass upon the facts—to substitute the judgment and opinion of the Court in a matter of contradictory testimony, in place of the verdict of a jury? The evidence to show that the agreement was executed has been already reviewed—what is there to show that it was executory?

After stating that a different kind of ramification is required in one case from the other, we are informed that the case under consideration is executory. I propose to test the accuracy of this conclusion. The distinction between executory and executed contracts is thus stated by Chancellor Kent: "if, for instance, one person sells and delivers goods to another for a price paid, the agreement is executed, and becomes complete and absolute; but, if the vendor agrees to sell and delivers at a future time, and for a stipulated price, and the other party agrees to accept and pay, the contract is executory, and rests in action merely." 4 Kent, 450. Striking out them, and disregarding all the testimony, but that of the agreement itself, and we have an executory contract, resting in action—a right to be enforced by suit merely. Connect with the agreement actual possession and ownership—the assertion of right—a failure to assert claim in opposition, and we have an executed contract—the very case presented by the record. But there is no authority for this disregard of the testimony in the case, any more than there is in predicating an instruction upon an imperfect view of the evidence, or giving a new instruction, when the old one is sustained. The quotation from 2 Greenleaf on Evidence, is unfortunate in not applying to the case. The subject treated of by the learned author was the defence of infancy to an *action of assumpsit*, which he states "may be avoided by showing that the consideration of the promise was necessaries furnished to him; or, 2d, a ratification of the contract by a new promise, after he came of age." § 364. Under this last head, he makes the remarks quoted by the Court, which, if extended a sentence farther, would have shown, beyond doubt, their true object and purport." "An explicit acknowledgment of indebtment, whether in terms or by a partial payment, is not alone sufficient—for he may refuse to pay a debt which he admits to be due;" thus showing that the clause was applicable to debts or engagements of the infant, upon which he might be sued, after he came of age. Much more pertinent and to the point are the remarks of Lord Mansfield, in

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the case of Zouch vs. Parsons—"Miserable must the condition of 319
minors be, if they could do no binding acts. The law, therefore, at the same time that it protects their imbecility and indiscretion from injury, through their own imprudence, enables them to do binding acts for their own benefit and without prejudice to themselves, for the benefit of others."

"If an infant does a right act which he ought to do, which he was compellable to do, it shall bind him, *as if he makes equal partition*, if he pays rent, &c., the authorities are express and the reason decisive, that generally, whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit of law. A right and lawful act is not within the reason of the privilege which is given to protect infants from wrong. His being compellable by any means and in any way to do it, proves the act to be substantially what he ought to do. A third rule deducible from the nature of the privilege, which is given as a shield and not as a sword, is, that it shall never be turned into an offensive weapon of fraud or injustice." 3 Burrows, 1801-2.

It will not be difficult to maintain that this partition so far as John Summerall was concerned, was an equal one. His sister and brothers had reason, not *he*, to complain of its inequality. When made, there was but one child of the negress alive, which is assigned to him by the agreement, the others were to have but the prospect of those to be born. Seven children were born to Phœbe, to three of which he was entitled as having first choice, whilst they were entitled only to two. He was the oldest brother, and best able and most competent of all to judge of the arrangement, and profiting so largely by it, it is therefore presumable that he was its author or greatly in favor of it. If, after obtaining his allotment and receiving his share according to the agreement, the negroes received by him die, is it to be tolerated that the deficiency shall be compensated by his brothers and sisters? Shall he, on that account, be permitted to disaffirm his agreement and bring an action extending over the range of near twenty years, and that too against a sister having claims upon his generosity, his care and his protection? This would indeed be allowing him to use his privilege as a sword and to turn it into a most offensive weapon of injustice. The above view of the English Courts is confirmed by the American authorities. "A parol partition of lands between tenants in common, when fair and equal, and followed 320
by a due execution of it, is binding on all, whether wives or minors." 9 Watts & Sergt., 127. "Where an executrix was also devisee of slaves in common with other executors, and held them for many years, this is evidence there was a division." 3 Monroe, 276.

Supposing, however, this agreement was voidable at the option of John A. Summerall, when is it to be exercised, and how long does the privilege exist? It will be discovered that the law is by no means silent on this subject. The omission to disaffirm a contract within a reasonable time, has been held sufficient evidence of a ratification. Chief Justice Dallas says, "the infant is bound to give notice of the disaffirmance of a voidable contract in a reasonable time, (four months he thought reasonable in that case.) This principle is recommended by its justice and general convenience. It is unjust that the infant, after his arrival at maturity, and the lapse of a reasonable time, should hold the scales in his hands, and decide as future circumstances should incline." Chancellor Kent says "where the contract is voidable, slight acts and circumstances will be a ground from which to infer assent." 2 Kent., 237. "His confirmation of the act or deed of his infancy may be justly inferred against him after he has been of reasonable age, either from his positive acts in favor of the contract, or from his tacit assent under circumstances not to excuse his silence." 2 Kent., 195. "Acquiescence merely for an unreasonable time is an act that denotes an intent not to rescind the contract." 6 Connect., 506. 9 Vernon, 368.

If the judgment and decision be in favor of defendant, as would seem to be the inevitable result from the opinion of the Court and the instructions directed to be given, the three brothers and sisters will then occupy their first position of joint tenants. Will John A. Summerall, on an account to be taken by a Court of Chancery for a division of the property, be charged with the three negroes he has received, and bring them into account, or are they to be rejected, and his brother and sister to account to him for those received by them and pay him? I cannot think that any Court of Equity would hesitate for a moment to affirm the agreement, and to hold the parties all bound by it. To turn these parties round to a suit in Chancery for a new adjustment of matters long since settled between them by pos-

itive agreement well understood and acted upon for years, never complained of until recently, and merely because one of them originally having an advantage over his younger brother and sister loses it through accident or otherwise, is a proceeding to which I can never give my assent. 321

It is not in evidence as to the precise time when John Summerall came of age. One of the witnesses, Fennimore, says: "He heard John say, that Sue belonged to Eliza. John was of age—he was not married at the time—it was eight, or ten, or twelve years since." John married in 1835—Thoms married in 1845. Now Petty, who made the sale of the negro, and seems acquainted with the circumstances, says: "He don't know of the agreement being disputed, until after the marriage of Thoms." His own brother, who had lived with defendant until the year 1843 or 1844, never heard him claim Susan; and his possession of the girl would seem to have been owing to his better fortune of having a home and family, while his sister, as stated by one of the witnesses, "had no home for Sue." If this was not an affirmance of the agreement and ratification, not only implied but express, then I confess I am at loss to understand the authorities.

I have not alluded to another feature in the case of no little consequence in its consideration. This arrangement was made by the guardian of the children with their consent—he bought the negress and sold her (in legal presumption) afterwards before the children came of age—he had a right to sell her children after they were born, so soon as they could, with propriety, be separated from the mother. The general rule is, that it is the "duty of a guardian to sell the personal property." 1 Vern., 335, 403. Reeves' Dom. Rel., 326.

In case of sale of these children, his account before the Judge of Probate with each of them, would be separate for his portion—this, itself, is partition in a different manner. What, then, is to prevent a division of the specific property without sale amongst his wards, if he judges it proper and to their interest. Having done so, his arrangement could only be set aside on the score of fraud. Field vs. Schieffelin, 7 John. Chy., 155.

In every point of view in which I have been able to regard the case, I see no reason to disturb the verdict and judgment of the Court below.

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An arrangement made by a surety, under and by virtue of which property mortgaged was left in the hands and subject to the control and management of the debtors, with the intent that by the rents, issues and profits they might diminish or pay off and discharge the mortgage debt for which the surety was bound, and thus save the property from sale at a time when it was supposed, if offered, it would be sacrificed, is not fraudulent, as tending to "delay, hinder, or defeat creditors." Nor is such an arrangement fraudulent, though made after a degree of foreclosure has been rendered, and an order of sale made, by which the surety was directed to take possession of the mortgaged property, as receiver and commissioner, and to sell, as he might be required by the creditor, and apply the proceeds to the payment and extinguishment of the mortgage debt.

On the 17th day of July, 1847, Charles Barnard, Abel Adams, George M. Barnard and Charles Larkins, merchants, trading as Barnard, Adams & Co., filed their bill for relief and discovery in the Circuit Court of Jefferson County, against William D. Moseley, Daniel S. Graham, George W. Gelzer and William J. Bailey, *administrator de bonis non* of Abram Bellamy, deceased—setting forth and showing that complainants, on the 4th day of November, 1845, in the Circuit Court of Jefferson County, obtained against Daniel S. Graham a judgment for the sum of $798 49-100, and that execution issued thereon according to law, but that no property of said Graham could be found liable and subject to be seized under and by virtue of said execution. That prior to the rendition of said judgment, Graham executed jointly with one George W. Gelzer a mortgage on all the property owned by him, to Stephen Woolf and William Blackburn, to secure them against loss or damage, by reason of their suretyship for said Graham and Gelzer, on their certain promissory notes, to the estate of Abram Bellamy. That, at the Spring term of the Court, in the year 1843, a decree was made by consent of said Graham and Gelzer, in favor of William Bellamy, executor of Abram Bellamy and Solomon E. Mathers, administrator of Stephen Woolf, and William Blackburn, foreclosing said mortgage, and subrogating the executor of Abram to all rights of the said Woolf and Blackburn, and ordering a sale of the mortgaged property to pay and satisfy the debt due to the Bellamy estate, and appointing William D. Moseley, receiver and commissioner of the mortgaged property. That Moseley, immediately after the rendition of said decree, took into his possession the land, steam saw mill and negroes in the mortgage and decree mentioned, and continued to hold them as receiver, by the direction and consent of the executor of Abram Bellamy, until the first Monday in March, 1847, a period of nearly four years—so that the property could not be seized or levied or under execution, thereby, as the bill alleges, hindering, delaying and defrauding other creditors and particularly complainants who have been execution creditors of said Graham since November, 1845, in the collection of their just debts. The bill charges that the property mentioned in the decree was not the joint property of Gadsden and Gelzer, but that each held and owned a part thereof separately. That the rents, issues and profits of the mortgaged property during the four years it was held by Moseley were amply sufficient to pay off and discharge the debt due the estate of Bellamy. That the rents, issues and profits, as complainants have been informed and believe, have been misapplied or squandered by said Moseley; and that the items in the account of the receiver, in which he gives himself credit for expenses paid in negro hire, &c., are incorrect; and that they are made up by Graham and Gelzer to conceal the fact, that the rents and profits of the mortgaged property have been received by them, and have gone into their own pockets. That, on the said 1st Monday of March, 1847, the said Moseley proceeded to sell, under said decree, enough of the mortgaged property to pay an alleged balance of $7,481 67-100 still remaining due to the estate of Bellamy—when in fact, if the rents and profits of the property had been properly applied, the whole debt would have been extinguished. That in making sale of the property, he sold the individual property of Graham, and that the negroes not sold were the property of Gelzer, and, therefore, not subject to complainants' execution—which, as complainants' allege, was in fraud of their rights, and, therefore, insist that the proceeds of the sale of Graham's property, or so much thereof as may be necessary for the purpose, should be paid over to them in satisfaction of their execution. 323

The bill also states the receiver not only sold the property of Graham, mentioned in the mortgage, but that he seized and sold three negroes, March, York and one whose name is not known, and eight mules, not included in the mortgage or decree, and which, complainants say they are informed and believe, were the individual and separate property of Graham, and subject to their execution; and that said Moseley applied the proceeds of the sales of said slaves and mules to the satisfaction of said mortgage debt. Complainants allege the death of William Bellamy, executor of Abram Bellamy, since the rendition of the said decree, and that no proceedings have been taken, or were taken prior to the sale, to revive it in favor of William J. Bailey, administrator *de bonis non*. 324

The bill prays an injunction against Moseley, restraining him from paying over the proceeds of said sale to the estate of Abram Bellamy, and from delivering up to Gelzer or to Graham, the negroes mentioned in the decree, and remaining unsold in the custody of Moseley as receiver, which injunction was granted and issued on the 17th July, 1847.

On the 19th day of March, 1849, Moseley filed his answer, admitting the statements of the bill as to the mortgage of indemnity and the decree made thereon in favor of Bellamy, in 1843, but insists that these proceedings were without fraud. That defendant had become surety for the payment of the mortgage debt, with a view to give time to Graham and Gelzer to pay it by the use of the mortgage property. That he was appointed receiver, as alleged in complainants' bill, but that for the purpose of assisting Graham and Gelzer in their embarrassment, he having become their security to Bellamy, he left the property in their hands and subject to their direction and management for the very purpose of enabling them, by time and the use of the property, to work out of their difficulties and to pay off and discharge the debt. That the decree referred to in complainants' bill was entered by consent of all parties, and that defendant was appointed receiver in order that he might control the property, if circumstances required it, and save himself from loss by reason of his securityship. That it was well understood at the time of the decree, that Bellamy would not press for his debt so long as there was a reasonable prospect that Graham and Gelzer would pay the debt through the means and use of the mortgaged premises. That defendant considered himself, (being security) the only party in danger in permitting the property to remain in the hands of Graham and Gelzer. That he suffered it so to remain having the fullest confidence

325 in their integrity and honesty, and for the reason also that they were acquainted with all the business touching the management of the mill. That defendant's sole object in becoming in any wise connected with the indebtedness of Graham and Gelzer was to prevent a sale of their property at ruinous rates, entertaining the hope, that by the profits of the mill, they would be enabled to reduce the amount of their indebtedness very considerably, and that if they should be compelled to sell, that they might be able to do so at a future time with much greater advantage. That the sale made by defendant in the year 1847, was made when property had risen in value, no objection to the proceeding being urged by Graham and Gelzer. That defendant was only bound to sell property to pay the debt for the collection of which he was appointed receiver, and for the payment of which he was security. That having done this, he was bound to pay over the balance or surplus to Graham and Gelzer, and to return the property unsold to the party to whom it belonged. That complainants were strangers, of whom and of whose claim he knew nothing in his office of receiver. Defendant filed with his answer an account exhibiting the expenses of the milling and showing the net proceeds after payment of all expenses during the years 1843, '44, '45, and '46, to be only $1201 60. The answer therefore, denies that the rents, issues and profits of the property were sufficient to pay the debt for which the aforesaid decree was rendered.

The separate answers of Graham and Gelzer are to the same effect as the answer of Moseley, with respect to the matters therein stated. With regard to the negroes York and March, and the mules alleged in complainants' bill to be the property of Graham, the answer of Graham states that they were purchased after the decree rendered in favor of Bellamy, and with the individual means of Gelzer. That he, defendant, had no interest in them.

The following statement of sales of property made under the decree by William D. Moseley, receiver, was filed with his answer:

Property.	*Purchaser.*	*Amount.*	*Remarks.*
Slave Noah,	W. J. Bailey,	1205 00	Paid.
" Athur,	Gelzer,	850 00	"
" Mary.	Gelzer,	100 00	"
" Samson,	Ross,	477 00	"
" Nero,	Finlayson,	375 00	"
326 " March,	Branch,	655 00	Note.
" York,	Branch,	687 00	Note.
Slaves Seley, Mariah and Cloe,	West,	600 00	Paid.
Steam Mill,	Moseley,	2105 00	Note.
One Mule,	Powell,	90 00	Paid.
" "	Gamble,	55 00	"
" "	Anderson,	81 00	"
" "	Gamble,	69 00	"
" "	Gamble,	71 00	"
" "	Stephens,	62 00	"
" "	Stephens,	63 00	"
" "	Andrews,	38 50	"
Total - - - - -		$7,583 50	

The notes given by Moseley to Bellamy, the one for the sum of $2,411 90-100, the other for the sum of $4,542 40-100, on both which was endorsed a statement to the effect that they were given as security for a debt due to William Bellamy, executor, from D. S. Graham and G. W. Gelzer, were also on file as proofs in the cause.

At a Circuit Court for the County of Leon on the sixth day of November, 1849, this cause coming on to be finally heard, upon bill, answers, exhibits and proofs on file—it was ordered, adjudged and decreed, that the injunction heretofore granted in this case, be dissolved, and that the bill be dismissed, &c.

From which decree complainants appealed.

Branch, for appellants:

1st. The law will not allow a judgment creditor to use his judgment as a cover to keep off other creditors. The language of the statute (Thomp. Dig., 215) is, "and every bond, note, contract, *suit judgment and execution*, which shall hereafter be had, made, &c." Decrees in Chancery stand on the same footing as judgments at law Thomp. Dig., 461.

All the facts of this case show that it is a decree or judgment, or suit, within the statute of Florida, to hinder, delay and defraud creditors. The fact that Bellamy, or rather Moseley, who seems to have been in fact both judgment creditor and receiver and commissioner, kept the property about four years without making a sale as directed

in the decree, and permitted it to remain all the while in the posses- 327
sion *and use* of the defendants, allowing them to receive the *rents and profits, was a fraud* on the junior execution in favor of the complainants in this suit, which will deprive the decree of its prior lien, and postpone it to the junior execution in favor of complainants in this case.

But there is another fact which seems to be conclusive on this head. The answers of Moseley, Graham, and particularly of Gelzer, admit and claim that it was *an arrangement made with the view and for the purpose of giving the defendants in the decree an opportunity to work out the debt.* That the decree was taken with this view, and Moseley appointed receiver and commissioner with this view. It cannot be presumed the Court rendering the decree was cognizant of an arrangement which proposed thus to use its powers. A decree or judgment rendered *not* for the purpose of *enforcement*, would make a mockery of the proceedings of our Courts of justice, bring them into contempt and bring its mandates down to be regarded as merely *"brutum fulmen."* In the legitimate exercises of its powers, it rendered the decree and appointed a receiver and commissioner to carry that decree into effect, who had no right to evade it in order to exercise any feelings of *benevolence* or *philanthropy* toward the defendant. Berry vs. Smith, 3 Wash. C. C. R., 62. Twyne's Case and notes in Smith's Leading Cases.

In the above case of Berry vs. Smith, Judge Washington says, "In consequence of the delay in the due execution of the writ, the time has been so long as to warrant *a presumption* of a design to protect the property, which, in contemplation of law, amounts to *a fraud*, however, *innocent and praise worthy*, on the ground of *benevolence*, the motive might be which induced it."

In this case, it is not a presumption, but a fact boldly avowed and relied upon by the defendants in their answers.

2d. That the decree having directed *rents, issues and profits* to be applied *"exclusively"* to the payment of the mortgage debt, the payment of them over to the defendants for about four years, was in violation of the decree, and a fraud upon the rights of the complainants. That had they been so applied, the mortgage debt would have been fully paid thereby, and the *separate* and *individual* property of Graham been left liable to be taken under complainants' execution.

By statement furnished by the receiver, Moseley, and appended to 328
bill, and which is admitted to be correct it appears, that the proceeds of the mill amounted to - - - - - - $14,899 60
Sale 1st March, 1847, - - - - - - - $7,481 67

Total receipts by receiver, - - - - - - $22,381 27
From this, deduct the mortgage debt, which on
1st March, 1847, amounted to, - - - - $8,707 90

Leaving balance in hands of receiver of - - $13,673 37

This large balance of $13,673,37 is sought to be absorbed by *expenses*, not one item of which does the receiver say is *correct*, or was paid by him, or even known to him, and to support which not a single *voucher* is produced, and every item of which is without *dates*, yet the Court below allowed them.

If the Court will take the trouble to examine this *formidable* list of expenses, it will be irresistibly forced to the conclusion that they have been trumped up for the occasion. The fact that $13,673 37 of *expenses* were incurred by a receiver appointed by the Court to sell specified property and collect therefrom $8,707 90, if not evidence of bad management, at least too plainly indicates the nature of the whole transaction, to be easily mistaken. The Court will observe that no authority is shown under which the receiver and commissioner had the right to expend one dollar. The decree directs the proceeds, *the rents and profits*, to be applied exclusively to the payment of the mortgage debt. A receiver has no powers not expressly granted him in the order appointing him. For powers of a receiver, see 2 Story Eq., 134-5.

3d. The reason assigned in all the books for the appointment of a receiver is, that the fund or property may be taken out of the hands of the debtor and a waste thereof prevented. It was a fraud, therefore, to permit it to remain in the hands of the defendants. 2 Story Eq., 34-5.

4th. Complainants contend that the decree became null and void, and in fact *was satisfied* by Bellamy's taking the notes of Moseley, the receiver and commissioner, for the debt—(see testimony of Budd, which contains copies of notes,) and that neither Moseley nor Bellamy had a right to keep the same alive so as to hold the property,

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329 and that he had no right to sell under the same. Noy's Maxims—Reed vs. Pruynn, 7 John. R., 426. Sherman vs. Boyce, 15 John. R., 443. Martin vs. Condy, 1 How. S. C. R., 417.

5th That when a creditor has two funds out of which to make his debt, and another has only one, a Court of Equity will compel him having the two funds to resort to that *first* on which the other has no claim. 1 Story Eq., 588.

In this case there were *three funds* or species of property out of which to make the mortgage debt. 1st. The partnership property of Graham and Gelzer. 2d. The individual and separate property of Gelzer contained in the mortgage. 3d. The individual and separate property of Graham contained in the mortgage.

As these three funds confessedly amount to much more than is necessary to pay the mortgage debt, the *two first* mentioned classes should have been exhausted before *the third* (which alone is responsible for debt of complainants) was taken. Instead of pursuing this equitable rule, the order has been reversed, and the individual and separate property of Graham has been exhausted, leaving most of that belonging to Gelzer individually, untouched. In this way complainants have been deprived of all remedy, and their debt made a total loss.

Archer, for appellee.

The bill alleges a judgment in November, 1845, in favor of complainants against Graham. This is almitted by defendant. Also, that in May, 1843, judgment or decree was rendered upon a mortgage executed by Graham and Gelzer. The decree is exhibited, see page 10. The bill again alleges that the receiver, under instructions from William Bellamy, held the mortgaged property nearly four years, so that the same could not be levied on by complainants, and that such proceedings hindered and delayed creditors. The answers satisfactorily explain the conduct of the receiver and of Bellamy, and deny the fraud, and no proof is adduced to the contrary.

The arrangement intended by the decree was virtually this, that the mortgagors, notwithstanding the foreclosure, should continue in possession, and be allowed further time to redeem the mortgage of Bellamy's estate. This was no fraud upon Barnard, Adams & Co. On the contrary, it was to their benefit. If Graham actually got
330 $14,000, which should have been paid to Bellamy's estate, but which was not paid, he is the better able to pay Barnard, Adams, & Co. It is clear that the delay was for the benefit of the debtors, to assist them and improve their means, and consequently operated rather to the benefit of their other creditors.

The bill further alleges that Noah and Arthur belonged to Graham, and this is admitted; also, that the land and mill belonged to Graham, but this is denied. These last were the joint property of Graham and Gelzer. The bill also alleges and admits that the other slaves belonged to Gelzer. Complainants insist that including the property of Graham and Gelzer in one mortgage is a fraud. But no fraud in fact is proved, and certainly cannot be inferred from the mortgage.

The bill then charges that the rents and profits of the mill for four years were sufficient to pay the mortgage debt. This is denied by the answers, and no proof to the contrary is adduced. The bill refers to Moseleys accounts to prove the allegations last mentioned, and charges that the credits claimed are "vamped up" by Graham and Gelzer for the occasion. But no proof is offered to sustain any part of the complainants' charges and insinuations.

The bill then charges that Moseley sold in March, 1845, all of Graham's property and only a part of Gelzer's and that he should have raised the money exclusively out of Gelzer's property, so as to leave Graham's property subject to the execution of complainants. But it seems that more of Gelzer's property was sold than of Graham's, and certainly there is no justice in the position that all of Gelzer's property should have been sold to pay the whole debt when there was property of his joint debtor equally bound.

The bill charges that York, March, another slave and the mules belonged to Graham, and that Moseley took them and sold them, although they were not a part of the mortgaged property. This charge, if true, would only show that Barnard, Adams, & Co. had a lien on this property under their execution, and that they were very negligent in not pressing their execution against the property. But unfortunately for complainants, the answers show that York and March and the mules belonged to Gelzer, and that he sold them in preference to and in substitution of his slaves named in the mortgage.

The foregoing covers all the material allegations of the bill. They are sufficiently denied by the answers, and the cause was set down 331
for hearing and finally heard as to all the defendants but Bailey, upon bill and answers and papers on file. What has become of Bailey's interest? who represents him does not appear. Indeed as to him, the case is still before the Circuit Court.

It was insisted in argument that Moseley's notes to Bellamy, given as collateral, amounted to a *payment* and discharge of the mortgage. This is not averred in the bill, but if this be true, it is too clear for argument that Barnard, Adams, & Co. had a complete remedy at law. The incumbrance being removed by the satisfaction, Graham's property was left subject to levy.

It was also insisted that the receiver being under injunction, had no right to pay over the proceeds of the sales to the mortgage debt, or to Graham and Gelzer; but the sale was on 1st March, and the payments were made on *that day.* The injunction was issued and served in July—Moseley paid Bailey, administrator, on 1st March, out of the sales, the following sums:

$3,822 50—81 00—233 50—2,105 00—Total, $6,241 50
Whole amount sales, - - - - $7,583 50

Balance, being bids for York and March, $1,342 00
Moseley also paid on the balance of $1,001 60
Net profits of the mill the amount of 720 00
Balance profits mill in hand when injunction was served, and not more than enough to pay expenses, - - $281 60

So that, before the injunction was served, all the moneys beyond expenses were paid over, except the bids for York and March. These slaves belonged to Gelzer. What equity has Barnard, Adams & Co. against that fund?

But suppose, for the sake of argument, that on the 1st March after the sale, Moseley, really had $14,000, the profits of the mill, and $8000 the sales of the property, was it not his duty to reserve enough to pay Bailey, as administrator, and to return the balance to Graham and Gelzer, or to the Court? If so, the surplus is exactly in the proper hands—Moseley would have no right to pay any but the mortgage debt.

But if Barnard, Adams, & Co. had any equities against the funds 332
in the receiver's hands, they have been so negligent as to have lost their claim. They had a judgment, an execution, made no complaint, filed no bill, their attorney was at the sale, became a bidder, and he and they laid by until the proceeds, excepting the bids for York and March, were paid over. And four months afterwards they file a bill of complaint. To sanction such proceedings would be to advertise premiums for negligence, and to entrap diligence and punctuality.

So far as the receiver is concerned, and the fund in his hands, the bill cannot be sustained, for a receiver is but the agent and representative of the Court, and cannot sue or be sued without the permission and sanction of the Court.

HAWKINS, J.

It is contended that the decree made in this case, to which Bellamy, executor of Abram Bellamy, Mathers, Blackburn, Graham, Gelzer, and others, were parties, is fraudulent, as tending to defeat, delay and hinder creditors. If this was the case, the duty of the Court would be a very plain one—but we cannot see that there was any fraud in the transactions. It was arranged by the decree that Gelzer and Graham should deliver the possession of the real estate, mill property and slaves and increase to W. D. Moseley. the receiver and commissioner appointed by the Court, to be sold by him, after thirty days' notice, as he may be directed by complainants, or either of them, and the proceeds to be applied to the Bellamy debt, and that in the meantime, Moseley was to receive, take charge of and manage the concerns of the mill, the issues and profits of which were to be exclusively applied to the discharge of the debt due to Bellamy.

Moseley did not take actual possession of the mill for the purpose of working it, but left it in the possession of Gelzer and Graham to be used by them. The possession of these individuals must be regarded as the possession of Moseley, and they could have been compelled to attorn to him if he had deemed it necessary. It has been seen by the terms of the decree, that the property could have been sold at any time at the instance of Bellamy. Moseley, for the purpose of procuring time for Gelzer and Graham, to enable them to pay their debt to Bellamy, becomes security for the amount of the mortgage debt, and by way of indemnity to him, and security to Bellamy, the

333 decree was made. The property was left in the possession of Graham and Gelzer, because they understood the management of the mill, and Moseley trusted to their integrity and honesty to manage the mill property, and hoped, he says, that the receipts of the mill would contribute to reduce the debt due by Graham and Gelzer. That in 1847, property having risen in value, the property, by consent of all parties, was sold

We cannot see any fraud in this decree, or any thing calculated to hinder or defeat creditors, but it seems merely an arrangement for the purpose of enabling debtors to liquidate their debts by the retention and use of, rather than by sale of the property. Indeed the tendency of the arrangement was rather intended to benefit the other creditors of Graham by the prevention of a summary sale of his property under execution, and in ratio to the amounts paid Bellamy out of the profits of the property mortgaged, to that extent would the chances of the creditors of Graham be increased. Of course a Court of Equity would not permit a fund to be locked up for the purpose of securing it from creditors, even under a decree of a Court, but a party complaining of such a procedure, would have an adequate remedy by an appeal to the equitable side of the Court, which on proper showing, would compel the parties to that decree, to proceed and sell or do what might be deemed equitable. But no steps are taken until the property mortgaged is sold. It is alleged in the bill and urged in argument, that the profits of the mill for four years were sufficient to have paid off the debt due to Bellamy. This is negatived by the answers, and the account of the profits, expenses, &c., if not surcharged or falsified by the complainants, and therefore, we must take it as true and correct. We do not concur with the counsel for complainants, that it was the duty of Moseley to have sold exclusively the property of Gelzer. It was a joint debt, and their joint property

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as contained in the mortgage, was the property which should have been sold. The record shows, too, that more of Gelzer's property than Graham's was sold. Noah, Arthur, and Mary were the property of Graham, and the rest of the negroes, seven in number, were the property of Gelzer, as well as the mules, and that the mill property was owned jointly. The complainants show no ground for a subrogation to the rights of Graham, for the above reason, and further that Gelzer states in his answer, that Graham owes about three thousand dollars.

It is contended that the note given by Moseley to Bellamy extin- 334
guished the mortgage. There is no allegation of this in the bill, but admitting this, the property of Graham would have been released from the lien of the mortgage and the effect of the decree, and the complainants should have levied their execution upon the property of Graham, and this question could have been settled at law upon a trial of the right of property. It was certainly the duty of Moseley to have paid the debt to the estate of Bellamy, and as to the surplus, if any, to have paid it into Court, to abide its final or further order. But whatever steps might have been legally taken by complainants were not taken until the fund was paid over, excepting the amount brought by the sale of York and March, and these negroes were the property of Gelzer and not Graham. Whatever equitable rights complainants may have had upon the funds in the hands of Moseley, we think clearly waived by their negligence.

No bill was filed until the transaction was closed, and as before remarked, if the individual property of Graham was liable to their execution, they should have levied it upon that property. With these views, we think the decree of the Circuit Court should stand. It is therefore ordered, adjudged and decreed, that the decision of the Court below be affirmed, and that the bill of camplainants be dismissed with costs.

APPENDIX.

The following opinions have been written out by Judge BALTZELL who decided the cases in the Court below, and are published at his request, as an appendix to this volume of Reports:

WOODS VS. BAILEY, ADMINISTRATOR.

The facts of this case are briefly as follows: In March, 1840, Ransom J. Roberts sold to William H. Williams a tract of land containing 600 acres, lying in Jefferson County, retaining the possession and giving no title but mere agreement "to make out a clear title to the lands and to hold himself responsible for all claims against it." Williams gave his note for $4000, with interest at ten per cent, per annum "for value received in land," payable to the order of Roberts, being in fact the purchase money. This note Roberts traded to Bellamy "for cotton delivered to him," giving also his endorsement on the note.

This note with others due to Bellamy, remained unpaid until the 20th October, 1842, when, according to the allegations of the bill Roberts having gone to Alabama, entered into an arrangement with Bellamy by which he confessed judgment for his entire indebtedness including also this note. Bellamy agreed in a separate instrument, amongst other things, "to release Roberts as endorser of Williams' note and upon the debt and interest of the judgment thereon, on *Roberts' giving a full, perfect and complete title to the 600 acres of land,* the incumbrance of the Union Bank and all others to be first discharged, &c., said conveyance to be either to said John or said Williams as said John may direct, so that said Williams may be compelled to pay said note; *said Ransom to make said conveyance and discharge all incumbrances on said land within 90 days from the date hereof.*" This agreement was dated 22d October, 1842. On the first of June, 1843, Roberts tendered a conveyance which Bellamy refused to accept, alleging, according to one witness, "that the land in question was not worth the money mentioned in the deed;" according to another, "that he could not give the consideration of $4000 for the land, but was willing to give what it was worth ac-
338 cording to the valuation of the witness." This tender was made 223 days after the date of the agreement.

After Bellamy's refusal to accept, Roberts sold the land to Woods for $2000, and the present bill is filed by the representative of Bellamy, to have a sale of the land by decree of Court to pay the note of $4000, insisting that there is an equitable lien through it in their favor against all persons.

That there was such a lien in favor of Roberts for the payment of the note of $4000 is not contested. He held possession of the land and retained the titles until payment. By the transfer of the note, he gets payment from Bellamy, becoming the trustee to make title when Williams should pay the note to Bellamy, or to hold it subject to be sold in favor of any holder of the note in case of Williams' not paying. He was not, and could not by possibility, be owner, otherwise than by taking up the note himself. Such a case is regarded as analagous to that of a mortgage taken to secure the purchase money, and in case of mortgage it is a well established principle, and so held by our Supreme Court in Preston vs. Stewart, that the assignment of the note carries all its securities with it. 1 Florida, 10. A decision expressly in point to the present one was made by the Court of Appeals of Kentucky, in a case tried before that Court. Ritchie purchased certain town lots, obtained a conveyance, and gave his bonds for the purchase money. The lots having been bought at a sale under a decree of foreclosure against Ritchie, suit was brought against the purchasers by an assignee of one of the bonds given for the purchase money, to have the lots sold again in payment of this claim, and the Court allowed it, asserting the general principle that "if a vendor of land have an equitable lien upon it for the purchase money, it passes to the assignee of the note given by the vendee and the assignee may enforce his lien." Poston vs. Eubank, 3 J. J. Marsh. 45. 5 Monroe, 285.

If conveyance had indeed been made in the first instance by Roberts, so that he had a mere equity, then the assignment might not have this effect.

The right of the lien being unquestionable, it remains to inquire into the effect of the agreement made with Roberts in Alabama. By it, Roberts was to have a release on his conveying "the land in Jefferson to Bellamy or to Williams, as Bellamy might direct, *the conveyance to be within 90 days.*" We have here the case of a debtor 339
compounding with his creditor, who consents to receive something else than money in discharge of his judgment. The rules and principles pertaining to such a case, are quite familiar, and have been long since ascertained and declared by repeated decisions of the Courts. "A composition is not binding upon a creditor unless its conditions are strictly performed." Amb., 332. Forsyth's Comp. Cred., 26.

"The Court will not dispense with the point of time in compositions. Therefore, whatever the accident in which happens to the debtor, it shall not affect the creditor who has compounded to take a less sum than the original debt." Again, "this Court has been so strict in regard to compositions, that, if there be an agreement to pay the compounded sum at a day certain, and the person fails, they will not relieve him, but he must pay the whole debt to the creditor." 2 Atkins, 526. Leigh vs. Barry, 3 Atkins, 585.

"All the cases hold, that, if the terms of the composition agreement be not exactly followed out by at least a tender of the substituted securities at *the very day,* the creditor is remitted to his remedy for the whole original debt." Fellows vs. Stephens, 24 Wend., 302. "There is a distinction between a private accord of the immediate parties and one which is common to them and other creditors. In the latter case, a tender satisfaction will do; in the former, there must be an *actual* acceptance—as between them and the defendant alone there could be no satisfaction short of an actual payment to the full extent of the debt, or the acceptance of a collateral thing. A mere accord is no bar, even though satisfaction be tendered." Ibid., 299.

In Strong vs. Holmes, 7 Cowen, 225, it is decided that "giving and accepting some third thing, as a conveyance of land, in satisfaction of a debt due by bond, is a good satisfaction," and the American Editor of Smith's Leading Cases remarks "that the cases there reviewed, show that 'if such satisfaction be specially pleaded, the plea must allege that the matter was *given and accepted* in full satisfaction of the amount due.'" American Notes to Smith's Leading Cases, 326.

In the case of the Brooklyn Bank vs. DeGraw, the defence was an agreement to accept a deed of trust of a house and lot in Brooklyn to sell in payment of the debt, &c., the Court say "even in the 340
case of a tender and refusal of specific chattels which operate to discharge the debt and extinguish the further relation of debtor and creditor, *the property of the article is deemed to vest in the creditor,* and the parties afterwards stand in the relation of bailor and bailee. If the tender in this case was valid at all, an interest, I apprehend, vested in the Bank, which would enable it to enforce the securities, &c. But waiving all this, it is sufficient to say that the tender here it not governed by the rules applicable to specific chattels. It is like a tender of money or things that may be brought into Court. In such a case, defendant pleads that he has been and still is ready with the money or things tendered, and it must be in Court on the trial." 23 Wend., 345.

Independent of all authority, and relying solely upon the fair import of the agreement between the parties, with what color of right may it be maintained that Bellamy should have accepted this deed when tendered? He agreed to release if the conveyance was made in 90 days. It was not made in this time, but in 223 days—133 days after the stipulated time. To compel Bellamy to accept the deed thus tendered, is to force upon him a new bargain, and bind him by a contract to which he never assented.

It is not denied that Courts of Equity, in some instances, have dispensed with time in the execution of agreements, but it is now admitted "that they went beyond the true limit to which jurisdiction of this sort should be confined, as it amounted to a substitution *pro tanta* of what the parties had not contracted for." 2 Story Eq., 90.

This learned author and jurist, the late Justice Story, quotes with approbation the remarks of Mr. Baron Alderson in Hepwell vs. Knight, 1 Yonge and Collyer, 415. "So also if it appears that the object of one party, known to the other, was, that the property should be conveyed on or before a given period, as the case of a house for a residence and the like, I do not see, therefore, why, if the parties choose even arbitrarily, provided both of them intend so to do, to stipulate for a particular thing to be done in a particular time, such a stipulation is not to be carried literally into effect in a Court of Equity. That is a real contract. The parties had a right to make it. Why then should a Court of Equity interfere to make a new contract which the parties have not made?" 2 Story Eq., 86, n.

341 The rules on the specific performance of contracts, even if applicable, will be found not to aid the case of Roberts. They are "that there has been no change of circumstances affecting the character or justice of the contract," "that compensation for the delay can be fully made," "that he who asks is in a condition to perform his part of the contract," "that he has shewn himself ready, desirous, prompt and eager to perform it," "that the remedies of the parties be mutual, and that a *performance will never be decreed where only one party is bound by the agreement.*" 2 Story Eq., 89. Fonb., 441, id., 48, n. 327. 1 John. Chy., 282, 373—4.

If mutuality be one of the requisites, the present case has not that feature, the agreement being that of Bellamy and not of Roberts. It was not signed by Roberts and imposed no obligation upon him. The agreement was signed by Bellamy alone, and bound him to allow Roberts the privilege of releasing the judgment and not by a transfer of the land. Roberts was not bound and under no obligation to convey the land to Bellamy. Indeed not a single one of these requisites has Roberts fulfilled or performed; with none could he have complied if an applicant for specific performance, and I have considered the case most favorably to him, in regarding him as an applicant for the benefit of the release, whilst the case before the Court is that of a party praying that a lien be enforced, the existence of which being admitted, the only question is, whether he has waived or discharged it.

It would be a strange kind of equity to permit Roberts not only to retain the land, but to have the benefit of the release too. This would be to allow him to retain the $4000 received from Bellamy, the price of the land as agreed with Williams, and then sell the same land to another purchaser for $2000 more.

But is it not most clear and obvious that the release cannot exist or prevail unless the title vests in Bellamy? The one is the consideration for the other. If the tender was good, the title vested independent of the acceptance of Bellamy, and by this means alone Roberts was entitled to his release. If there was no tender or an insufficient one, there could be no release.

I have considered the case so far without reference to Woods, whose answer removes all difficulty as to him. He does not pretend that he is a purchaser for value without notice. On the contrary, he
342 admits notice. He is then bound by the equities and state of facts existing at the time between Bellamy and Roberts.

HUNTER, ADM'R, VS. BRADFORD, ADM'R. CARPENTER AND WIFE. ET AL., VS. MCBRIDE, ET AL.

On the 22d December, 1839, Leigh Read sold to Archibald R. S. Hunter his plantation of 940 acres of land—20 negroes, with planting utensils, hogs, cattle, oxen, mules, corn and fodder, and household and kitchen furnitture, for $27,500, to be paid in part upon the delivery of the property on the 1st of January, 1840, in promissory notes of Mrs. McBride, secured by Mrs. McBride and C. H. Dupont and Daniel McBride, and the widow, to be paid in annual instalments as may be agreed upon.

On the 2d of January, 1840, Read made a bill of sale of the 20 negroes, and on the same day took Hunter a mortgage of them providing for the payment of $18,500 in three promissory notes due in one, two and three years. The land was not conveyed, but Read bound himself on or before the 1st of January, 1843, or in case of his death his heir or heirs within a reasonable time after his decease (if each heir be of full age,) and if not, then his executors or administrators, *upon the reasonable request* of said Hunter, to make deeds, &c.

In February, 1845, the administrator of Read obtained judgment against Hunter's administrator for the sum of $9,432, being the sum supposed to be due upon this sale and purchase. The present suit is instituted in chancery by the administrator of Hunter to enjoin this judgment on the ground, 1st, that there is an incumbrance in favor of the Union Bank. 2d, That the estate of Read is insolvent and unable to answer in damages for the breach of his covenant to make titles.

There was incumbrance on part of the property sold, to wit, the land and 13 of the negroes, but this objection is obviated by the discharge of the incumbrance, the parties having agreed "that the property sold by the execution of the Union Bank vs. Read's administrator brought $5079, $4754 of which sum was received by the Bank

in full satisfaction of their execution against Read's estate, and of 343 their lien upon the property sold by Read to Archibald Hunter." Thus has been done through the agency of the law what it was the agreement of Hunter with Read to do, and what the Court itself would have directed to be done without any agreement.

As at first agreed, the property was to have been put in the Life and Trust Bank; afterwards the agreement was to put it in the Union Bank. It was already mortgaged to the latter, having been bought by Read from Havis, as his mortgage recites. Both James Hunter and Bembry say that A. R. S. Hunter "purchased the Union Bank stock, and was to substitute his mortgage for Gen. Read's. James Hunter says "Gen. Read told me if I would pay his stock note he would not only credit the note of A. R. S. Hunter, as I had bought my brother's interest in the land and negroes, but that he would allow me to take to myself an assignment of his stock and mortgage the same." In a memo. in the hand writing of General Read found amongst the papers of A. R. S. Hunter and presented by his administrator, a credit is allowed Hunter of $8000 on account of the stock.

A purchaser has the right independent of agreement, to discharge an incumbrance. He need not wait until he is evicted, but may satisfy the incumbrance and then resort to this action on the covenant. 7 John., 358. 16 John., 254. If the estate is subject to an incumbrance, the purchaser should apply to the Court for leave to buy off the charge and pay the residue into the Bank. 1 Sugden Vend., 61. 2 Daniel Chy. Prac., 1458, Per. Ed. The Court made an order to relieve the estate from incumbrance. 13 Vesey, 80.

Hunter then would be entitled to a credit upon his purchase to the extent of this payment to the Bank.

In addition to this, A. R. S. Hunter sold this property to his brother James, who was to pay the heirs what was due to them. How then, can he complain of breach of covenant, of incumbrance, &c.? Now as to the personal property mortgaged, it is well settled, that on the failure to pay as provided by the deed, the legal right of the property becomes vested in Read—he then became the owner on the 2d of January, 1843, and had the legal right to sell. Philips vs. Hawkins, 1 Florida, 268.

A second ground is the inability to answer the covenant for the breach of covenants.

There is no allegation that Hunter has been evicted from the land 344 or disturbed in his possession either of the land or negroes, nor is it pretended that there is a superior or better title in any one else. Is there any thing in the remaining objection that titles were not made on the 1st of January, 1843? By the terms of the agreement, in case of Read's death, his heir or heirs within a reasonable time after his decease, if of full age, if not, then his executors on reasonable request, were to make conveyance. Now it is not pretended that request has ever been made, there is no allgation in the bill nor is there proof of any, so that his right would be by no means clear in a Court of law. Complainant applies to a Court of Equity and must have conscience, good faith and reasonable diligence to call its powers into action. 17 Peters, 179. 9 Peters, 416. "He must show that he has been in no default in not having performed the agreement, and that he has taken all proper steps to performance on his part." 2 Story Eq., 771. "If a purchaser when he made his contract, knew that there was a defect in the title, and that it would take a considerable time to remove it, or if he acquiesces in the delay or proceeds with knowledge of the defect in the execution of the contract, he cannot complain." 2 Rob. Prac., 177. 4 Randolph, 481. 4 Call, 288.

We see here that no demand has been made for titles—that complainant never furnished endorsed notes agreeably to his obligation as part payment—that he has entered into the possession and had the use of the property—cultivated the land, taking its proceeds and profits—using the negroes and having the benefit of their labor for nine years, thus acquiescing in the delay of the title, indeed that the only complaint is of an incumbrance that he could have removed himself, and was by his agreement bound to remove, and which before the trial, was wholly removed; where then is the equity to enjoin?

Another view of the subject will show the entire groundlessness of the application. The rent of the land, the hire of the negroes for nine years, with the prices of the corn, mules, furniture, cattle, farming utensils, &c., would at least estimate, have largely exceeded Hunter's payments and the amount of the Bank execution.

Rent of 400 acres cleared land, 9 years, $1 per acre,	$3,600
Hire 10 negroes, (half the number) $150 each, per year,	13,500

Carpenter and wife vs. Read's Adm'r.—Opinion of Justice BALTZELL.

345 Corn, fodder, mules, &c., 5,000

$22,100

Payments by Hunter to the Bank, 13,888

Excess, $8,212

The amount of the purchase money with interest to the 22d January, 1849, the date of the master's report, is $47,443 73, the payments by Hunter to the Bank amount to $13,888, interest about $7000, making an aggregate of $20,888, leaving unpaid and due to Read's estate $26,455 73. So that the effect of the grant of the injunction will be to release Hunter's estate from the payment of this large debt, and make him owner of a large amount of property with the rent and hire, and without any equivalent or consideration. On the pretext of an incumbrance of $5,009 he is to be acquitted of a debt of $26,000. In this computation, I have excluded the McBride obligation, the ownership being contested; the master's report credits Hunter with the McBride obligation and $8,466, the Bank stock. This will be to rescind and dissolve the contract and nullify on the part of Read, whilst it is permitted to remain in operation so as to give to Hunter's estate all the benefits and advantages of it. If the contract is to be rescinded so as to deprive Read of the purchase money, Hunter should restore the negroes, and a mutual return by each be made of money paid, of negroes, rents and profits; neither should be permitted to retain any portion of the proceeds of the contract.

I now proceed to the second branch of the case—that of Carpenter and wife vs. Read's Administrator. These parties claim that the McBride obligation shall be paid to them and not to Read's administrator. They admit that it was delivered by Hunter as collateral security in pursuance though not in full compliance with the agreement with Read. There is no distinct ground asserted in the bill for this claim by the complainants. The most that can be made of their bill is, that they claim as distributees of their father, alleging in general terms "that the balance due on said obligation ought to be paid to them in equal proportions—that Read's estate is insolvent, and A. R. S. Hunter's also will be insolvent."

346 There is no question as to validity of the sale of the land and negroes by A. R. S. Hunter to McBride, as the heirs expressly ratified and confirmed it after they came of age, and their confirmation makes the matter as binding as if they had been of full age and assanted to the bargain when made.

The only question is as to the power and authority of A. R. S. Hunter, as guardian, to assign and transfer the obligation and of their right to intercept the fund from a third person. The obligation was payable to A. R. S. Hunter, individually, as guardian—he had the clear right to receive the money and to give a discharge and release it—he also had the right to assign it.

This subject is so well and ably treated, and the authorities on the subject so fully considered by the late Chancellor Kent, in the case of Field vs. Schieffelin, as to leave nothing farther to desire in its solution.

"That he, the guardian, had a legal control over that bond and mortgage, and a right to collect and receive the money due thereon, and a legal right to sell and assign the same in the due exercise of his discretion as guardian, is a proposition that does not seem to admit of dispute. The bond was not due when it was assigned to the plaintiff, but if the money was wanting for the purpose of the trust, either for discharging incumbrances or *for making more advantageous investments*, or for payment of debts and for the better maintenance and education of the ward, or for any purpose whatever connected with the faithful discharge of the trust and beneficial to the infant, the guardian had just and lawful authority to raise the money by the assignment of the bond and mortgage. The necessity or expediency of the measure rested entirely, in the judgment and discretion of the guardian. He was as between him and the purchaser the proper and exclusive judge of that expediency. It was not the duty or business of the purchaser to enquire into the necessity of the assignment, or to see to the application of the purchase money. He had the right to presume in the absence of all direct and plain proof to the contrary, that the guardian was exercising his power fairly and faithfully in conformity with his duty. If there was any fraud or collusion between the plaintiff and guardian, or if the plaintiff knew or was sufficiently informed when he accepted of the bond and mortgage that the guardian had in contemplation a breach of trust, and intended to misapply the moneys, then I apprehend, that the 347 plaintiff must be deemed to have taken the bond and mortgage in trust for the infant. In every instance the guardian acts under responsibility to his ward for the faithful and judicious of his trust, but the stranger who deals with him justly and fairly has a right to presume that he acts for the benefit of the infant, and he does not partake of that responsibility until the presumption of fair dealing is destroyed by evidence of fraud or collusion." 7 John. Ch., 155.

In the case under consideration, there is no charge of fraud, collusion or unfair dealing on the part either of Read or Hunter, and the evidence throughout establishes the contray. Where then is pretext for intercepting this fund at the instance of these heirs? Indeed it is difficult to resist the belief that their claim was an afterthought. In February, 1845, judgment was botained by Read allowing credit for this obligation as a payment. In December, 1845, James M. Hunter, the adm'r of A. R. S. Hunter, files his supplemental bill, claiming this obligation under oath, to be the property of the estate of A. R. S. Hunter. It is only in June, 1847, five years after these parties had ratified the sale by their brother A. R. S. Hunter, that the heirs for the first time assert their claim. During this time the subject was for the most part in controversy in the Courts, and it is incredible that they could during all this time have been ignorant of their rights. This of itself should be regarded as a ratification. The omission to disaffirm a contract within a reasonable time has been held sufficient evidence of ratification. In Holmes vs. Bloog, the Court thought four months sufficient. This principle, says the Chief Justice, is recommended by its justice and general convenience. It is unjust that the infant after his arrival at maturity and the lapse of a reasonable time, should hold the scales in his hands and decide as future circumstances should incline. 8 Taunt., 35-39. His confirmation may be justly inferred after he has come of age, from his positive acts in favor of the contract, or from his tacit assent under circumstances not to excuse his silence. Slight acts and circumstances will be ground from which to infer assent. 2 Kent., 195, 237. Acquiescence merely for an unreasonable time is an act that denotes an intent not to rescind the contract. 6 Conn., 506 9 Vern., 368.

Here we have the express ratification by these heirs after they 348 came of age of the sale by their guardian of their land and negroes —a ratification made to the party then indebted for the purchase money—obviously that was the time to have asserted their right, and to have claimed it. They did nothing of the kind. So far from it, according to the testimony of the witness on being presented the deed, they hesitated to sign, alleging "they had never received any thing for it, but when I showed them the obligation of A. R. S. Hunter, they said they were willing to be bound by it." I can regard this in no other light than a ratification as well of the transfer of the obligation as of the principal sale. At all events, there was notice express and direct with silence and acquiescence for the period of five years, sufficient to have barred an ordinary debt by the statute of limitation, connected with the additional fact that they in the meantime permitted their brother, the administrator of A. R. S. Hunter, to claim it on the part of the estate in a bill filed in Court for that purpose.

These Claimants too, are heirs and distributees of this estate, and a claim on their part comes with a very questionable grace. Indeed I have not been able to resist the conviction that the entire arrangement was a family concern, the purchase being in the name of the elder brother, but for the benefit of his brothers and sisters. They all united in the sale to McBride, they were together in the other purchases, and the testimony would seem very clearly to show co-operation.

On the whole case, I see no reason to grant the injunction, nor to deny the right of Read's estate to the McBride obligation.

NOTE.—The reporter in consenting to publish the foregoing opinions of Judge Baltzell as an appendix to this volume of Reports, does not thereby intend to indicate a concurrence with the views taken and expressed by the learned Judge. On the contrary, he sees no reason to be dissatisfied with the opinions of the Supreme Court. The opinions are published merely to give the views which Judge B. entertained in the Court below.

REPORTS

OF

CASES ARGUED AND ADJUDGED

IN THE

Supreme Court of Florida,

AT

TERMS HELD IN 1851-52.

By DAVID P. HOGUE, Reporter.

VOLUME IV.

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JUDGES

OF THE

Supreme Court of Florida,

DURING THE PERIOD OF THESE REPORTS.

HON. WALKER ANDERSON, CHIEF JUSTICE.
HON. LESLIE A. THOMPSON, } ASSOCIATE JUSTICES.
HON. ALBERT G. SEMMES, }

DAVID P. HOGUE, ATTORNEY GENERAL.

JUDGES OF THE CIRCUITS.

HON. GEORGE S. HAWKINS, WESTERN CIRCUIT.

HON. J. WAYLES BAKER, MIDDLE CIRCUIT.

HON. THOMAS DOUGLAS, EASTERN CIRCUIT.

HON. JOSEPH B. LANCASTER, SOUTHERN CIRCUIT.

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ADDITIONAL GENERAL RULES

ADOPTED BY THE SUPREME COURT, AT ITS SESSION AT TALLAHASSEE, JANUARY, 1852.

Ordered, That hereafter upon every appeal in Chancery causes, the appellant shall file with the transcript of the record a petition of appeal, in which the grounds upon which a reversal of the decree is placed shall be distinctly and plainly set forth; and counsel for appellant will not be permitted in argument to insist upon any matters except such as are so stated and set forth.

Ordered, That hereafter when any appeal shall be entered in any Circuit Court, whether the case be in Equity or at Law, it shall be the duty of the party Appellant, at the time of entering his or her appeal, to apply to the Clerk of the Circuit Court from which the appeal is taken, or the Clerk of this court or some of the Deputies, to issue a citation requiring the Appellee or Respondent to be and appear at the next ensuing term of this court to which the appeal is returnable, to show cause, if any he can, why the judgment or decree appealed from should not be reversed; and that said writ of citation shall be served and returned in like manner as a writ of *scire facias ad audiendum errores,* upon a writ of error sued out: *Provided, however,* that this rule shall not be deemed applicable to any cause where the appeal shall have been prayed and allowed in open court during the term wherein the judgment or decree appealed from shall have been made or passed.

DECISIONS
OF THE
Supreme Court of Florida
AT
JANUARY TERM, 1851.

The following acts, organizing the Supreme Court of Florida, were passed at the late session of the General Assembly; and the questions which are discussed in the first opinion delivered by the court, arising under the provisions of the laws in reference to Circuit Judges, having been brought before the court, it is deemed proper for the better understanding of the subject, to publish so much of the said acts as have relation to the matter.

AN ACT to organize the Supreme Court of the State of Florida.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Florida in General Assembly convened.* That, from and after the first day of January, in the year of our Lord one thousand, eight hundred and fifty-one, the Supreme Court of the State of Florida shall be composed of one Chief Justice and two Associate Justices, who shall be chosen and elected according to the provisions of the constitution, and hold their offices for eight years.

SEC. 2. *Be it further enacted,* That said Chief Justice and Associate Justices shall each receive for his services, an annual salary of two thousand dollars, to be paid quarterly at the treasury.

SEC. 3. *Be it further enacted,* That the Justices of the Supreme Court shall hold four terms of the said court in each and every year—that is to say, one term at Tallahassee, in the middle circuit, on the first Monday in January; one term at Jacksonville, in the eastern circuit, on the third Monday of February; one term at Tampa, in the southern circuit, on the first Monday of March; and one term at
2 Marianna, in the western circuit, on the third Monday of March: *Provided, however,* That said Justices may have power to order special terms or sessions of said court, whenever, from any cause the regular terms could not be held, and whenever the public service may require the same: *And provided further,* that for the year 1851, there shall be but one term of the Supreme Court, to be held at Tallahassee, on the first Monday in January, or as soon thereafter as organized, which court shall hear and determine all cases before them from every circuit in the State.

SEC. 4. *Be it further enacted,* That the Supreme Court, when in session at Jacksonville, in the eastern circuit, shall hear and determine all appeals and writs of errors, and all other matters of jurisdiction, brought from, or which shall arise in, the eastern circuit; and when in session at Tampa, in the southern circuit, shall hear and determine all appeals and writs of error, and all other matters of jurisdiction, brought from, or which shall arise in, the southern circuit; and when in session at Tallahassee, in the middle circuit, shall hear and determine all appeals and writs of error, and all other matters of jurisdiction, brought from or which shall arise in, the middle circuit; and when in session at Marianna, in the western circuit, shall hear and determine all appeals and writs of error, and all other matters of jurisdiction, brought from or which shall arise in, the western circuit: *Provided,* That no Justice of said court shall sit upon the determination of any case which he may have decided as Circuit Judge, or in which he may have been engaged as counsel: *And provided,* That by agreement of parties, any case may be heard and decided by the court at either of its sessions.

SEC. 5. *Be it further enacted,* That whenever, from any cause, any one or two Justices of the Supreme Court are disqualified or disabled from hearing and determining any cause brought before them, it shall be the duty of the Jus-
3 tices of the said court to notify the same to any one or two Judges of the Circuit Court, as the case may be, and the time and place when such causes shall be set for hearing; and it is hereby made the duty of such Circuit Judge or Judges, upon receiving such notice, to attend at the time and place designated, and he or they shall be, and are hereby, invested in full authority, in conjunction with the remaining Justice or Justices of the Supreme Court, to hear and determine the causes of which they were notified as aforesaid.

SEC. 6. *Be it further enacted,* That, in the event of the death, resignation or removal from the State of any one of the Justices of said court, the Governor of this State shall appoint some suitable person who shall supply the vacancy, until the same is filled by the General Assembly.

SEC. 7. *Be it further enacted,* That, from and after the said first day of January, in the year one thouseand eight hundred and fifty-one, all laws and parts of laws conflicting with or coming within the purview of this act, shall be repealed

[Passed the House of Representatives, December 20, 1850. Passed the Senate, January 6, 1851. Approved by the Governor, January 11, 1851.]

First section of An Act to amend An Act to organize the Supreme Court of the State of Florida.

SEC. 1. *Be it enacted by the Senate and House of Representatives of the State of Florida in General Assembly convened,* That, whenever one or more Judges of the Circuit Court shall, under the provisions of the fifth section of the act to which this is an amendment, hear and determine causes in the Supreme Court, the said Judge or Judges of the Circuit Court, for the time during which he or they shall be so engaged in hearing and determining said causes, shall be and constitute a part of the Supreme Court of the State 4
of Florida, anything in the act to which this is an amendment to the contrary notwithstanding.

[Passed the House of Representatives, January 22, 1851. Passed the Senate, January 23, 1851. Approved by the Governor, January 24, 1851.]

The eighth section of the fifth article of the constitution does not render a Judge of the Circuit Court ineligible to the office of Justice of the Supreme Court.

The Supreme Court is established by the imperative terms of the constitution, and by the third section of the fifth article, the powers of the court were vested in, and its duties directed to be performed by, the Judges of the several Circuit Courts, for the term of five years from their election, and thereafter, until the General Asembly should otherwise provide. The General Assembly, by the acts of January 11th, 1851, and January 24th, 1851, has not otherwise provided altogether, but in part only. The powers of the Circuit Judges, as Judges of the Supreme Court, have not been taken away, or dispensed with. On the contrary, their services are, by the fifth section of the one, and the first section of the other, expressly required and retained in the cause therein specified.

The fifth section of the act of January 11th, and the first section of the act of January 24th, 1851, are not, therefore, in conflict with the constitution.

In the matter of the authority of the Judges of the Circuit Courts to sit in this court as Justices thereof,

THOMPSON, *Justice,* delivered the opinion of the court.

The fifth section of the act of January 11, 1851, entitled An act to organize the Supreme Court of the State of Florida, provides that, whenever from any cause, any one or two Justices of this Court are disqualified or disabled from hearing and determining any cause brought before them, it shall be the duty of the Justices of this court to notify the

same to any one or two Judges of the Circuit Court, as the case may be, and the time and place when such causes shall be set for hearing, and it is made the duty of such Circuit Judge or Judges, upon receiving such notice, to attend at the time and place designated, and he, or they, shall be, and are, invested with full authority, in conjunction with the remaining Justice or Justices of this court, to hear and determine the causes of which they were notified as aforesaid.

And by the first section of the act of January 24, 1851, to amend the foregoing act, it is provided that such Circuit Judge or Judges as may be called on as provided, for the time during which he or they shall be so engaged in hearing and determining causes in this court, shall be and constitute a part of the Supreme Court of the State of Florida.

The contingency mentioned and provided against in the fifth section of the act of January 11, 1851, having arisen in consequence of the disability of two of the Justices of this court, who had been of counsel in several causes pending, and on the calendar for trial, this court proceeded to make the necessary requisitions upon the Judges of the Circuit Courts, to supply the deficiency. But the question of the eligibility of the Judges of the Circuit Courts to election as Justices of this court, having been raised and mooted in the General Assembly during its late session, and the opinion of the Attorney General thereon called for by the House of Representatives, and it being understood that some members of the bar entertained opinions adverse to that of the Attorney General—under these circumstances, the Honorable THOMAS DOUGLAS, Judge of the Circuit Court of the Eastern Circuit, on being requested to preside in the adjudication of several cases, stated these facts, and requested of this court the expression of an opinion on the subject; his Honor holding, that if the opinion of the ineligibility of the Judges of the Circuit Courts to be elected
6 Justices of this court was well founded, it followed, as a legitimate deduction, that they could not legally sit herein, and take part in the adjudication of causes, which the Justices of this court were disabled to hear and determine

For the purpose of satisfying the learned Judge, who was very properly unwilling to assume the exercise of a doubtful power, we consented to consider the question, and for this purpose, invited the members of the bar to discuss it before us. Whether we were wise in thus consenting to consider the subject in its present shape, and to express an opinion thereon, is, in itself, a question of very doubtful propriety; yet we shall feel some gratification if our judgment, although it may be deemed extra judicial, shall possess sufficient weight to put the question at rest.

The decision of the question as presented, involves an inquiry into the constitutionality of the acts of January 11th and 24th, before referred to, so far as they provide for calling in the Judges of the Circuit Courts to assist in the determination of causes in this court. The Judiciary has no direct delegation of power to declare an act of the General Assembly unconstitutional and void, but it is an incidental authority, unavoidably exercised in administering the *paramount* law of the Constitution. To call this incidental power into action, there must be a suit or judicial proceeding in which a conflict arises, or is supposed to arise, between the Constitution and a statute, and which affects the rights of the parties litigant. In the present case, there is no such suit, or other proceeding before us; and if we had a doubt upon the subject, it would be our duty to decline the expression of any opinion, until the question was directly presented for adjudication. Fearing that a refusal to express our opinions may imply a doubt, which we do not entertain, we proceed to give our views.

The clause of the Constitution which is supposed to render Judges of the Circuit Court ineligible to the office of Justice of the Supreme Court, is the 8th section of the 6th article, and is in the following terms: "No Governor, Justice 7
"of the Supreme Court, Chancellor, or Judge of this State, "shall be eligible to election or appointment to any other "and different station, or office, or post of honor, or emol- "ument, under this State, or to the station of Senator or "Representative in Congress of the United States from "this State, until one year after he shall have ceased to be "such Governor, Justice, Chancellor, or Judge." We have been referred to the opinion given by the Attorney General upon the call of the House of Representatives, and the interpretation which he gives to this clause of the Constitution meets with our entire approbation.

The use of the terms, "any other and different station," &c. would seem to imply that the words *other* and different were used in contradistinction to each other—they were not to be considered as synonymous, or convertible terms. We concur with him in the belief, that the language employed points not alone to another station or office, but to one which is also different in its structure, character, duties and the nature of its functions. It is to be observed, that the restriction acts alone on the magistracy composing the executive and judicial departments of the government, and it would seem that the convention intended to remove from the officers of those departments all temptation to prostitute the duties of their station to courting popularity, or hunting after other and different stations during the time they so held office, by rendering them ineligible during that period, and for one year afterwards. The Government is created for the purpose of securing the happiness and safety of the people, and nothing can tend so much to the attainment of that end, as that the executive officer shall, without fear, favor, or affection, perform his duty in the enforcement of the laws, and that the officers composing the judicial departments shall preserve the fountains of justice pure and uncorrupted. There are, therefore, obvious reasons 8
why the convention, in the formation of the scheme of government, should have inserted the restriction; but we do not think it should be extended beyond the plain import of the terms used. The promotion of an officer of the judiciary, or his translation to another office or station in the same department, is in no just sense, within the reason and spirit of the Constitution.

We think, however, that the Attorney General might have gone further, and have maintained with equal conclusiveness, that if one holding the commission of Judge of the Circuit Courts of this State, had been elected to be one of the Justices of this court, he would not have been elected even to another office or station, within the meaning of the Constitution.

The 3rd section of the 5th article of the Constitution provides, that, "for the term of five years from the election of "the Judges of the Circuit Courts, and thereafter, until the "General Assembly shall otherwise provide, the powers of "the Supreme Court shall be vested in, and its duties per- "formed by, the Judges of the several Circuit Courts within "this State, and they, or a majority of them, shall hold such "sessions of the Supreme Court, and at such times as may "be directed by law." The Circuit Court Judges, it is clear, were, by force of this provision, Justices or Judges of the Supreme Court for the term of five years, and afterwards, until the Legislature should otherwise provide. An election to the Supreme Court bench would, therefore, be a re-election to the same office which they had held, and the powers of which they had exercised previously. They had performed the duty ever since the organization of the government, and if they continued to perform the same duties and exercise the same powers by virtue of a new commission, and even with a new title, can it be said that they are holding and exercising another office? We think not, and are

very clear in our opinion that the Circuit Judges are not ineligible to sit in this court, because of the restriction before referred to.

Was it competent for the General Assembly to make the provision contained in the fifth section of the act of January 11th, 1851? The Supreme Court is established by the imperative terms of the constitution, and by the 3d section of the 5th article, for the term of five years, and thereafter, until the General Assembly should otherwise provide, the Judges who were to preside in the Supreme Court are designated. The powers of the court are vested in, and its duties were to be performed by, the Judges of the Circuit Courts. Has the present General Assembly otherwise provided? It is not pretended that the Legislature has interfered with the organization provided by the constitution, save by the acts of January 11th and 24th, 1851, before referred to, and we must look to these acts for a solution of the question. The Legislature can only deprive the Circuit Court Judges of their constitutional power, as Judges of this court, by the organization of the court, in some mode or manner, so as by express enactment, or necessary implication, their services may be dispensed with, and their power taken away. Although the first section of the act of January 11th, 1851, provides that the Supreme Court shall be composed of one Chief Justice and two Associate Justices, yet the whole act must be taken together; and on referring to the fifth section, we find their services are not dispensed with, or their power to perform the duties of Judges of this court taken away, but by express enactment are retained; thus preventing the necessary implication which would result from the terms of the first section. It is as if the first first section had read—the Supreme Court shall be composed of one Chief Justice, two Associate Justices, and such of the Circuit Judges as may be called in by the Chief and Associate Justices, to supply any defect arising from the disability or disqualification of either one or two of the said Justices. It was well remarked at the bar, that the constitution did not prescribe the number of Judges, but vested that in the discretion of the Legislature. Such a number might have been provided for, as would have rendered a call for the assistance of the Circuit Judges wholly unnecessary, and thus enabled the Legislature to dispense with their services. A proper economy in the infant condition of our State Government, and its scanty exchequer, determined the Legislature to fix the number at three, and to retain the services of the Circuit Judges, and the power given them by the constitution, in the cases mentioned in the fifth section of the act, to prevent a failure or delay of justice. The Legislature foresaw that any lawyer who might be selected for this service, would be interested as counsel in pending litigation, or a judge of one of the Circuit Courts might have decided causes removed into this court for the correction of errors, or the persons selected might be otherwise disqualified or disabled to determine causes brought here for trial, and, therefore, provided against such contingency. The Legislature, we think, has not exercised the power given by the constitution to provide otherwise, so as to supercede the Circuit Court Judges fully and completely, but have done so in part only, leaving still in those functionaries the power to execute the duties and office of Justices of this Court in certain cases. The Legislature has not conferred the power to sit in this court, upon the Judges of the Circuit Court—it is only that they have purposely omitted to take it from them *in toto*.

We take occasion to return our thanks to the gentlemen of the bar for the argument of the question before us, and to state that we feel great pleasure in the reflection, that the last view we have taken of the subject appears to be the unanimous opinion of the bar, as well as of the court.

TURBUTT R. BETTON, APPELLANT, *vs.* ROBERT W. WILLIAMS AND THE HEIRS AT LAW OF GENERAL LAFAYETTE, RESPONDENTS.

Where a bill is taken *pro confesso*, and a final decree passes by default, an appeal cannot be taken.

Under the statute of this State, an appeal may be taken only after a final decree—and, consequently, the appeal opens every question decided by the Chancellor during the progress of the cause, and, also, the regularity of the proceedings therein prior to a default.

A demurrer to a bill, for want of proper parties, is well taken, if the defect appears upon the face of the bill, especially if, on examination, it is found that the persons omitted are indispensable to a complete adjudication of the right of all interested.

Under the general rule in equity, that all persons materially interested in the subject ought to be parties to the suit, either plaintiffs or defendants, the vendors of land should be parties to a suit against the vendee, to enforce the lien of the purchase money on the land; and this rule applies where they have assigned the bonds or notes given for the price of the land, if there are any remaining rights or liabilities of the assignors which may be affected by the decree. Where there are such rights, or the assignment is not absolute and unconditional, or the extent or vitality of the assignment is denied, *then* an assignor is not only a proper, but a necessary party.

Where there is a contract to make title to land, upon payment of a certain sum of money, though the bond securing the payment of the money is assigned, yet the obligation remains to make the title, when the condition is performed; and this obligation cannot be delegated to another, without the consent of the vendee. An objection that the person who has so contracted is not made a party to a bill to enforce the lien upon the land is well founded, and ought to be sustained. The allegation of the insolvency of the assignor in such a case is not sufficient to excuse the omission.

The original vendee of an estate is not a *necessary* party to a bill against his assignee, for a specific performance of an agreement to purchase.

Appeal from a decree of the Hon. THOMAS BALTZELL, Judge of the Middle Circuit of the State of Florida, made on the 20th of June, A. D. 1850.

To the bill of complaints in the court below, Betton filed a demurrer—among other causes stated, for want of proper parties. The demurrer was overruled by the Judge on the 29th day of December, 1848, and the defendant had leave to answer by the first Monday in February thereafter. The defendant not having answered at the time required, a decree was entered upon the rule book in the clerk's office, taking the bill as confessed. A final decree passed on the 20th of June, 1850, and on the next day, the defendant appealed.

The object and purpose of the bill, and all other matters involved in the case, are sufficiently stated in the opinion of the court.

The cause was argued by ARCHER for Appellant, and BRANCH and HOGUE, for Respondents.

The court pronounced the following opinion, reversing the decretal order of the court below, by which the demurrer of the appellant was overruled, vacating and annulling all the subsequent proceedings up to and including the final decree of June 20th, 1850, and remanding the cause to the Circuit Court of the Middle Circuit, sitting in and for the County of Leon, with directions to allow the demurrer, with leave to complainants to amend their bill, and for such other proceedings as the case required, in accordance with the usual course of chancery practice.

THOMPSON, *Justice*, delivered the opinion.

In 1833, General LaFayette, of France, sold on a credit to William B. Nuttall, Hector W. Braden and William P. Craig, twenty-six sections of land in Florida, receiving their bonds for the purchase money and interest, and executing and delivering them a bond to make titles, on payment of the purchase money. Soon afterwards, Messrs. Nuttall, Braden and Craig sold out a large portion of these lands to other persons, and among others, to John M. G. Hunter, a tract

containing nine hundred and sixty acres, which is particularly described in the bill. This sale was also on credit. Hunter having executed and delivered his bonds for the purchase money and interest, received from Nuttall, Braden and Craig the possession of the land contracted for, and their bond to make titles, when the purchase money should be paid. Hunter sold and assigned his contract to one Baker Johnson, from whom, by successive sales and assignments, the right and interest of Hunter in said contract, and the possession of the land thereunder, were passed through divers persons to the appellant, Turbutt R. Betton, who, at the time of filing the bill, was, and for some time previously had been, in possession of the premises, and claiming to hold under the contract of purchase aforesaid.

At some time subsequent to the sale to Hunter by Nuttall, Braden and Craig, the time not being set forth in the bill, the latter entered into an arrangement with the Union Bank of Florida, by which, in consideration of the transfer of a sufficient number of the bonds which they had received from their vendees of the said lands, among which were the bonds of Hunter before mentioned, the Union Bank contracted and agreed with Nuttall, Braden and Craig, to pay their debt to General LaFayette, for principal and interest of the original purchase money, as their bonds should respectively fall due, and become payable. The Union Bank failed to pay the debt due to General LaFayette by Messrs. Nuttall, Braden and Craig, and, becoming embarrassed in its affairs, with the view to secure the payment of the said debt, transferred to the respondent, Robert W. Williams, who was the agent and attorney of General LaFayette, amongst other bonds of a similar character, the said bonds of John M. G. Hunter, upon trust, to sue for and collect the same, and apply the proceeds to the payment of the debt due LaFayette, in redemption of the engagement of the bank.

The bill in this case was filed to subject the land sold to
14 Hunter to the payment of the purchase money debt; and although the heirs at law of the original vendor, Gen. LaFayette, join in the suit as parties complainants, yet the suit is substantially a proceeding by Williams, the assignee of the bonds, to enforce the lien on the land, under the contract between Nuttall, Braden and Craig, and Hunter; the heirs of LaFayette join, we presume, as the persons holding the legal title, and who are willing to convey the estate, upon the execution of the sub-contract by the purchaser, or his assignee. Betton demurred to the bill, and the demurrer, upon argument, was overruled, and he was ordered to answer by the first Monday of February, 1849. No answer being filed, the bill was taken for confessed at Rules, at the clerk's office on that day. The cause then proceeded *ex parte,* and a final decree passed on the 20th June, 1850, and on the next day, Betton entered his appeal to this court. It is contended by respondents that this appeal cannot be sustained, because the appellant, in the court below, suffered the bill to be taken *pro confesso,* and the final decree passed by default. This is undoubtedly the rule in chancery in England, and which has been recognized and adopted as the correct rule in several of the States of the Union. 2 Smith's Chancery Practice, 22. 1 Bland's Reports, 12, 35. 8 Wendell's Reports, 219. 25 Wendell's Reports, 249. 12 Johnson's Reports, 493; and we think such rule is consonant with reason, and should be enforced here, so far as it can be made applicable to our practice. In New York, as in England, an appeal may be taken from an interlocutory order or decree, and if the party declines to appeal, or omits to do so, within the time limited, he will be considered as acquiescing in the propriety of the decree, and a subsequent default, will debar him from bringing any question in the cause before the appellate tribunal. Sands v. Hildreth, 12 Johnson's Reports, 493. Kane v. Whittick, 8 Wendell's Reports, 219. Under our statute, an appeal may be taken only after a final decree, the consequence of

which is, that the appeal opens every question decided by 15
the chancellor in the Circuit Court during the progress of the cause, and, also, the regularity of the proceedings therein prior to a default. Betton could not appeal from the decretal order of December 29th, 1848, overruling the demurrer, because it was not a final decree. He could, we conceive, adopt either of two courses;—to answer the bill, defend the cause upon the merits, and, on appeal, present the questions arising on the demurrer to this court for its review, as well as the merits of the final decree; or, it was competent for him to do as he has done, after the judgment of the court on the demurrer, to abandon further defence, and rely on what he considered the erroneous judgment of the chancellor. Mr. Betton was not in default until February rules, 1849, consequently we consider he has the right, after final judgment, to enter his appeal, and bring before this court the matters in the record prior to his default—the decree *pro confesso,* and all other subsequent proceedings in this cause, no matter how erroneous they be, cannot be examined into upon his complaint.

From the view which we have taken of the effect of a decree *pro confesso,* or a default in a chancery proceeding, it results in this case, that our inquiry must be limited to the decree of the Circuit Court of the 29th December, 1848, overruling the demurrer, and if that judgment be found correct, the final decree must be affirmed.

The demurrer does not allege a want of equity in the bill—indeed, it is conceded in the argument by counsel for the appellant, that Williams, as the assignee of the bonds of Hunter, given for the price of the land, and the interest thereon, has the same right, which the assignors, Nuttall, Braden and Craig, had, to subject the land to the payment of the debt; but it alleges a want of proper parties defendants in general terms.

It is objected by the counsel for the respondents, that a demurrer, for want of proper parties, must show who are the 16
proper parties—not, indeed, by name, but in such manner as to point out to the plaintiff the objection to the bill, and to enable him to amend by adding the proper parties. Such is the rule laid down in all the treatises on chancery pleading and practice. Mitford's Chancery Pleading, 180. 1 Daniel's Chancery Practice, 385. Story's Equity Pleadings, 238, 543. However, in Tourton vs. Flower, 3 Peere-Williams', 369, there was a demurrer for want of a particular party pointed to in the demurrer, by reference in compliance with the rule, and the demurrer, being held to be ill for that cause, as the party referred to was, in fact, before the court, it was then alleged *ore tenus* at the bar, the absence of another and necessary party, and the demurrer was held good for this last cause, though without costs—this seeming to be, according to the judgment of Lord Chancellor Talbot, the penalty for a demurrer *ore tenus* at the bar, as this was held to be. So in Pyle v. Price, 6 Vesey Junior's Reports, 780, there was a general demurrer, and the objection of the want of proper parties was alleged *ore tenus.* It was insisted in this case, that a demurrer for such a ground must point to the parties, by name or by reference. Lord Eldon is reported to have said, it was doubtful whether there was a general rule that a demurrer, for want of parties, must state the parties; and in a late case in the English chancery, *The Attorney General* v. *Poole* (4 Mylne & Craig's Reports, 32,) Lord Cottenham says upon this point, that Lord Redesdale, in his book, certainly so states the rule, and that that passage has been adopted by subsequent writers upon equity pleading, but no authority is referred to in support of the *dictum.* He says further "that it is not necessary to inquire how far that proposition is consistent with the general doctrine upon the subject of demurrers, or with the well established practice of allowing demurrers *ore tenus,* for want of parties. There seems, at least, sufficient ground for the

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doubt suggested by Lord Eldon, in Pyle v. Price." We find, also, a *dictum* of the Supreme Court of the United States, in Whiting v. The Bank, in which it is said, that the objection of a want of a proper party ought properly to have been taken by the parties in that suit at the original hearing, *or upon appeal,* if any, before the Appellate Court. See 13 Peters' Reports, 14. We are, however, satisfied that the objection to the demurrer, if available at all, should have been taken in the court below, by a motion to have the demurrer taken off the file, or some other appropriate motion, by which the court would have passed upon the validity of the pleading, and the judgment thereon being entered of record, its propriety could have been reviewed by this court, on appeal.

In the case at bar, the ground stated in the demurrer is, that the proper parties are not made defendants to the suit; and as this objection is taken by demurrer, and the defect, if it exists at all, must appear on the face of the bill, we are inclined to think it sufficiently certain, especially if, on examination, we find that the persons omitted are "indispensable to a complete adjudication of the rights of all interested, so that the performance of the decree of this court may be perfectly safe to those who are compelled to obey it, and, also, that future litigation may be prevented." Story's Equity Pleadings, §72.

It is alleged in argument by the appellant, that the following persons are necessary and proper parties, and who should have been made defendants in this suit: 1 William P. Craig, the heirs at law of William B. Nuttall, and the heirs at law of Hector W. Braden, who are the vendors of the land in question to Hunter, and who are bound by their contract with him to execute a title, on payment of the purchase money. 2 John M. G. Hunter, the vendee of Nuttall, Braden and Craig, who is still liable on his bonds for the purchase money and interest, and is interested in taking
18 the account of what is due thereon, and who is entitled to be exonerated from liability, on payment of the purchase money, or recission of the contract. 3. The Union Bank of Florida, as the assignee of Nuttall, Braden and Craig, and the *cestui que trust* of Williams, as to the residue of the fund transferred to him, after the satisfaction of the debt due the heirs of LaFayette.

It is insisted for the respondents, that it does not appear that Nuttall, Braden and Craig, the Union Bank, or Hunter, are necessary parties—that they have no rights to be affected or concluded by the decree, nor are they under any obligations necessary to be noticed, when the person holding the legal title to the land, and holding the notes given by Hunter, are offering to convey, on payment of the purchase money—that the requisition of the title of Nuttall, Braden and Craig, is a mere pretence, Betton knowing, from the beginning, that the legal title to the land was in LaFayette, and not in Nuttall, Braden and Craig, and that the latter could not convey any title thereto.

The general rule in equity is thus stated by Lord Redesdale: "all persons materially interested in the subject ought generally to be parties to the suit, plaintiffs or defendants, however numerous they may be, so that the court may be enabled to do complete justice, by deciding upon and settling the rights of all persons interested." Mitford's Pleadings, 164. See, also, Story's Equity Pleadings, §72. And in treating of the necessity of making an assignor a party to a suit, Judge Story says, that "where the assignment is not absolute and unconditional, or the extent or validity of the assignment is denied, or there are remaining rights or liabilities of the assignor, which may be affected by the decree, then he is not only a proper, but a necessary party." Story's Equity Pleadings, §153.

1. Applying the rules thus laid down to the facts stated in the bill, are not the vendors of the land to John M. G. Hunter materially interested, not only in the subject mat- 19
ter of the suit, but also in its object? Are there not remaining rights and liabilities of those persons, which will be affected by the decree? The subject matter of the suit is a contract which they made with Hunter, by which they bound themselves, on the payment of certain sums of money, to make title to certain lands; now, although they have assigned the bonds, by which the money was secured to be paid, yet the obligation remains that they should make the title, when the condition is performed; and this obligation they have not delegated, and, indeed, cannot delegate to another, except with the consent of their vendee, or his assignee. Nuttall, Braden and Craig did not assign to Hunter the contract which they had made with LaFayette, either in whole or in part, neither did they stipulate that they would procure the title to be made to Hunter by LaFayette; but for aught that appears in the bill, Hunter may have supposed that they possessed a full and complete legal title, and such must be the inference from the statement of the contract between them. It is true that neither Hunter, nor his assignee, could be compelled to accept a conveyance from Nuttall, Braden and Craig, unless the title was in them, and they had a good right to convey the property. If, upon an examination of title preparatory to the consummation of the contract, it was found that the legal title was in LaFayette, he might well insist on a conveyance directly to himself of LaFayette's title, as well as a conveyance from his vendors. It might be deemed necessary to his perfect assurance. Clark vs. Redman, 1 Blackford's Reports, 179. Lawrence v. Parker, 1 Massachusetts Reports, 191. Taylor v. Porter, 1 Dana's Reports, 422. It would, therefore, result as a necessary consequence, that, in a suit against the vendee to enforce the lien of the purchase money on the land, the vendors should be parties to the suit, so as to be bound by the decree of the court to make the conveyance which they had
contracted to make, and which the vendee or his assignee 20
has a right to require, before he parts with his money. They should properly join as complainants with their assignee; but if their authority cannot be obtained for this purpose, they may be made defendants—it is not of much importance how they appear, so they are before the court, and may be subject to the decree to be rendered.

So, also, we think Nuttall, Braden and Craig have rights connected with their liabilities—they are indebted to the heirs of LaFayette for the original purchase money, or some portion thereof, as alleged in the bill, and are, therefore, interested in its payment, to be relieved from liability. It is true that the bill alleges that Nuttall and Braden are both dead, and that their estates, as well as the survivor, Craig, are insolvent, but the latter may not always remain so. At any rate, insolvency does not always render it unnecessary to make the individual a party. In the case of Brooks v. Stuart, 1 Beavan's Reports, 514, the insolvency and discharge of a principal debtor, in a joint and several contract, was held by Lord Langdale, Master of the Rolls, not a sufficient excuse for omitting to make him a party defendant in a suit against the surety, and a demurrer was allowed for that objection; and we think there is much stronger reason why the vendors of Hunter, though insolvent, should be parties to this controversy. So, also, it may be true, as alleged, that the Union Bank has, for a full and valuable consideration, undertaken to pay the debt due to LaFayette; but it is distinctly averred in the bill, that the latter has not accepted the bank as his debtor, or in any wise released his claim upon Nuttall, Braden and Craig; and, besides, the Union Bank is alleged to be insolvent. There can be no doubt but that Nuttall, Braden and Craig are materially interested in the object of the suit, which is to recover a fund, which is to go in liquidation of their debt. The court below should have allowed the demurrer, for want of these parties.

We are relieved from the consideration of the question of the notice, which it was alleged in argument, Hunter and his assignee had of the fact that Nuttall, Braden and Craig had only an equitable title, and that the legal title was in LaFayette, because we find no such allegation in the bill. The only allegation of any knowledge on the part of Betton, is contained in the following averment at the conclusion of what is termed the charging part of the bill: "And they," the said complainants, "further well hoped that the said Turbutt R. Betton, who now holds possession of the same, *well knowing the premises,* would have paid, or tendered to your orators the said amount of the purchase money," &c. This allegation cannot be extended, so as to amount to an averment of notice by Hunter, or Betton—that, at the time the first named entered into the contract, or the latter acquired title thereto by assignment, they were informed of the state of the title, and how the vendors, Nuttall, Braden and Craig, expected to acquire the legal title.

3. As to Hunter, there is more doubt whether he is an indispensable party to the suit. It would seem from the application of the principle, that, as he is liable on his bond to Nuttall, Braden and Craig, so he is interested in taking the account of what is due thereon, and should, therefore, be considered a necessary party." But in Hall v. Sever, 3 Younge and Collyer, Equity Ex. C., 191, it was held, that the original vendee of an estate is not a necessary party to a bill against his assignee for a specific performance of an agreement to purchase. Upon this authority, we are inclined to consider that Hunter is not a necessary party, but as the case will, necessarily, be remitted to the Circuit Court to make other parties, it might be better that the complainants should bring him before the court. He would be a proper, although not a necessary party.

3. As to the Union Bank of Florida, we cannot perceive the necessity for bringing this corporation before the court in this controversy. Whatever interest it may have in the subject matter, or object of this suit, it is sufficiently represented herein by the complainant, Williams.

The decretal order of December 29th, 1848, overruling the demurrer of the appellant, Betton, is reversed and set aside, and as a consequence of said reversal, all the subsequent proceedings in said cause, up to and including the final decree of June 20th, 1850, are hereby vacated and annulled. Let the cause be remanded to the Circuit Court of the Middle Circuit, sitting in and for the county of Leon, with instructions to allow the said demurrer of the said appellant, for the reason stated herein, giving leave, however, to the respondents to amend their bill, by making William P. Craig, the heirs at law of William B. Nuttall, and the heirs at law of Hector W. Braden parties thereto, either as complainants or defendants, and in such other manner, and upon such terms, as the Judge of said court, upon application to him, and on notice to the adverse party, may think proper to direct, and for such other proceedings, according to the usual course of chancery practice, as may be requisite and necessary in the premises.

Let each party pay his own costs in this court; and that the respondents may proceed without delay in this cause, let the mandate of this court to the Judge of the Circuit Court of the Middle Circuit issue at any time, on the application of the respondents, or their solicitor.

Decree reversed.

WILLIAM G. PONDER, EXECUTOR OF ARCHIBALD GRAHAM, APPELLANT, v. MARY GRAHAM, APPELLEE.

As respects third persons, a man who lives with a woman, and holds her out as his wife, is estopped from denying it, when charged with liabilities as her husband, but such recognition cannot affect the rights of property even as between themselves.

The executor of a person who has recognized a woman as his wife, is not estopped from setting up and asserting the illegality of the marriage, where it was absolutely void, as where there existed a civil disability to contract marriage. The marriage being void, no civil rights can be acquired under it, and it is competent for the executor, representing the interests of distributees and creditors, to impeach its validity.

The act of Congress, approved March 30, 1822, by which the Territorial Government of Florida was organized, and the several acts amendatory thereof, are to be regarded as the Constitution of the Territory, differing, however, from the Constitution of the State Government in this—that the former contains *grants* of power, while the latter are restrictions of power primarily possessed.

By the organic law, the judicial power of the Territory was vested in two Superior Courts, &c., and the legislative power in a Governor and Council, and this power was to extend to "all rightful subjects of legislation."

An act of the Legislature which undertakes to determine questions of fact and law, affecting the rights of persons, or of property, is judicial in its character, and is not, therefore, a rightful subject of legislation. And though the facts and reasons alleged in an act of divorce are such as, by law, would warrant the sentence or decree, yet the inquiry into those facts and reasons is judicial in its nature, and the determination upon them is a judicial act.

The act of the Legislative Council, passed in 1828, gives to the courts jurisdiction in cases of divorce.

The Legislative council had no power or authority, after the act of 1828, to take jurisdiction of, and decide questions of divorce, and to pass an act dissolving the marriage contract between two persons, lawfully made and entered into—nor was the power or authority possessed by the Legislative body either before or after said act.

Marriage is a contract, in the strict, legal definition of the term, and a law dissolving the marriage relation, impairs the obligation of the contract, and is in conflict with the Constitution of the United States, and is, therefore void.

Appeal from judgment of the Circuit Court of the county of Leon, rendered at the Spring term, 1850, the Honorable THOMAS BALTZELL, Judge, presiding.

Mary Graham filed her petition in the Circuit Court of the county of Leon, representing that her husband, Archibald Graham, died on or about the 2d January, 1848, after having in his life time made and executed his last will and testament—that said will and testament bears date 16th November, 1847, and that one John R. Cannon, and the defendant, William G. Ponder, were therein named and appointed executors—that defendant alone qualified and took out letters testamentary—that the provision made in the said will is not satisfactory to petitioner, and that she, in due form, and in proper manner, signified her dissent thereto, within the time limited by law. The petitioner further states, that her deceased husband died seized and possessed of a large estate, real, personal, and mixed—out of which, petitioner prays that dower may be allotted to her, under the law in such case made and provided.

The defendant for answer, or plea to said petition, alleged that the said Mary Graham ought not to have her dower, as in her petition she claimed and prayed, because the said Mary never was *accoupled* to the said Archibald Graham, deceased, in lawful matrimony. To this plea, there was a replication, affirming that petitioner was *accoupled* in lawful matrimony with the said Archibald Graham, and issue thereon. The jury found for the petitioner; and thereupon it was adjudged and ordered, that said petitioner is entitled to an assignment of dower, and a writ of dower issued as prayed for, commanding the sheriff to summon five discreet free holders as commissioners, to allot and set off, by

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25 metes and bounds, to Mary Graham, widow of Archibald Graham, one-third part, according to quantity and quality of the real estate of which the said Archibald died seized, whereof the said Mary had not relinquished her right of dower, and at the same time to allot and set off to the said widow her portion, or one-half of the personal estate of the deceased.

The commissioners summoned by the sheriff made their report, August 8th, 1850, which was confirmed—but to which the counsel for appellant excepted, for the reason that the "said commissioners have assigned, allotted and set apart to the said Mary, one-half part of the gross amount of the personalty, without having first deducted therefrom the amount of debts due by said decedent at the time of his death—this exceptant contending, that the widow of one deceased is only entitled to a share of the nett personal estate, deducting all debts and charges upon the same, at the time of the death of decedent, and the expenses of administration"—which exception was, however, overruled by the court.

The facts of the case are succinctly these: The respondent, then Mary Buccles, about the year 1820, in South Carolina, intermarried with one Solomon Canady. Some time afterwards, they removed to, and resided in, Georgia, but soon, in consequence of domestic dissentions, separated.—Mary went to reside with Graham, a bachelor, and continued to live with him, under circumstances from which an adulterous cohabitation might be inferred.

In 1832, and while the said cohabitation continued, a bill was passed by the Legislative Council of the then Territory of Florida, entitled "An act for the relief of Mary Canady."

By this act, the Legislative Council, for the cause expressed in the preamble, assumed to judge and declare that the said Mary Graham was thereby divorced from her said husband, Solomon, and the bonds of matrimony subsisting between them, were thereby to be entirely and abso-
26 lutely dissolved, as if the same had never been solemnized. (See pamphlet acts of 1833, page 123.) There does not appear to have been any petition, affidavit, or proofs—a reference to a committee to ascertain the facts, or any notice to the absent husband. In 1834, the cohabitation between Mary and the testator still subsisting, the ceremony of marriage is celebrated between them, and from this time up to the period of the testator's death, which occurred in 1848, he lived with her, and acknowledged her as his wife, and in his will he provides for her by that name, and in that relation.

On the trial of the case in the court below, defendant's counsel prayed the court to instruct the jury as follows, viz:

1. That the Legislative council of the Territory of Florida had no power or authority to take jurisdiction of and decide questions of divorce, and to pass an act dissolving the marriage contract between two persons, lawfully entered into between them; and that, therefore, the act of the Governor and Legislative Council of the Territory of Florida, entitled an act for the relief of Mary Canady, passed February 9th, 1832, rejected February 10th, 1832, and reconsidered and passed by the requisite majority, February 11th, 1832, is void and of no effect.

2. That it is incumbent on the party claiming the benefit of the said act, to show that the other party, to wit, Solomon Canady, had notice of the said proceedings before the Legislative Council, and had an opportunity to appear before it, and cross-examine the witnesses—introduce evidence in his favor, and make defence to the said complaint; and that in the absence of such proof, especially if the jury believe from the evidence that Solomon Canady was not a resident of the Territory of Florida, the said act is to be disregarded, as invalid.

3. That all judgments rendered any where against a party who had no notice of the proceeding, are rendered in vio- 27
lation of the first principles of justice, and are null and void—which instructions so prayed, numbered one, two and three, the court refused to give to the jury.

The court then gave the following instructions:

1. That the marriage of Graham with the petitioner is legal and valid, unless the act of the Legislative Council of 1832 was against the provisions of the organic law, so as to make it void.

2. That *prima facie*, the action of the Legislature is to be regarded as valid, and it lies upon the party contesting it to maintain its invalidity, by showing that it was passed under circumstances not justified by the constitution and laws then existing.

3. If you shall be of opinion that the marriage contract between Canady and his wife was in full force and operation, securing to each the rights and privileges inherent to such relation, so that the contract was not abrogated and annulled, but operative and in force, and especially that the same was in full force, so far as the husband was concerned—then it was not competent for the Territorial Legislature to declare a divorce between the said parties, and such action was illegal and void, as impairing the obligation of the contract.

4. That if a party has, beyond all question, impaired and broken the marriage contract, so that its existence as a contract may no longer, with propriety, be asserted—that the clause of the Constitution of the United States, providing that no States shall pass a law impairing the obligation of a contract, is not affected by the action of a Legislature declaring a divorce, and allowing a new marriage.

5. If you shall be of opinion that the husband had violated the contract, and in fact impaired its main provisions and constituent elements, by deserting his wife, withdrawing from her society, refusing to her a suitable maintenance and support, and by other acts and conduct impairing, repu 28
diating and rejecting his contract, so that it could not in fact be regarded as a subsisting contract—that then it was competent for the Legislature to declare the same, and to give her the privilege of forming another contract, by contracting a new marriage. To which instructions, the counsel for defendant excepted.

The errors assigned in this court are—

1st. The court below erred in the instructions given to the jury, as set forth in the bill of exceptions.

2d. The court erred in refusing to instruct the jury, as prayed for by appellant.

3d. The court erred in overruling the exceptions of appellant to the report of the sheriff and commissioners.

The case was very elaborately argued by ARCHER for appellant and by RANDALL and WOODWARD for respondent.

Judge BAKER, of the Middle Circuit, sat with the Chief Justice, and SEMMES, Justice, at the hearing of this cause, THOMPSON, Justice, being disqualified, by reason of his having been of counsel in the court below.

SEMMES, *Justice*, delivered the opinion of the court.

This cause comes before this court on appeal from Leon Circuit Court. The suit was commenced in the court below by the respondent, representing herself as the widow of the testator, Archibald Graham, and praying for an allotment of dower in the estate of her deceased husband. The appellant filed his plea, *"ne unques accouple en loyal matrimonie,"*—to which, there was a general replication of valid marriage. On the trial of the cause, the Judge in the court below gave to the jury several instructions, which were excepted to by counsel for appellant. Other instructions were asked for by the same counsel, which were refused, and which refusal was also excepted to.

29 In considering this case, it is unnecessary to notice the instructions given by the court on the trial. Passing by these, I proceed to the consideration of the first instruction asked by the appellant, and refused. That instruction in substance is this: That the Legislative Council of the Territory of Florida had no power or authority to take jurisdiction of and decide questions of divorce, and to pass an act dissolving the marriage contract between two persons, lawfully entered into between them; and that, therefore, the act of the Legislature divorcing Mary Canady, passed February 11th, 1832, is void and of no effect.

In considering the important questions which arise under this instruction, and to which the attention of counsel was mainly directed, I frankly confess in the outset my unqualified concurrence in the doctrine, as laid down by the court in the case of The State v. Cooper—that it is the duty of a court to sustain the validity of a statute, unless its unconstitutionality is so obvious as to admit of no doubt. 5 Blackford's Reports, 259. On the other hand, it must be conceded, that, however grave and interesting the questions presented for the determination of a court, it is its duty to shrink from no responsibility imposed upon it by the laws and the Constitution.

A question has been raised by the counsel for respondent, which it is necessary first to dispose of. It is insisted that, inasmuch as Graham by his will recognizes respondent as his wife, his executor is estopped from setting up the illegality of the marriage, and that by his probate of the will, he is bound to execute it. I do not understand that the executor is seeking to avoid the execution of this will, by depriving respondent of the benefit of its provisions, as one of the *legatees*. But, on the contrary, she has renounced the provision in her favor, and claims dower, as the widow of Graham, adversely to the will. The doctrine of estoppel has no application to this case. It is not denied that, as respects
30 third persons, a man who lives with a woman, and holds her out as his wife, is estopped from denying it, when charged with liabilities as her husband, but it cannot affect the rights of property even as between themselves. 5 Iredell's Reports, 495.

The objection, I apprehend, arises from not considering the distinction between void and voidable marriages. Whenever any of the canonical disabilities exist, the marriage is not *ipso facto* void, but is esteemed both by the canon and common law valid for all civil purposes, until sentence of nullity is pronounced by the spiritual court, which can only be done in the life-time of the parties; and in the event of either of the parties dying before the Ecclesiastical Court proceeds against them, the marriage becomes good, *ab initio*, to all intents, and the wife and husband may have dower and *curtesy*, and the issue will be legitimate. Coke on Littleton, 32, 33. But where any civil disability, as prior marriage, exists, the marriage is void absolutely, and no civil rights can be acquired under it; and it may be inquired of in any court where rights are asserted under it, though the parties be dead. 5 Iredell's Reports, 493-4.

Where any civil disability exists, the judgment of the court is but declaratory; it does not make it void; for though a marriage *de facto*, it had no legal existence. It is competent for a party to set up the nullity of his first marriage, in bar of a sentence praying the nullity of the second marriage. Shelford, 332. Either of the parties to a marriage, or the parent or guardian of either of the parties, or any other person interested, may apply to the court, and they have a right to a declaratory sentence, and it is upon the ground that the public, as well as the parties in interest, have a right to know the real character of these domestic relations. Shelford, 334. It is, therefore, upon principle and authority, competent for the executor, representing as he does the interest of distributees and creditors of this estate, to impeach the validity of this marriage.

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The main question raised in this case, as to the power of 31
a Legislative body, *as such*, to grant divorce, is not altogether a new one. It has been investigated by some of the American Courts, and grave constitutional questions have been necessarily involved in the discussion; and yet the question still remains an open one—opinions clashing—nothing settled. It is to be regretted that amid the conflict of opinion, upon a question of such deep interest, we are unable to avail ourselves of the investigation of any one of the great jurists of our country, to relieve the subject from embarrassment and difficulty, and that while almost every other legal question of importance has had light and authority imparted to it, this, one of the most important of all, has been allowed to slumber on in doubt and uncertainty.

The Legislatures of some of the States of the Union exercise exclusive jurisdiction over this subject; one or more of them by reason, as is contended for by their courts, of the absence of any constitutional inhibition—while others claim this authority by reason, it is said, of an inherent power, analogous to that of the Parliament of Great Britain. Some exercise the power as a constitutional right, while others claim it as an original right, and without the sanction of constitutional authority.

No one doubts the right of the people by their constitution, to invest this power in the Legislature, or any where else; but the question is, when the constitution is silent on the subject, in what department of government does this authority rest? I believe that much, if not the whole difficulty, has arisen from overlooking some of the great principles which enter into the constitutional government of the States, and from not preserving the obvious distinction between legislative and judicial functions—by confounding the *right* which a legislative body has to pass *general laws* on the subject of divorce, with the power of dissolving the marriage contract.

There is an important and well recognized distinction be- 32
tween the powers of the Federal and State Governments. The former was created by the States directly, not by the people; designed not as a government for the people, but of the States; with authority to legislate on questions of national policy in which the States, as sovereign communities, had and felt a national interest; in short, to represent, by its action, the united will of these distinct sovereignties. The domestic relations, and all questions affecting our civil institutions, remained where they were—with the *people* of the respective States. The powers of the General government are, therefore, purely derivative. The constitution is a mere delegation of power, and as a consequence, Congress can exercise none not expressly given, or which does not arise by necessary implication. The *limitation* of power contained in that instrument is, necessarily, applicable to the government created by the instrument itself. All power, therefore, not delegated by that instrument, or inhibited to the States, is reserved to the latter.—On the other hand, the legislature of a State, aside from any constitutional restriction, possesses the law-making power, and is undoubtedly vested with all the legislative powers possessed by the people themselves, and may exercise the same in any manner consistent with the great and fundamental principles of natural justice.

The people, in organizing their respective State Governments, never contemplated, by their several constitutions, a *grant* of power, but a *limitation* of *inherent* power in the legislature, their legally constituted delegates. See Smith on the Constitution, and Story on the Constitution.

The legislative department, unless restricted by constitutional provisions, possesses every power not delegated to some other department; although as to other departments, it is in the nature of a *general grant of power*. 2 Scammon's Reports, 81.

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These general principles will be found not without their application to the case before us, and especially to the decisions of some of the State Courts on this subject, which I will hereafter notice.

The Territorial Government of Florida was organized by act of Congress, approved 30th March, 1822. For several years subsequent, Congress passed several acts amendatory of this, but not altering any of its essential provisions. This government was formed under that clause of the Constitution of the United States, which vests in Congress the power "to *dispose* of, and make all needful rules and regulations respecting the territory, or other *property* belonging to the United States." It is a question by no means free from doubt, whether it ever was contemplated by the use of these words, to vest in Congress the power to establish separate and distinct Territorial Governments. Be this as it may, the exercise of the power has been acquiesced in, and I know of no useful purpose to be gained by calling it in question.

The act of Congress above referred to, being the organic law, is to be regarded, as it is in point of fact, the Constitution of the Territory. This organic law, unlike the Constitutions of the States, is a *grant*, and not a *restriction* of power primarily possessed, and in this respect, similar to the Constitution of the Federal Government. The Territorial Government being the creature of Congress, derives all its powers from this charter, giving it a political existence. It is to this grant, that we are mainly to look for a solution of the question before us—all powers not enumerated, or arising by implication, are reserved, and this is the correct rule in the construction of this grant. See 3 Story on Constitution, 133. The act provides that "the *judicial* power of the Territory shall be vested in two Superior Courts," &c. The legislative power shall be vested in the *Governor and Council*, and "shall extend to *all rightful sub-*
34 *jects of legislation.*" The question here arises, was the act of the Legislative Council, in 1832, divorcing the respondent from her husband, Solomon Canady, a *legislative* or *judicial act?* What are we to understand by rightful subjects of legislation?

It is insisted in argument, that a legislature possesses *inherent* power, over and above that of making laws. If this were true, then the terms, *"rightful subjects,"* are a *restriction* imposed by Congress on the grant itself, confining the action of the Council to such matters as legitimately attach, and from necessity belong, to the law-making power. But the proposition is not true. The legislature and the law-making power are convertible terms, and the one has no greater or less import than the other. No legislature, as such, has any other power than that of making laws. Its *inherent* authority does not extend beyond this. Were those restrictive words erased from the grant, I know of no rule of construction which would, under the general terms, "legislative powers," vest in the Council any other power than that of enacting laws and special acts, which confer *privileges* without invading rights, (of course, excepting rules for its own government.) But from the plain and obvious import of the terms used in the grant, I believe it the only sound and consistent interpretation which the act is susceptible of.

It is said that this act of the Legislative Council was a *law*, and, consequently, was a legitimate exercise of power. If this were true, it was competent for the Legislature to *repeal* it; for all laws can be repealed, (except where vested rights are created.) And it would scarcely be contended that any legislative body could dissolve the contract one day, and restore it the next. But the act was not a law in any sense. The term is defined by all legal writers to be a rule of civil conduct, prescribed for the *future* actions of men—from its very nature, it must be *prospective*, otherwise it can-
35 not be a rule of civil conduct, but partaking of a judicial proceeding as contra-distinguished from a legislative power. It is said by an eminent jurist, "that the very essence of a law is a rule for future cases." It must be of general and uniform application. If an act of the legislature, in terms, judicially determines a question of right, or of property, as the basis upon which the act is founded, so far the proceeding must be regarded as *judicial*. Smith on the constitution, § 347; or where the act determines matters of fact, or of right, dependent on matters of fact, it is the exercise of *judicial* powers. Smith on the constitution, § 351.

An act which is limited in its operation, and which exhausts itself upon a particular person, or his rights, is, in its very spirit and terms, a judicial proceeding. 9th Gill and Johnson, 365.

The judicial power of a State is that which administers justice, under the sanction and according to the forms of law. When speaking of the legislative and judicial departments of a government, our meaning is well defined and comprehensive—why should it be less so, when referring to their respective powers?

The act of the counsel undertakes to determine questions of fact and law exclusively within the province of the courts. If, as is contended with much reason, there were no existing causes of divorce, as set forth in the preamble to this act, then the dissolution of the marriage contract was a mere assumption of power, exercised in the most arbitrary manner.

An act declaring that to be a crime which, by the laws of the land, was no crime, and punishing an innocent party, by depriving him of important legal rights without a hearing, without notice, and who had not, in any mode, made himself amenable to our laws, such proceeding could not be justified, on any principle of natural right, or common justice. But assuming the fact to be so—that the grounds
36 on which the legislature acted were recognized by our law as causes for divorce—then the legislature, assuming the high prerogatives and character of a judicial tribunal, proceeds to determine the facts and administer the law—upon *ex parte* showing, pronounces judgment against an absent defendant, and declares a forfeiture of his marital rights, for causes happening in a foreign jurisdiction, and to whose laws he was alone amenable. Is there no distinction between making a law and expounding and administering a law? Between declaring that certain acts may work a forfeiture, and passing judgment of forfeiture? Between enacting a law affecting the remedy, and pronouncing a judgment dissolving a contract? Had any court dissolved this marriage contract, with the facts before it disclosed in this record, it would have been but a poor compliment to its own sense of justice, or the high and solemn trust with which the law had clothed it.

Chancellor Kent (2d Commentaries, 106,) says, the question of divorce involves investigations which are of a *judicial* nature, and the jurisdiction over the subject ought to be confined to judicial tribunals. If the question of divorce be a rightful subject of legislation, then it is very clear that it is an improper subject for judicial cognizance, unless it can be shown that the right of the courts to legislate, is coextensive with that of the legislature to administer the laws. And if the courts have no jurisdiction, of what avail is that political maxim which we find engrafted in our declaration of rights, but which exists above and independent of all constitutions—"that the courts of the country shall be open to every citizen for the redress of his wrongs, and enforcement of his rights."

In this country, at least, no man can be compelled to surrender his rights, except by due course and process of law, administered by the courts.

The case reported in 4th Condensed Supreme Court Re-

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37 ports, 520, decided by Chief Justice Marshall, has been referred to, and the *dictum* of this great jurist has been invoked by counsel for respondent, as an authority in support of their position. Did I believe his language susceptible of the construction given it I would more than doubt my own convictions on this subject. The Chief Justice says—"it never has been understood to restrict the *general* right of the Legislature to *legislate on* the *subject* of divorces. *Those* acts *enable some tribunal,* not to impair the contract, but to liberate one of the parties," &c. Mr. Justice Story in the same case says—"*A general law regulating* divorces, *like a law regulating remedies in other cases* of breaches of contract,"&c., and he further adds, "that he was not prepared to admit a power in the State Legislatures to dissolve the marriage contract," &c., "without a judicial inquiry to ascertain the breach of the contract." Chancellor Kent, (2d Commentaries, 89,90,) in commenting on the above case, fully recognizes the general right of a legislature to pass *laws* on the subject of divorce, and so far as I am aware, the exercise of this power has never been questioned by any legal writer.

It is said, and the doctrine is broadly intimated in several of the authorities, that a legislature in this country can grant divorces, in analogy to the Parliament of England. I can see no parallel in the two cases. Political writers in England claim for their Parliament omnipotent power. It is said that in that country, "there is no written constitution, no fundamental law, nothing visible, nothing tangible, nothing real, nothing certain, by which a statute of Parliament can be tested." See 3 Dallas's Reports, 308; and yet, with all this acknowledged and untrammelled power, it does not assert or exercise the right of dissolving the marriage contract, to the extent and in the summary mode adopted by the Legislatures of some of the States.

Parliament never decrees a divorce, *a mensa et thoro*—
38 that power belongs exclusively to the courts. Parliament never even decrees a divorce *a vinculo,* but for adultery, and that upon a judgment *a mensa et thoro,* first pronounced by the Ecclesiastical Courts, and unless sufficient cause is shown, a verdict for damages in a Court of Common Law is requisite, before Parliament will take jurisdiction. The whole proceedings, from the libel filed in the Ecclesiastical Court, up to the final decree by Parliament, are, in every essential requisite, *judicial.* The formal petition to the House of Lords, with an office copy of the judgment and proceeding in the court, notice to the defendant, the examination of witnesses, the hearing of counsel, and the judgment pronounced, all clothe it with a judicial character, of which it is impossible to divest it—done, it is true, by Parliament, but by virtue of its omnipotent power.

The case in the Supreme Court of Maryland, reported in 1st Gill and Johnson, 464, was where the legislature had granted a divorce *a mensa et thoro.* This authority, and the one from Connecticut, are mainly relied on by respondent's counsel.

If the Legislature of Maryland based its rightful exercise of this power, as is intimated in the authority, upon any analogy of Parliament, it is obvious it cannot be sustained. The claim of omnipotent power in Parliament rests upon the fact, that it is unfettered by a written constitution—that it stands in place of the people, and speaks the language of absolute sovereignty. Smith on the Constitution. But this principle in the English Government is not recognized in the United States. It is at war with our institutions, and is but another name for despotism. See 1st Kent's Commentaries, 426. It is also said by the court in this case, "that the General Assembly of Maryland exercised the power of granting divorces, for the want, perhaps, of Ecclesiastical Courts to effect it." But the Ecclesiastical Courts of England had not the power of granting divorces *a vinculo,* and in this respect, at least, their existence in that State, with all their 39 power of ex-communication, would have been of no avail. But if the reason assigned be a good one, why is it that the legislature does not also claim cognizance of all other matters appertaining to the marriage relation, and decree alimony to the wife?—for that was and is, within the exclusive jurisdiction of the Ecclesiastical Courts of Great Britain. But the conclusion of the court, why the divorce granted by the legislature in that case was a *legislative* and not a *judicial* act, is manifestly based upon another point. In Maryland there is no law authorizing any court to decree a divorce, and from this it was insisted that the authority was within the province of the legislature. The Court says:—"She could have recovered a suitable maintenance in a Court of Chancery. If she could have been thus redressed by an exercise of judicial authority, we would ask is it not fair to conclude that the redress (alimony) granted to her by the legislature is an exercise of judicial authority?" The court held the act of the legislature valid as to the *divorce,* but invalid as to *alimony,* upon the ground that, for the latter, the party had her redress in the courts—for the former, none; and hence the conclusion of the court, that the first was a *legislative,* and the latter a *judicial* act. Without adopting the opinion of the court, the authority as it stands is against the respondent—for, if the *law* vesting this power in any particular branch of the government be a true test of its character, then the act of the Legislative Council of Florida, giving to the courts jurisdiction in cases of divorce, passed in 1828, is conclusive proof that the act divorcing respondent was a *judicial* act.

I regret being also compelled to differ from the learned judge who delivered the opinion of the court in the case reported in 8th Connecticut Reports, 547; but in my opinion the authority cannot be sustained on principle. The Supreme Court of that State (Peters, Justice, dissenting,) held that the legislature possessed the power of granting 40 divorces—that, under the original charter of the government, this power was exercised like that of the Parliament of England—that the constitution of 1818 was not a *grant* but a *limitation* of power in the legislature, and that if this body was authorized to *make a law,* giving power to some *tribunal* to grant divorces, it could do so itself directly, by a sovereign act, and in the exercise of a constitutional right.

I fully concur in the construction given by the court to the constitution of 1818, but the fact of its being a *limitation* and not a *grant* of power leads my mind to a different conclusion from that arrived at by the court; for conceding the absolute supremacy of the legislature of that State prior to the constitution of 1818, yet that instrument, by declaring as it does, that the executive, legislative and judicial departments of the government shall, thereafter, remain separate and distinct, did, in terms and emphatic language, *restrict* the legislature from the exercise of judicial functions, and if that body had "reserved rights," (which was doubtless true,) it certainly was not one of them, in the face of this limitation, to assume the *administration* of the laws by dissolving a contract.

Every legitimate body necessarily has the power to pass laws affecting the remedy, and empowering the courts to enforce that remedy; but it does not follow that it can administer the law itself; for the obvious reason, that the exercise of the one is within its province, and the other out of it. The legislature of Connecticut, it is true, has exercised judicial powers from the commencement of her civil polity, and probably to a greater extent than any other State in the Union. This, no doubt, has arisen from the fact, that originally there was a union of all the departments of government, and a concentration of the powers of all in the legislature, or general court. I am aware that it has been held that this *usage,* on the part of the legislature, to exercise

judicial functions, "made up a part of the constitution of that State," and, under this construction, the right to grant new trials and divorces, has been conceded to the Legislature. If it be true, as is contended by the courts, "that *usage* and the *Constitution* are synonymous terms in that State," (2 Root's Reports, 350,) then the argument is at an end, and, by a parity of reasoning, the principle will apply to Florida, and every State in the Union. But I humbly submit, that the terms are not synonymous in any conceivable sense. I cannot well understand how the usage of a legislative body can be appealed to, to determine the *limitation* of power imposed by the *Constitution* of a State. If *usage* is to be the test of constitutional power, and the interpreter of constitutional rights, then it becomes the paramount law, and government is thrown back, and resolved into its original elements. Whence the necessity of the people assembling convention, asserting their power, and declaring their rights? Why have a constitution, if its operation is to be controlled, and its powers fettered and restricted, by previous custom?

If this be the science of government, then it must forever remain stationary—no progress—no improvement—and the principle upon which our's is based is a false one—false both in theory and practice. If *usage* and the constitution are convertible terms, then I can well understand the doctrine, that a State Legislature may claim the omnipotence of the British Parliament. It has been truly said, that our constitutions originated in a spirit of distrust to legislative power, (Smith on the Constitution,) and we are not without evidence in our own country that, while other departments of government are content to remain in the spheres marked out for them by the constitution, the tendency of the legislative department is to absorb all power. Mr. Madison says—"The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex." Federalist, page 278.

42 It is very far from being true, even in political science, that the exercise of a *power* by a legislature is evidence of a *right*. The exercise proves nothing but the fact—it does not establish a principle, and it would be a most fearful doctrine in a free government to hold, that a legislative exposition of a constitutional restriction upon its own powers was proof of the fact. It would be a judicial determination of a constitutional question, of right belonging to a co-ordinate branch of the government.

If the constitution of a State has any vitality at all, its provisions, separating the several departments of government, do necessarily, as they were designed, restrict this prior usage within constitutional bounds, and prevent a blending together of those powers, which the wisest and best of men have considered the only safe guarantee to public liberty and private rights. I am satisfied in my own mind, that when a constitution declares that the judicial and legislative powers shall remain *separate* and *distinct*, or where, as in the organic law of Florida, they are separated without the use of these words, the exercise of judicial power by the legislature is an infraction of the constitution, and, therefore void. The use of these words is as positive and well defined a restriction, as that contained in the Constitutions of Massachusetts and Alabama, declaring that the legislature should *never* exercise any judicial powers. See Watkins v. Holman, 16 Peters, 60.

The fundamental principle of every free and good government, is that these several co-ordinate departments forever remain separate and distinct. No maxim in political science is more fully recognized than this. Its necessity was recognized by the framers of our government, as one too invaluable to be surrendered, and too sacred to be tampered with. Every other political principle is subordinate to it—for it is this which gives to our system energy, vitality and stability. Montesquieu says there can be no liberty, where the judicial are not separated from the legislative powers. 1 43
Spirit of Laws, page 181. Mr. Madison says these departments should remain forever separate and distinct, and that there is no political truth of greater intrinsic value, and which is stamped with the authority of more enlightened patrons of liberty. Federalist, 270.

It is only by keeping these departments in their appropriate spheres, that the harmony of the whole can be preserved—blend them, and constitutional law no longer exists. The purity of our government, and a wise administration of its laws, depend upon a rigid adherence to this principle. It is one of fearful import, and a relaxation is but another step to its abandonment—for what authority can check the innovation, when the barriers so clearly defined by every constitutional writer, are once thrown down. Each department is a blank in government without the aid and co-operation of the others; and when one is encroached upon, its powers, to that extent, become paralyzed, and the whole system fails to carry out those high purposes for which it was designed. Under all circumstances, it is the imperative duty of the courts to stand by the constitution.

It is contended that the provision in the constitution of our State, declaring that divorces shall not be allowed but by judgment of a court, is to be construed into an admission of this power in the legislature prior to the constitution. Just the reverse is true—the provision itself was unnecessary—the separation of the departments of government was comprehensive enough. But this provision has a meaning not apparent on its surface. In my opinion, it is a strong and emphatic condemnation by the people of this *usage* on the part of the legislature to assume powers not of right belonging to it.

It is also said that, inasmuch as Congress repealed many acts of divorce passed by the Legislative Council, and did not repeal this, it became valid, by the implied sanction of Congress. My answer to this is, that it was out of the 44
power of Congress, itself to pass the act, and that it could not, by its approval, make that valid, which was, *ipso facto*, void under its own grant, as well as the Constitution of the United States, which I will endeavor to show; and, secondly, no approval of Congress is to be inferred from its silence. Many acts of the Council silently acquiesced in by Congress, have been declared unconstitutional, and set aside by the courts of the Territory, in the exercise of legitimate powers granted to them.

If the legislature passed this act in violation of the organic law, it was void, and if Congress could, by its approval, make that a law which was no law, it was assuming to legislate directly on the question of divorce. This it could not do. But it is said, how can Congress authorize any tribunal to do that which it cannot do itself? The answer is a plain one. The powers of the Federal Government being purely derivative, the authority of Congress to establish and organize a Territorial Government is not an *original* power, but a *limited* one, derived from a *specific* grant in the constitution; and in the exercise of this power, it could establish judicial tribunals, possessing *all the powers incidental to them;* but it does not follow, that Congress could exercise *judicial* functions. Chancellor Kent (2d Commentaries, says the repeal of these acts of divorce by Congress, amounts to a strong national condemnation of the exercise of this power by a legislature. There is another point presented by the record in this case, which I think it my duty briefly to consider—it is, whether this act of the legislature is not unconstitutional, on the ground that it impairs the obligation of a contract

It is insisted that marriage is but a *civil relation*, and not embraced within the definition of a *contract*, as used in the constitution. In England, as well as in this country, all legal writers consider it *as purely a civil contract*. It is true

it is a civil relation, but *nonconstat,* it is not a contract in the strict legal definition of the term. Every contract creates a legal relation between the parties. Blackstone says that "the law of England considers marriage in *no other* light than as a civil contract, and viewing it in this civil light, the law *treats* it as it does all other contracts." 1 Blackstone's Commentaries, 448. Rutherford says the contract of marriage creates important legal rights in the person and property of the other. 1 Institutes, 314. See, also, Bacon, 476, 488. The contract creates mutual rights, duties and obligations, deeply interesting to society, it is true, but none the less important and valuable to the contracting parties. It is municipal, as it affects the public—it is a contract, as it affects the rights of the person and the rights of property—it has all the attributes of a pure contract, whether we consider the capacity of the parties to contract, the subject matter or the consideration; and the rights growing out of it can be asserted and enforced in a court of justice. A man has as good a right to the property acquired by marriage, as that acquired under any other contract. Mr. Justice Story says, "As to the case of the contract of marriage, which the argument supposes not to be within the prohibitory clause, (of the constitution,) because it is a manner of civil institution, I profess *not to feel the weight of the reason assigned for the exception.* In a legal sense, all contracts, recognized as valid in any country, may be properly said to be matters of civil institution, since they obtain their obligation and construction, *jure loci contractus.*" 4 Condensed Supreme Court Reports, 520. I know of no reason why the word contract, as used in the constitution, should be restricted to those of a pecuniary nature, and not embrace that of marriage, involving as it does, considerations of the most interesting character and vital importance to society, to government, and the contracting parties. It is comprehended by the words of the constitu-
46 tion, and there is no rule of construction that would exclude it, in the absence of any thing to show that it is not within its spirit. 9th Gill and Johnson. And what was the *obligations* of the contract, but the rights and duties which grow out of it? A legislative act which discharges the duties and destroys the rights acquired under any contract, must, of necessity, impair its obligation. A law affecting the remedy, does not impair the obligation, but an act of the legislature dissolving the contract, *destroys* the obligation.

In every respect in which I have been able to see this case, I can find no reason to sustain the act of the legislature. It appears by the record, that the parties were domiciled in the State of Georgia, where, it is alleged, the desertion and ill treatment occurred. The wife, living with the testator, Graham, removed to Florida—while the husband returned to Carolina, his former residence. The bill was introduced into the legislature one day, and passed the next. It is very clear that this divorce would not be recognized by the courts of Georgia or Carolina, were any rights asserted under it in those States. There was an utter want of jurisdiction over the person, as well as the subject matter, and an act thus passed in defiance of the maxim, *audi alteram partem,* has no merit to recommend it to this court. The husband, in this case, in the language of Chief Justice Story, "had as good a right to his wife as his property acquired under the marriage contract—he had a legal right to her society and fortune, and to divest him of these rights, without his default, and against his will, was as flagrant a violation of the principles of justice, as the confiscation of his estate." 4 Condensed Supreme Courts.

I am, therefore, of opinion that the act of the Legislative Council of February 11th, 1832, was in conflict with the organic law of Florida and the Constitution of the United States, and is, therefore, void.

Per Curiam—Let the judgment of the court below be reversed.

Sarah A. Lines, Appellant, vs. William Smith, Appellee. 47

Promissory note and bills of exchange are presumed to be founded on a valid and valuable consideration—but this presumption, which the law raises for the protection of negotiable paper, may be rebutted by proof to the contrary.

The statute requiring the promise to pay the debt of another to be in writing, in order to bind the party to be charged thereby, does not dispense with the consideration required by the common law to support the contract.

The sale of a slave carries with it an implied warranty of title—and it is the sale of the title which creates the liability of the purchaser, and constitutes the consideration for the promise. If the vendor had no title, there would be no consideration for the promise; and the failure of consideration, or want of title, may be set up as a defence, whether the party promising, or a third person, was the purchaser.

A mere naked promise to pay the existing debt of another is void. Such a promise must have a new, independent, or original consideration to support it.

The debt of a third person is an adequate consideration for a promise, provided the promise is in writing, and the instrument bears on its face, "value received," or some other words, which raise a presumption of legal consideration sufficient to sustain the promise, independently of the original debt.

This was an appeal from a judgment of the Circuit Court of Gadsden county, Hon. Thomas Baltzell, Judge of the Middle Circuit, presiding, rendered at the Spring term, A. D., 1850.

The case is fully stated in the opinion of the court.

Judge Baker, of the Middle Circuit, sat in the place of Justice Thompson, who had been of counsel in the case in the court below.

White, for appellant, contended—

1st. That the court below erred in sustaining the demurrer of appellee to the pleas of appellant, which alleged a want and failure of consideration.

There must be an actual, valid and valuable considera-
48 tion to support a promise. Story on notes §§ 181, 187.— The defence of failure of consideration is one that may be made, and will apply to all cases where a party takes a a note, even for value, after it has been dishonored, or is over due—citing Story on Notes, § 190. The demurrer in this case admits the total want or failure of consideration, set up by the pleas.

2d. That a past transaction cannot be made good consideration, unless it is the result of a previous request—Citing Archibald's Nisi Prius, 49. Hunt v. Bates, Dyer, 272. Hayes v. Warren, 2 Strange, 933. Jones v. Williams, 5 Barnawell and Alderson, 1109. Mills vs. Wyman, 3d Pickering, 207, and other authorities.

3d. The statute requiring the promise to pay the debt of another to be in writing does not dispense with the consideration required by the common law. 1 Saunders' Reports, 211, (note 2.) Cowper, 289. 5 East, 10.

Dupont, for Appellee, insisted—

1st. That the appellant, defendant in the court below, had not any legal interest in the matter of defence.

2d. That the pleas do not sufficiently set forth the want of consideration relied on—citing the rules of court, 1st Chitty's Pleadings, 516. 1st Stephens' Nisi Prius, 932. 3d Adolphus and Ellis, 521, 522. 6th Car and Payne, 736.

3d. That the pleas are inconsistent and repugnant, and, therefore, bad on demurrer. 1st Chitty, 231. Gould on Pleading, 154, 155. 14th East, 291, and other authorities.

4th. The bare existence of a debt due by a third party, is a sufficient consideration for the making of a bill, or note. In this case, the plea is, that the note was given for the debt of another. In the case of Ridout v. Bristow, Tyrwhitt's Reports, 84, the promissory note was, "for value received by my late husband." It was objected that the note on its face negatived any consideration between the parties. The objection was overruled. See, also, Chitty on Bills, §33,

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83—9th American, from 8th London edition. Chitty on Contracts, 413, 414.

SEMMES, *Justice*, delivered the opinion of the court.

This was an action in *assumpsit*, commenced at the spring term, 1849, of Gadsden Circuit Court, by respondent, against appellant, on a promissory note, in the following words:

"$300. One day after date, I promise to pay James O. "Goldwire, or bearer, three hundred dollars, for value re- "ceived, this the 12th day of January, 1849. The above "note is given in payment for a negro girl named Priscilla, "which Sarah J. Goldwire has purchased from James O. "Goldwire. SARAH LINES."

To the declaration in this case, the defendant in the court below filed twelve pleas. The first, *non assumpsit*, was, on motion, stricken out, and the others were demurred to. The Circuit Court sustained the demurrer, and from its judgment, this appeal is taken.

The grounds of error assigned by counsel for appellant are, the judgment of the court below sustaining the demurrer to the three last pleas, numbered on the record ten, eleven and twelve.

The first of these pleas avers that the note declared on was given in part payment for a negro slave, which James O. Goldwire, the payee, had sold to Sarah J. Goldwire, and that, at the time of said sale, the said James O. Goldwire had no right, title or interest whatever in said slave, and that shortly after said sale, John W. Goldwire, the rightful owner, took possession of her, whereby the consideration failed, &c.; and that the note was transferred after it became due. The last two are substantially the same—the twelfth alleging that the note declared on was made and delivered to James O. Goldwire, for a debt then and there before that time due and owing to the said James O. Goldwire by Sarah J. Goldwire, and that there never was any
50 consideration or value for the making and delivery of said note, or for the payment thereof, and that the same remained in the hands of the payee after it became due, &c.

All the allegations contained in these pleas, the respondent, by his demurrer, admits to be true, and the questions presented to the consideration of this court are—first, whether it is competent for the appellant, in her defence to the payment of this note, to avail herself of a want or defect of title in the vendor to this slave? and, secondly, whether the existing debt of a third person, as set forth in the pleadings, is a sufficient consideration to support the promise of the appellant? If the respondent was a *bona fide* holder of this note, being a negotiable instrument, it is very clear that no defence, impeaching the consideration, could be relied on, and that no equities between the original contracting parties could be inquired into. But having taken the note after dishonor, he became a purchaser with notice, and the note in his hands is subject to all the defences which might be made to it in the hands of the original payee. Story on Promissory Notes, 216.

The note declared on, like all other similar contracts, must have an actual, valid and valuable consideration to support it. If there is no consideration, it is *nudum pactum;* for the law of the land supplies no means, nor affords any remedy to compel the performance of an agreement made without sufficient consideration. 7 Term Reports, 350.—17 Johnson's Reports, 304. Promissory notes and bills of exchange, it is true, are presumed to be founded on a valid and valuable consideration, and for this reason, it is not requisite to establish a consideration between the original parties, or others who become, by transfer, *bona fide* holders; and the burden of proof rests upon the other party to prove the contrary, and rebut the presumption of validity and value which the law raises for the protection and support of negotiable paper. Story on Notes, 206

Our statute, requiring a promise to pay the debt of another 51
to be in writing, in order to bind the party to be charged thereby, does not dispense with the consideration required by the common law to support the contract. But it is contended by counsel for respondent, that the consideration of this note cannot be inquired into by appellant, because she has not such an interest in the title to the slave as would give her the right of action for a breach of warranty. This is not necessary. The sale of the slave carried with it an implied wararnty of title—it was the sale of the title which created the liability of the purchaser, and which was the sole consideration of the note. If no liability on the part of the purchaser existed, by reason of a defect or want of title in the vendor, then there was no debt, no consideration to support the promise, and no principle of law can be invoked which would deny to appellant the right of establishing the fact. If the memorandum to this note were stricken out, it is obvious the maker could plead a want or failure of consideration to any action on it; and it is equally clear, that the plaintiff could reply in confession and avoidance, that the consideration was the debt of a third party, as set forth in this memorandum. Would the appellant be estopped from asserting that there was no debt or liability at the time the promise was made? If a person undertakes to pay a certain sum to a plaintiff in execution, upon his forbearing with his debtor a certain time, can it be said he would be bound, if the creditor failed to forbear? and yet the party promising, would have no interest in the execution debt. And so, where goods are agreed to be furnished a person, upon a guaranty of a third, the guarantor is not bound, if the creditor fails to comply with his undertaking.

It may be said that these are conditions precedent; true—but that does not affect the principle; for, if the goods were actually sold, and a written guaranty executed and delivered, and the party selling had no title, and admits it, 52
and they are taken possession of by the owner, the consideration has failed, and the guaranty is void. In the case before the court, the note was made and delivered upon the fraudulent representations of the payee, the vendor of the slave; and in answer to the argument of counsel, I know of no reason why the appellant could not have recovered back the amount of this note, had she paid it voluntarily, and in ignorance of the facts.

But it is said "the *legal inference* is, that the appellant was indebted to the purchaser of this slave the amount of this note, and for convenience, the former executed and delivered her note to the vendor." If this were so, then the appellant was discharging her debt to the purchaser, by paying a claim for which the latter was not liable. But no such legal presumption exists; and I am aware of no authority that even intimates that it is necessary that a consideration should exist between the promissor, and the party for whose benefit the promise is made. Like all other cases of a similar character where the contract is valid, upon the guarantor's paying the money for the original debtor, he would have his right of action against the latter; and in a suit for the recovery of this advance, it would be the assertion of a novel principle, that he could be met by a legal presumption of indebtedness to a party for whose benefit he had advanced the money.

In regard to the two last pleas, it is contended by counsel for respondent, that they are contradictory, and otherwise at variance with the rules of pleading; that they allege a good and valuable consideration for the making and delivery of the note, and then deny that there ever was any consideration. If this were true, they would manifestly be bad for repugnancy, and the repugnant matter could not be rejected, without destroying the sense and effect of the pleas. See Stephens Pleadings, 420. But the latter plea, particu-

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53 larly, is in strict conformity with the rules of the court, setting forth with sufficient certainty the matters relied on in defence of the action. The objection is, that the consideration as set forth is matter of inducement to the defence relied on. This may be partially true, but still it would here constitute an exception to the general rule, that a traverse cannot be taken on matters of inducement. In this case, the introductory matter is, in itself, essential, and though in the nature of inducement, might, nevertheless, have been traversed. See Stephens Pleading, 285. Neither do these pleas allege, as is contended, a good and valuable consideration; but, on the contrary, aver that the consideration of the note was the debt of a third party, then, and before that time, due and owing. And this brings us to the consideration of the second question growing out of the pleadings.

It is said this is an *original* undertaking on the part of appellant; and in support of this position, counsel relies on the authority in Chitty on Bills, 83, n. a., that "the engagement of each party to a bill or note, is an *original* undertaking for himself, and not a promise for the debt of another, although it may have the effect of discharging the debt of a third person." This is true; but it does not disturb the principle recognized by every authority without an exception, that a mere naked promise to pay the already existing debt of another, without consideration, is void. 8 Johnson's Reports, 30.

The true rule to determine whether a promise to pay the debt of another is original or collateral is—to whom is the credit given? If the whole credit is given to the person who comes in to answer for another, his undertaking is original. If a person comes in aid of another who obtains the property, so that there is a remedy against both, according to their distinct engagements, then the undertaking is collateral. 2 Term Reports, 80. 1 Salkeld, 27. And in the case of a collateral undertaking, if it is made subse-
54 quent to the creation of the debt, and is not the inducement to it, the consideration of the original debt will not support the subsequent promise. See 8 Johnsons Reports, 31.

In this case, the note is given in *payment* and discharge of a previously existing debt of a third party; and the promise is, as counsel asserts it to be, an original one. But this, so far from avoiding the difficulty is, under the facts, conclusive against the respondent. Were it not for the demurrer, it would be but a fair, if not the only inference, that the sale of the slave, and the making and delivery of the note, constituted one transaction. In that case, the sale would have become incorporated in the promise—it would have become an essential part of the contract; and if a sufficient consideration had existed, that consideration would have sustained the promise. But the demurrer repels any such inference, and places the entire undertaking of appellant upon the sole consideration of the previously existing debt of a third party. To support such an undertaking, the previous contract of sale of the slave would not be sufficient, but a new, and independent, or original consideration, of benefit or harm, must exist between the new contracting parties. 8 Johnson's Reports, 31.

The court in the case reported in 1st Saunders' Reports, 211, say, that this principle, requiring a new consideration, extends to all cases of promises to answer for the debt of another; for it is clear, that the mere existence of the debt of a third party is not sufficient to support the promise; and in the same authority it is said, there must be a sufficient new consideration, as forbearance, &c., otherwise the promise is not binding, though reduced to writing. As where A has sold and delivered goods to B, and afterwards, C promises A in writing to pay for them, the promise is *nudum pactum*, because it was so at common law, and the statute makes no alteration. In the case of Waine v. Warlters, in 5 East's, 10, the promise of the defendant was not made at the time, 55 nor did it form a part of the original contract between the creditor and the third person. It was made after the debt was created, and, therefore, required a new consideration to support it.

An *executed* consideration will not support a promise, unless it be executed at the request of the promissor; for the obvious reason, that there is no legal consideration apparent, to support the contract. Story on Contracts, 93, 94.

The reason why a promissory note, given in fact in payment of the debt of a third person, is valid and binding on the maker, is, because—first, the consideration cannot be inquired into in the hands of an innocent holder; and, secondly, the words, value received, generally contained in these instruments, import a sufficient new consideration between the contracting parties; and bearing this in mind we can readily understand why a contract of this sort is an original undertaking on the part of the maker for himself, and not a promise for the *debt* of another, though the note has the effect of discharging that debt. The principle, therefore, that the debt of a third person is an adequate consideration for a promise is true, with these qualifications—that the promise must be in writing, and the instrument must bear on its face value received, or some other words, which raise a presumption of a legal consideration sufficient to sustain the promise, independently of the original debt.

The case of Eyck v. Vanderpoel, reported in 8th Johnson's Reports, 93, is directly in point. In that case, the note was for value received by third parties, and on demurrer to the declaration, the court say, that the note was for value received by a third person, being the debt of another. There was no consideration or inducement for the promise. The instrument repels any presumption of consideration from the words "value received," because it admits that the value was received by a third person. See, also, Rann v. Hughes, 56 7 Term Reports, 350.

For these reasons, the court is of opinion that the judgment of the Circuit Court, sustaining the demurrer to tenth, eleventh and twelfth pleas, was erroneous.

Let the judgment of the court below be reversed.

A. E. Gregory, Administrator de bonis non of the Estate, of J. M. Nixon, Deceased, Appellant, v. Robert Harrison, Respondent.

An administrator *de bonis non* cannot call to account a removed executor, and charge him with a *devastavit*, as to the goods and chattels of his testator which have come to his hands.

The title of an executor in the effects of his testator is derived from the will, and exists independently of the letters testamentary; and so far as it relates to money collected, and goods reduced into possession and converted cannot be divested by the revocation of the letters testamentary. The revotion of letters testamentary, and the appointment of another administrator, can only have relation to the goods not reduced into possession, and to *choses* in action not recovered. As to goods reduced to possession, a removed executor holds them—not as his own, but as trustee for the creditors, legatees and distributees of his testator, and to them he is accountable. The administrator of a *deceased* executor occupies precisely the same position, and is a trustee for the same persons, as to the goods or effects reduced to the possession of the executor.

The commission of an administrator *de bonis non* gives him no warrant to demand from a removed executor, or administrator, any other goods or effects than those which were the goods and chattels of the testator, or intestate, at the time of his death.

An administrator is correctly defined to be a "change, alteration or conversion" of the goods of the testator,or intestate, and by this is meant a change in the property,not a change in *specie*. An administrator *de bonis non* takes possession of the goods and chattels of the testator, or intestate, which re-

57 main in specie and unadministered. He is appointed to finish what is left unfinished, and for no other purpose.

Creditors have a right to sue the representative of a deceased executor,or a removed executor, for a debt of the original testator, without having first obtained a judgment against the executor in his life time,and heirs, legatees and distributees can assert their rights against the same persons.

This case was decided in the court below, by the Hon. THOMAS BALZELL, Judge of the Middle Circuit, sitting in and for the county of Gadsden, on the 20th of November, A. D., 1850. The demurrer of defendant to complainant's bill was sustained, and the bill dismissed, and from this decision, an appeal was taken.

The case is fully stated in the opinion delivered by the court, affirming the opinon of the court below.

The main, if not the only, question in the case presented for the decision of the court is, whether an administrator *de bonis non* is entitled, by virtue of his commission as such, to call a removed executor to account, and charge him with a *depostavit,* as to the goods and chattels of his testator which have come to his hands.

Dupont, for Appellant, argued—

That there is nothing in the English books, of a *positive character,* opposed to the exercise of such authority by an administrator *de bonis non.* That the definition given of an administration, viz: "a change, alteration, or conversion," as understood and applied by those who contend for a contrary doctrine, is not correct—for if so, then it would follow, that, in a contest between the representative of a deceased executor and the administrator *de bonis non,* for the possession of a security or evidence of debt, taken by the deceased executor for any demand due the estate of his testator, the possession and control of the same would not be awarded to the administrator *de bonis non;* and yet the contrary has been held. See 1 Barnewall and Creswell, 150.

58 The negative of this proposition which appellant contends for, would leave one class of creditors without any remedy for the recovery of their demands—as, in the case of an estate wholly administered, or converted, before they had time to establish their demands by judgment. See Judge Coalter's dissenting opinion, in 5th Randolph, 97 to 108.

A better definition of the term "'administered" is this—the faithful performance by the executor, or administrator, of the duties required of him by law." Vide Williams on Executors, 205, 207. See, also, as to the authority of an administrator *de bonis non,* 1 Wiliams on Executors, 362. 1 Haggard, 139.

This is not the case of an administrator *de bonis non,* but of a substantial adminstrator; and the reasons which apply in favor of the exercise of the right claimed in the case of the former, apply, with more cogency, to the case of an administrator of the latter character. The statute of this State provides that, "in the case of the death of any administrator, or of the revocation of his letters of administration, the Judge of Probate shall grant *new* letters to the person applying, &c.," (not letters *de bonis non,*) evidently intending to give them a relation back to the date of the original letters. Thompson's Digest, 198, 199.

As to the operation and effect of the order of the Judge, removing and dismissing the executor in this case, see 1st Florida Reports, 127. 1st Howard's Supreme Court Reports, 286. 1st Toller on Executors, 131.

If the administrator *de bonis non,* or the substituted administrator, has not the authority contended for, who has? The heir cannot maintain an action at law, 13 Wendell, 456; nor can he sue in equity, 4 Paige, 47, 51. 4 Littell, 264. Neither the heir nor distributee can sue, without first assuming the character of administrator.

Erskine, for Respondent. 59

An administrator *de bonis non* cannot bring an action at law, nor a suit in equity, for an account, against a removed executor, 1st Bacon's Abridgment, Accompt (c.) No powers are transmitted from the former executor to the administrator *de bonis non,* who is but the representative of the unadministered estate. Story's Equity Pleadings, sections 382, 619. 1st Kelly, 80, 2d Kelly, 428. 5th B. Monroe, 490. 5th Randolph, 51. 3d Kelly, 256.

Gregory, being merely the officer of the court of Ordinary, appointed to finish a business began by another, he is only entitled to all the property which was of Nixon, the testator at the time of his death, which remained in specie, and was not administered by Harrison, the removed executor. 4th Bacon's Abridgement, 24. 5th Randolph, 51 to 126. 1st Gill and Johnson, 270. 7th Missouri Reports, 471. 11th Alabama Reports, 872.

An executor is a trustee, but there is no trust affecting the assets themselves. The administrator *de bonis non* cannot follow the assets disposed of by the executor, or sue for their value, because the property vests absolutely in the executor, on the death of his testator. If it wastes it, he, or his representatives, are responsible directly to creditors, and others entitled, but not to the administrator *de bonis non.* 2d Williams Executors, 670, 672. 1st Howard's Mississippi Reports, 92. 8th Blackford, 168.

But it is contended that, if this doctrine be correct, then creditors, who have failed to establish their debts, are without remedy. It is answered, that an action at law may be maintained against the executor of an executor who has wasted the estate. 1st Saunders, 219, e. And since the statutes, 30th Car. 2, c 7, and 4 and 5 of William and Mary, c 24, there is no reason why an action cannot also be sustained against the administrator of an executor, who has committed a *devastavit,* without having first obtained judgment against the devastating executor. At any rate, a 60
removed executor or administrator is directly and personally liable, and may be fixed with the debt. 11th Viner's Abridgement, 119.

Again: it is said that the appellant is a "substituted administrator." This is true; but for what, and whose substitute is he? He is the substitute of the ordinary, to administer what is left unadministered of the estate of Nixon. This is the extent of his authority; and his letters show that he was appointed administrator *de bonis non cum testamento annexo,* and he has, therefore, incurred the obligations, and acquired the rights of an administrator of that character. As to the authority relied on by appellant's counsel 1st Haggard, 139, it has been questioned, if not overruled, by the Supreme Court of Alabama. See 6th Alabama Reports, new series, 36. See also, 1st Howard, (Mississippi,) 89. 8th Blackford, 567. 9th Cowen, 320. 1st Richardson's South Carolina Reports, 123. 5th Johnson's Chancery Reports, 388, 409.

ANDERSON, *Chief Justice,* delivered the opinion of the court.

This case is brought up by an appeal from Gadsden Circuit Court.

A bill in equity was there filed by A. E. Gregory, as administrator *de bonis non administratis* of the estate of James M. Nixon, deceased, the purpose of which bill was to call Robert L. Harrison, former executor of Nixon, but who had been removed or dismissed from his executorship by the Probate Court, upon the complaint of some of the parties in interest, as provided for in our statutes. The bill charges a *devastavit,* and prays "that an account be taken, &c., and that what may be found to be due by the said defendant, be decreed to be paid by the said defendant to complainant, as administrator as aforesaid."

61 It is not necessary to state at large the several allegations of the bill, nor to refer to the exhibits, further than to say, that they exhibit amongst other matters, a large balance to be due by the removed executor to the estate of his testator, on an order for a final settlement made by the Judge of Probate for Gadsden county, on the 27th of July, 1843.

The defendant, Harrison, demurred to the complainant's bill, "denying the right of the said complainant, as such administrator of the estate of said James M. Nixon left unadministered by this defendant, to call upon and require of this defendant any account of the administration of the said estate by this defendant, in his capacity as executor of the last will and testament of the said James M. Nixon, deceased." It was the opinion of the court below, that this demurrer was good, and the bill was thereupon dismissed. It will be perceived by this statement, that a single point is presented to the consideration and decision of this court, and that is, whether an administrator *de bonis non* can call to account a removed executor, and charge him with a *devastavit,* as to the goods and chattels of his testator which have come to his hands.

It is the first time that this question has been before the appellate tribunals of this State, and it cannot be denied that it is one of some difficulty. This difficulty, however, we apprehend, grows rather out of the loose practice which has prevailed in some of the States of this country, and the consequent leaning of the courts to sustain, for the sake of expediency, a practice regulating, by long acquiescence, the settlement of numerous estates, that out of any inherent obstacle to the ascertainment and adjustment of the respective rights and liabilities of parties standing in the relation to each other occupied by those before the court.

To arrive at a proper understanding of these rights and liabilities, we propose, in the first place, to inquire whether, in any respect material to this controversy, a removed ex-
62 ecutor differs from the personal representative of a deceased executor, and then to look briefly into the early law respecting the character, rights and liabilities of administrators, *de bonis non,* and of executors, and their personal representatives after their decease.

An executor derives his interest in the personal effects of his testator from the will itself, and the property in them vests in him, from the moment of the testator's death.

In England, with certain exceptions peculiar to that country, the Ecclesiastical Courts have exclusive jurisdiction of the probate of wills, and in this country, the Courts of Probate have succeeded to that jurisdiction. It results from the exclusive character of this jurisdiction, that an executor, though deriving his title from the title itself, cannot assert that title in any of the other courts, until he is prepared to exhibit there a proof of the will from the Spiritual Courts; in other words, he must have a probate of the will, or letters testamentary, before he can proceed effectively with the duties of his office—nevertheless, these letters testamentary are only attestations of his title, and, as a consequence of being only such, they have, when procured, relation back to the time of the testator's death. For the same reason, the executor, before probate, may do almost all the acts which are incident to his office, except only some of those which relate to suits. See 1st Williams on Executors, book 4, Chapter 1, Sections 1 and 2, and the authorities there cited. The courts of our own country, in numerous cases, recognize these positions. Johns v. Johns, 1st McCord, 132. 3d McCord, 371. 3d Massachusetts, 514.

It follows necessarily, from this view of the origin and source of an executor's title, that it exists independently of his letters testamentary; and so far as relates to money collected, and goods reduced into possession, it cannot be divested, by the revocation of the letters testamentary. It is true that our statute (Thompson's Digest, 211,) gives to the

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Judge of Probate authority to revoke letters testamentary, 63
upon grounds not known to the English Courts; but there is no authority given to divest the executor of the title which he acquired from his testator's will. The appointment of another administrator can only have relation to the goods not reduced to possession, and to *choses* in action not recovered.

A removed executor, then, notwithstanding the revocation of his letters testamentary, still holds his interest in the chattels reduced to possession—not as his own absolute property, but as trustee for the creditors, legatees and distribute of his testator, and to them he is accountable.

The administration of a deceased executor occupies the same position. The death of the executor is a virtual revocation of his letters testamentary from that time, though they may be used in his behalf, as evidence of his authority, for acts done during his life-time—as the removed executor may resort to his cancelled letters, to justify his antecedent acts. The administrator succeeds to the deceased executor's title in the first testator's effects, so far as they have been reduced to possession—that is to say, to his title as trustee for the creditors, legatees and distributees, and is bound to account to them just as the removed executor retains his title and obligation to account. It is not correct to say that the adminisrator *de bonis non* is the substitute of a removed executor—this last derived his authority from the testator's appointment, and the other from the ordinary, in virtue of the ordinary's right to take charge of the goods of a deceased person, which are not in charge of an executor of his own choice. The exercise of the ordinary's right begin where the exercise of the better right of the testator stops, or is arrested, by the removal of his appointee. By the common law, the rights of an executor and of an administrator *de bonis non* to the residuum of the estate were essentially different, and, therefore, the one cannot be correctly regarded as the substitute of the other—the former 64
being entitled to the residuum in his own right—the latter, as the bailiff of the ordinary, and accountable to him that the assets might be distributed, *en pios usus,* at the ordinary's pleasure.

Without tracing this analogy any farther, we think it very evident that, in regard to the accountability of a removed executor to an administrator *de bonis non administratis,* he stands on the same footing with the representative of a deceased executor, and in the further consideration of this subject, we shall so consider him.

We proceed next to inquire into the character, rights and liabilities of an administrator *de bonis non administratis.*

I think a very clear and accurate apprehension of these, may be derived from the terms of the warrant under which he acts. His commission gives him power to represent the testator, or intestate, so far as there remained unadministered "the goods, and chattels, and credits which were of the testator, or intestate, at the time of his death." All the difficulty and obscurity which have rested upon the extent of the power of an administrator of this character, grow out of a lack of definiteness in the import of this word unadministered. Taken alone, it is conceded that its meaning may not be precise and obvious beyond all danger of mistake, but taken in connection with the other words employed in the commission, there can be no real difficulty in fixing its precise meaning. Let us turn our attention for a moment to these other words, and for the purpose of illustration, let us advert to the facts of the case before the court.

At the time of Nixon's death, it appears, from the inventory found among the exhibits, that he was possessed of much real and personal estate, and had large and numerous debts due to him upon bonds and notes. All these, with the exception of the real estate, were strictly and truly

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65 "the goods and chattels, rights and credits, which were of the testator at the time of his death," and as such, they passed, in entire conformity with the commission of an executor, into the hands of Harrison, the defendant in this suit.

The complainant's bill alleges among other things, that Harrison rented out the real estate, and received the rent; that he hired out the negroes, and received the hire; that he collected the bonds and notes, and has not accounted for the proceeds; and it further charges, that, chiefly in consequence of unaccounted for sums of money, the defendant is indebted to the estate of Nixon, in an amount exceeding eleven thousand dollars. He demands from Harrison this sum—that is to say, the complainant, under his authority *to represent Nixon, so far as there remained unadministered goods, chattels and credits, which were of Nixon at the time of his death, demands* the rents and hires which have issued subsequently to Nixon's death, out of the lands and negroes left by him, and he demands the money paid to Harrison on the bonds and notes, in extinguishment of the "credits" which once belonged to Nixon. Were the rents received by Harrison, of the goods and chattels of Nixon at the time of his death? Surely not. Were the hires received on the negroes after Nixon's death, of his goods and chattels at the time of his death? Surely not. Is the money now in the hands of Harrison, arising from the collections of the bonds and notes, in any sense "of the goods and chattels, rights and credits" of Nixon at the time of his death? Again, we may reply, surely not; and if not, then the commission of the administrator *de bonis non* gives him no warrant to demand them.

It may be said, and has been said in the argument of this case, that, as these various sums have passed into Harrison's hands, he thereby became a debtor to the estate of Nixon, and that this debt became one of those rights and
66 credits which Gregory, the complainant, has authority to administer. In reply to this, all that is necessary to say is, that, although it may be called a debt to Nixon's estate, it certainly is not a debt which was due to him at the time of his death, and if not, it comes not within the reach of the commission of the administrator *de bonis non.*

These considerations establish very clearly, I think, that, to the money coming into the hands of an executor from the various sources to which we have adverted, an administrator *de bonis non* can assert no claim. The want of right to assert a claim to goods which have been converted by the executor, is based upon the same general principles, though, perhaps not so obviously. And this brings us to the definition of the word administered; for what has been administered has passed, without dispute, beyond the reach of the administrator *de bonis non.* In the case of Coleman v. McMurdo, 5th Randolph, 51, (to which we shall have occasion to refer more at large hereafter,) the word *administer* is defined by two of the Judges, in their opinions, to be equivalent to "alter, change, or convert," and we think these words, properly understood, may, for all necessary purposes, be regarded as a correct definition of the term. But we think these terms, change, alter and convert, have to some extent, been misapprehended, and this has led to the confusion of ideas manifest in some of the opinions referred to. Although Judge Carr speaks of "a change, or conversion of the goods," he very clearly means a change *in the property of the goods.* This is apparent from the very first authority which he quotes in elucidation of his definition. In 2 Peere Williams, 340, Attorney General against Hooker, Lord Chancellor King said, "As to what has been urged, that, if an executor dies intestate, all the personal estate, *the property whereof is not altered,* shall go to the administrator *de bonis non,* and not to the next of kin to the executor—this is true, &c." A change in the property of the goods is, therefore, what is meant by these learned judges, 67
as amounting to an administration—not a change in specie. This is further and strikingly illustrated in one of the cases that have been cited, where an executor collected the debt of his testator, and having kept the money separate and distinct in a bag, it was, after his death, adjudged to belong to the administrator *de bonis non.* In this instance, there had been a change in the goods, for a debt due had been changed into money; but, inasmuch as the *property* had not been changed, as was apparent, from the executor keeping the money apart and marking it as the property of his testator, there was no change, alteration, or conversion, in the technical, legal sense. That this conversion of the goods of the testator is no wrong, is evident from a consideration of the object and purposes of the executor's trust. The title of the goods vests in him, upon the death of the testator, subject to the condition of his reducing them to possession. He can give title to such alienees as purchase from him, and if he so chooses, by exercising acts of ownership over them, he may convert them to his own use; but in the former case, he is responsible for the purchase money received, and in the latter case, for the value of the goods converted; but responsible to whom?

This inquiry brings us to the consideration of the rights and liabilities of an executor. The latter of these we will first ascertain, as it will lead us to a better understanding of the former, and it will be found that the one is correspondent to, and exactly commensurate with, the other. Before the statutes of 22d and 23d Charles 2d, no executor could be called to account for the portion of the estate remaining in his hands, after the debts and legacies had been paid; but that statute, known as the statute of distributions, provided for the distribution of the fund, and gave a remedy for enforcing it, to the parties in interest. Before that time, the Ecclesiastical Courts had authority to enforce the payment of legacies, and in Lord Nottingham's time, the Court of 68
Chancery undertook to extend its aid also to legatees. Toller's Law of Executors, 489.

The debts, covenants and other contracts of the testator, the Courts of Law have provided abundant means of enforcing, (Toller, 457;) and the Court of Chancery also lends its searching and powerful sanctions in behalf of enforcing claims of this class, which are of an equitable nature. Toller, 478.

The liabilities, then, of an executor are of such a nature, that they necessarily embrace the entire fund which may come to his hands. What remains, after the claims of creditors and legatees are satisfied, goes, by a certain law, to certain specified persons. What is this fund which is thus ascertained to be the measure of the executor's liability? In the words of an elementary writer of high reputation—"all the personal estate whereof the testator died possessed, whether it consist in chattels real, or chattels personal, belongs to the executors, and are assets in their hands, "for the payment of the testator's debts and legacies." 3d Bacon's Abridgement, 57; and so of debts due to the testator, after they have been recovered by the executor. 3d Bacon's Abridgment, 58.

It results from this, that, when money has been collected by the executor out of the debts due to the testator, and when any personal estate has been sold by him, or converted to his own use, he becomes, to that extent directly liable by means of the various remedies of which we have spoken, to the several persons having claims as creditors, legatees, or distributees. To refer again, by way of illustration, to the case before us. Harrison, upon the death of Nixon, and the receipt of his letters testamentary, became responsible—first, to the creditors of his testator, then to his legatees, and, lastly, to his distributees. The measure of this responsibility is furnished by the amount of assets

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69 realized by him—that is to say by the amount of the very fund which the complainant here is seeking to have made payable to him by Harrison.

This undoubted liability of Harrison must have a correspondent right, and that right can be no other than the right of being protected from the claims of a third party to this very same fund. The discharge of Harrison from his executorship does not release him any more than his death would have released his personal representative from his responsibilities to the creditors and others; and there is no principle of law, or equity, or of common justice, that will hold him at the same time, and out of the same fund, responsible to another party.

Another well established rule of the law of administration, may be called to our aid in favor of the conclusions which we have deduced, from a comparison of the respective rights and liabilities of the removed executor, and of the administrator *de bonis non.*

The claim which the creditor of a testator has, is not in the nature of a lien upon the goods of the testator, but is a personal claim against the executor. Mr. Justice Buller has said—"At law there is no such thing as a *fund* in the hands of an executor being the debtor; but the person of the executor, in respect of the assets which he has in his hands, is the debtor." And to the like effect, Lord Hardwicke has stated—"By law, undoubtedly the executor has power to dispose of and alien all the assets of the testator, and when he has done so, no creditor of the testator can, in point of law, follow those assets; for the demand is not at law a lien, or charge upon the assets, but a demand against the executor, in right of the testator, in respect of the assets *and so is a personal demand.*" Ram's Treatise on Assets, page 494, and authorities there cited.

The claim of the creditor, then, being a personal one upon the executor, in respect to the assets which have come
70 into his hands, does not follow those assets into the hands of other parties, except that, in some excepted cases, equity will aid a creditor in doing so; but these exceptions do not disturb the conclusions derived from the general rule. The recovery, therefore, of assets by an administrator *de bonis non* from the removed executor, would not transfer the creditor's claim—in the words of Lord Hardwicke, just quoted, "no creditor can follow those assets;" the claim against the executor being a personal one, would survive the transfer of the assets, and in this way the law would be made the occasion of working gross injustice.

The true rule, and the consistent one, evidently is, that, for the value of the goods administered, or converted, the executor is liable only to the creditors, and those standing in like relation; for any other liability would be a cumulative, and not a substituted one, and, therefore, cannot be supposed to be contemplated by the law.

It does not interfere with any of these general conclusions, that an administrator *de bonis non* may take possession of the goods and chattels of the first testator, or intestate, which remain in specie, and unadministered. Though the title of the first executor attaches to them upon the testator's death, as it does to all the personal effects, that title being, *en autre droit,* and not personal to himself, requires that the goods be reduced to possession, before the title is consummated. The courts, both of law and equity, will lend him their aid, in thus perfecting his title; but, as we have seen, they require, before doing so, the exhibition of proof of his having established before another tribunal his authority as executor—in other words, his letters testamentary must be exhibited. These courts refuse to invade the province of the Ecclesiastical Courts, and to admit any other evidence but their's of the alleged authority, and it follows that, when the Ecclesiastical Court withdraws its testimony, when it revokes the letters testamentary, there remains no other mode by which the executor in the other 71
courts can show his right. They, therefore, refuse to hear him—his title to the personal effects not reduced to possession, cannot be consummated for want of a remedy, or rather of a forum before which to assert it. Then comes in properly and consistently with the rights and interests of all parties, that other officer of the law, known as an administrator *de bonis non administratis.* The effects of the first testator remaining unadministered, or unconverted, by the deceased or removed executor—being beyond the reach of administration by the representative of the deceased executor, or by the removed executor, by reason of the absence of the necessary evidence, whereby to reduce them to possession—are not suffered to be lost to the estate of the testator, but the Ecclesiastical authority appoints, in respect to them, a new administrator, and clothes him with power to possess and administer them to the extent of his authority, and no more. He is appointed to finish what is left unfinished, and for no other purpose. Let us illustrate the extent and the limitation of this latter officer's power and authority, by a reference to the successive steps he would take in using the remedy provided for him, in reducing a chattel of the original testator into possession. He finds such a chattel in the possession of a stranger, who refuses to deliver it up on demand—he sues in trover, and proves the original property of the testator, and exhibits his own letters of administration.

The defendant relies upon the title derived from the executor. If it came from the executor during his life time, or before his removal, the court will permit the defendant to exhibit the letters testamentary, as evidence of the executor's title under the testator, and the defence is complete. If the title came from the executor after his removal, or from his administrator after his decease, the court allowing no other evidence than the letters testamentary, and
they, at the time of passing the title, having been cancelled 72
by the Ecclesiastical Court, or virtually cancelled by the executor's death, then there is no proof of the defendant's title, and the administrator *de bonis non* must recover. So, if he were to sue in *assumpsit* for a debt due the testator at the time of his death—if it had been paid to the executor before his removal—the letters testamentary would have been allowed as competent evidence of the executor's authority to receive, and this defence properly set up would be a bar to the action. If it had been paid to the executor after his removal, the right of the executor to receive it could not be made available, either in abatement, or in bar, not so much of the absence of title in the executor, as on account of the want of the evidence in that title—the letters testamentary having been cancelled, and the court refusing to admit any other evidence.

To apply this species of illustration to the parties now before the court. If Gregory were to sue Harrison in *trover,* for a chattel converted by Harrison, his right to recover would depend upon the time of the conversion by Harrison—if it were subsequent to the revocation of his letters testamentary, he, Harrison, would be without evidence of his title, and therefore, without defence—if prior, his letters would be a sufficient warning for the conversion—his inchoate title, derived from his testator, had been made consummate by conversions, and he would, necessarily, prevail against Gregory; in other words, the chattels would have been administered, and, therefore, beyond the reach of one whose authority only extended to goods *unadministered.* If Harrison had not yet accounted to the estate for the value of the chattel, he must owe a debt somewhere; but all that is necessary to say about it, in reference to the rights of Gregory, is, that it was not a debt due to the testator at the time of his deah.

It will be perceived, from a review of the general princi-

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73 ples of law, regulating the respective rights and liabilities of the parties of which we have spoken, and of the corresponding remedies which have been provided for the assertion of those rights, and the enforcement of those liabilities, that the entire system is harmonious and symmetrical throughout. The creditors, legatees and distributees of the testator, have a certain recourse and adequate remedies against the first executor, and the extent of this recourse is well defined; for it is exactly commensurate with the value of the effects of the testator which come to the executor's hands. These rights of the creditors and others being personal as to the executor, and not attaching to the effects themselves, are not divested by the removal of the executor from his executorship. They still remain, and although they may be curtailed in their extent, in consequence of the disability of the removed executor to proceed in collecting the uncollected debts due to the testator, and in reducing to possession the other unadministered assets, yet, to that precise extent, are the rights of the creditors and the others transferred to the new administrator. Thus these rights are co extensive with the estate—personal as to the removed exe cutor, to the extent administered by him, and personal as to the new administrator, to the extent unadministered by the former. The two responsibilities of the executor and administrator *de bonis non* are, in mathematical phrase, complements of each other—making, together, an entirety.

By the just and equal operation of these general rules, these two officers, representing the testator's estate successively, are protected from conflicting and contradictory claims. Each stands alike, in the relation to the creditors, legatees and distributees, of responsibility, to an extent well defined and easily ascertained, but neither is responsible to the other; for any such responsibility would mar the symmetry of the system, and introduce disorder and injustice.

74 Having thus looked into the elementary principles of the law of administration, and drawn from them certain conclusions, as to the relative rights and liabilities of the parties before the court, we will proceed to inquire how far these conclusions are sanctioned by authority.

It has been said in argument, and also in the opinions of some American Judges, to which we shall have occasion to refer, that there are no reported cases to be found in the English books, sustaining the views we have taken. This may, perhaps, be so, if express adjudications of the question are meant; but the incidental denial of the right of an administrator *de bonis non* to sue a representative of a deceased executor for goods converted by the executor, may be repeatedly found. The following instances are quoted from the opinion delivered by Judge Carr, in the case of Coleman v. McMurdo:

In 2d Peere-Williams, 340, Attorney General v. Hooker, Chancellor King said—"As to what has been urged, that, if an executor dies intestate, all the personal estate, the *property whereof is not altered,* shall go to the administrator *de bonis non,* and not to the next of kin of the executor—this is true, because, from the time the executor dies intestate, the first testator dies intestate also, and it was the executor's own fault that he did not, as he might, alter the property."

In Rutland v. Rutland, 2d Peere-Williams, 210, the same doctrine is explicitly laid down.

In 1st Bosanquet and Puller, 311, Tingrey v. Brown, Chief Justice Eyre and the court say—"That every thing is unadministered which has not been reduced into actual possession, and converted by the administrator."

In 1st Salkeld, 316, Chief Justice Holt, after laying down the rule, that the same hand having to pay and receive, is an extinguishment, puts this case—"If the executrix of the obligee takes the obligor to husband, that is no extinguishment, for he may pay her money as executrix, and if she 75
lay this money by itself, the administrator *de bonis non* of her testator (if she dies intestate) shall have that money, as well as any other goods that were the testator's; for if the goods remain in specie, they shall go to the administrator *de bonis non,* because, in that case, it is notorious which were the goods of the testator, and they are distinguishable; and there is the same reason where money is kept by itself, and the husband permits it so to be; but if the husband seizes it, it will be his, and will be a *devastavit.*" The elementary writers of England concur in the distinctions thus made by the courts.

In 3d Bacon's Abridgment, page 19, the enumeration given of the property which an administrator *de bonis non* is entitled to, corresponds with the views we have taken of his rights. "An administrator *de bonis non* is entitled to all "the goods and personal estate, such as terms for years, "household goods, &c., which remain in specie, *and* were "not administered by the first executor or administrator— "as, also, to all debts due and owing to the testator, or in- "testate. Also, it is holden, that, if an executor receives "money, in right of the testator, and lays it up by itself, "and dies intestate, this money shall go to the administrator "*de bonis non,* being easily distinguished to be a part of the "testator's effects, as goods in specie. But if A dies intes- ""tate, and his son takes out administration, and receives "part of a debt, being rent arrear to the intestate, and ac- "cepts a promissory note for the residue, and then dies in- "testate, this acceptance of the note is such an alteration "of the *property* as vests it in the son, and, therefore, on his "death, it shall go to his administrator, and not to the ad- "ministrator *de bonis non.*" Mr. Bacon here furnishes at once authority for, and illustrations of, the most of the positions which we have been considering at length.

The goods to go into the hands of the administrator *de* 76
bonis non must be *in specie,* and also unadministered. The two illustrations show what meaning the author gives to the word "administered." In the first, the money to the administrator *de bonis non,* because there is no conversion of property, though there had been a change of a debt into money. In the second illustration, there had been "an alteration of property," and it is taken as an act of administration, and, therefore, the note does not go to the administrator *de bonis non.* In this last instance, it will be observed, also, that the note had been in no wise applied by the administrator to the payment of his intestate's debts. The simple act of altering the property, by making it his own, was administering it, so far as the administrator *de bonis non* was concerned. It will be observed, also, that, in the case stated, there was a change in the character of the goods—in the first, there was no change of the property, but in the second, there was, and hence in the first, the money, being unadministered, went to the new administrator, but in the other, the money represented by the note, being administered, did not.

In Lovelass on Wills, at page 89, it is said, "All those "goods, chattels and effects, which belonged to the deceas- "ed, in action or possession, as his own, and so continued at "the time of his death, and which, after his death, the ex- "ecutor or administrator *gets into his hands,* as duly apper- "taining to him in right of his executorship or administra- "tion, shall be assets in the hands of the executor, to make "him chargeable to a creditor, legatee, or party in distribu- "tion, as far as such property extends." Here it will be perceived that the *possession* of the goods makes him chargeable. He may relinquish this possession after his removal, or his representative may do so after his death, to a new administrator, and thereby he will be discharged; but so long as he retains possession, or waste having been committed, restitution becomes impossible, he remains charge-

77 able, and so does his representative; but to whom?—to creditors, legatees and parties in distribution, but not to the administrator *de bonis non.*

The American cases, in confirmation of the views we have presented, are numerous and decided. We proceed to refer to some of them.

The case of Coleman v. McMurdo and Prentiss, reported in 5th Randolph, 51, is precisely of the character of the one before us, so far as regards the controverted points, and the court having bestowed much labor and research on its consideration, the opinions of the Judges, delivered at great length by every member of the court, are entitled to very great respect. The courts of several other States have regarded this decision as settling the question, and to us it appears that the arguments of the majority of the court are unanswerable. The head note of that case is as follows: "An administrator *de bonis non* cannot sue the representative of a former executor, or administrator, either at law or in equity, for assets wasted or converted by the first executor or administrator; but such suit may be brought directly, by creditors, legatees, or distributees." The opinion of one of the Judges of the court (Coalter) was opposed to this conclusion; but I think it will be perceived from an attentive reading of his opinion, that he was influenced in a very great degree by a consideration of the inconvenience likely to arise from the decision of the court, which, it was alleged, was in conflict with the long established and uniform practice of the Inferior Courts of Virginia, and that, in view of these consequences, his reasoning was directed to conclusions not warranted by the premises. It will be proper here to remark, that Judge Coalter, in his opinion, doubts whether the statute of 30th Car., 2 explained and made perpetual by that of 4th and 5th William and Mary, affords a sufficient remedy against the personal representatives of a deceased executor, to any but *judg-*

78 *ment* creditors. If this doubt was well founded, it would certainly interefere with the reasoning by which we have endeavored to establish the respective and harmonious rights of all the parties representing and interested in a testator's estate; but we think it is not, as is shown in the opinions delivered by the other Judges.

The case of Sibley v. Williams' Executors, 3d Gill and Johnson, 52, elsewhere cited on another point, expressly affirms the right of a creditor to sue the representative of a deceased executor for a debt of the original testator, without having first obtained a judgment against the executor in his life time. The Judge, who delivered the opinion of the court, says that such a right was given to creditors by the statute of 30th Car., 2, and 4th and 5th William and Mary, and he quotes the construction given to those statutes by Sergeant Williams in his Notes on Wheatly v. Lane, 1st Saunders' 219, as authority for the opinion. To sustain his construction of the statute, Judge Coalter is forced to question this authority of Sergeant Williams. He says, "Sergeant Williams seems to intimate that it (an action) may be sustained against the executor or administrator of the executor or administrator, without a previous judgment establishing a *devastavit.*" On reference to the note, it will be found that the learned Sergeant's *intimation* is expressed in very decided and unequivocal terms. Speaking of the distinction between an action against the executor in his life time upon a judgment, suggesting a *devastavit* by him, and one against the executor of such an executor, suggesting a *devastavit* by the former executor, he says: "The former action can only be brought *upon a judgment* previously obtained against the executor *de bonis testatoris,* or where he is made a party to a judgment against a testator, by *scire facias*; but in the other an action may be brought in every case, where the testator, in his life time, was in any way guilty of an act which amounts in law to a *devastavit.*"

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In perfect accordance with this so called imitation of 79 Sergeant Williams, Judge Green, in the case from 5th Randolph, says: "It seems to me that the statute gives a right to all creditors, whether they had obtained judgment against the executor or administrator in his life-time, or not, to sue the representative of the executor or administrator, and to allege in the declaration the existence of the debt—that assets sufficient to pay it had come to the hands of the executor or administrator, and that he had wasted or converted them. This construction is necessary to give effect to the statutes."

But this doubt of Judge Coalter, as to the construction of these statutes, even if well founded, does not affect the particular case before us. Upon this point, there is a difference between a removed executor, like Harrison, and the representative of a deceased executor. By the principles of the common law, Harrison, though removed, would be responsible for a *devastavit,* and recourse need not be had to the statute to prove, by analogy, this liability. But a *devastavit* being a *tort,* died with the person, and the creditor's rights and remedies were at an end, where the executor committing a *devastavit* died, until continued by the statutes, and transferred as against his representative. Without the statutes, therefore, Harrison would be still liable, as are executors *de son tort,* and a displaced administrator, after a wrongful administration has been revoked. 11th Viner's Abridgment, 119.

In the case of Alsop v. Mathers and others, the Supreme Court of Errors of Connecticut says: "The extent of the liability of an administrator *de bonis non* is defined by the condition of his bond—this is prospective, and restricted to estate not administered. No part of the condition of his bond creates or recognizes any privity between him and his predecessor, nor makes him responsible for any *devastavit* or default of another, either of omission or commission." 8th Connecticut Reports, 564.

In the case of Chamberlain, administrator *de bonis non,* v. 80 Bates, 2d Porter's Reports, 550, it was decided that an administrator *de bonis non* cannot sustain an action at law against the representative of a former administrator to recover money received by the latter, in the course of a partial administration, and not accounted for, or paid over. Delivering the opinion of the court, the Chief Justice adopts and endorses the reasoning of the court, in the case of Coleman v. McMurdo, from 5th Randolph, and affirms its judgment. In speaking of the distinction between a removed administrator, and the representative of a deceased one, he says: "The statute authorizes the Orphan's Court, where administration has been granted on insufficient security, to require other that is sufficient—also, where any administrator has embezzled, wasted, or misapplied all or any of the decedent's estate, or shall refuse or neglect to give bond, with security, as aforesaid, to forthwith revoke or repeal the letters of administration, and grant others to such persons entitled thereto, as will give the requisite bond. The subsequent administration may have action of trover, detinue, account and on the case for such goods and chattels as came to the possession of the former administrator and were withheld, wasted, embezzled, detained, or misapplied by any of them, and na satisfaction made for the same. By this, I would understand that authority is given to the new administrator immediately to institute either or all the actions mentioned, that may be the most appropriate for any misconduct, or either of the wrongs therein specified. It is justly to be inferred that the Legislature, by expressly prescribing these remedies, intended to confer on the subsequent administrator more extensive powers than by the common laws are incident to administrators *de bonis non;* otherwise, it would have been sufficient merely to have authorized the removel and the subsequent appointment." It thus appears that the analogy which we have attempted to

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show exists between the case of a removed executor, and the representatives of a deceased one, according to the principles of law, apart from any statute, is sanctioned by the opinion of the Chief Justice. 81

In Pennsylvania, it was held, in the case of Potts v. Smith, 3d Reports, 361, that "an administrator *de bonis non* can claim nothing but the goods of the intestate remaining *in specie* unconverted and unchanged at the time of the death of the original administrator." The law, as thus interpreted, was afterwards changed in that State by statute.

The Court of Appeals of Maryland, in the case of Hagthorp and others v. Hook's administrator *de bonis non,* 1st Gill and Johnson, 271, and in the case of Sibley v. Williams, 3d Gill and Johnson, 52, sustains the principles which we have been asserting, except so far as they are modified by the statutes of that State.

The Supreme Court of Georgia, in the case of Thomas v. Hardwick, 1st Kelly, 78, adopts fully the reasoning and conclusions of the Virginia case. Judge Lumpkin, quoting from the opinion of Judge Carr, repeats that the statute of 30th Car., 2d chapter, 7, explained and perpetuated by the 4th and 5th William and Mary, expressly declares in its preamble, that executors and administrators, for want of privity, were not before answerable, nor could be sued for debts due by the first testator, or intestate—notwithstanding such executors or administrators had wasted the estate of the first testator, or intestate, and to remedy this evil, it makes such second executors or administrators chargeable. How? To the administrator *de bonis non?* No. but chargeable in the same manner as the first executor or administrator should, or might have been—that is, directly to the creditors. The court decides that "an administrator *de bonis non* cannot call the representatives of a deceased executor or administrator to account for any property which their testator, or intestate, may have converted, or wasted." This case is the more noticeable, because the defendant was a removed executor, and the decision of the court sustained the right of a creditor to recover from him after his removal, for a debt due by the testator. 82

The Court of Appeals in Equity of South Carolina, in Smith v. Carrere, 1st Richardson, 123, fully approved the views of the court in the case of Coleman v. McMurdo.—We shall have occasion hereafter to refer to a case subsequently decided in South Carolina, in which this case is reviewed, with dissent from some of its conclusions.

The Supreme Court of the State of Indiana, in Young v. Kimball, 8th Blackford's Reports, 167, adopting the Virginia precedent, held, where an administrator having committed a *devastavit,* died, and his administrator was sued in Chancery by the administrator *de bonis non* of the first in testate for such *devastavit,* that the suit would not lie; and, also, that, under the statutes of 30th Car. 2d, and 4th and 5th William and Mary, and a similar statute of the State, that the administrator, thus sued, was liable for the *devastavit* to the creditors, &c., of the first intestate.

We think that these citations show sufficiently that the rule established in the case of Coleman v. McMurdo, (significantly enough called in argument the mother of American cases,) has met with the general approbation of the courts of the several States. The case of Villard v. Roberts, before alluded to, as seeming to dissent from Smith v. Carrere, may, to some extent, be admitted to be an exception to the general acquiescence; but the court, on that occasion, was not very decided in its dissent, and was evidently under the bias of a fear that the adoption of the Virginia decision would introduce an inconvenient change in the practice of the Probate Courts. The case is reported in 1st Strobhard, 393. The chancellor, in delivering the opinion of the court, frankly admits that the court "were more influenced by the uniform and recognized practice in our own State, than by any other consideration." "This, of itself, would be a sufficient reason, in the eye of this court, for the judgment it now delivers—for the loss and disappointment to parties who have made settlements upon faith in the prevailing usage would be incalculable, if a different rule were suddenly adopted." 83

The judgment of a court, however reputable, which thus avows that the argument of convenience is paramount with it to all other considerations, can have but little authority beyond the borders of its own State, when in conflict with the numerous other courts whose decisions have been cited, and when the same considerations of convenience are not applicable elsewhere. But besides this, though the Chancellor, in his opinion, calls in question the principles established in the cases of Coleman v. McMurdo, and Smith v. Carrere, yet the point *decided* by the court is in perfect harmony with those cases, as well as with the rules which we have been endeavoring to establish.

A bill was filed by persons claiming under a legatee, against the personal representatives of deceased executors of McKenzie, praying for an account, &c. The defence set up in answer was, that the defendants had settled with Chovin, the administrator *de bonis non* of the first testator. In reference to this defence, the Court of Errors say, in the judgment of the court—"It is ordered that it be certified to the Court of Appeals in Equity as the opinion of this court, that the account and settlement between the representatives of the executors of McKenzie, and Chovin, the administrator *de bonis non* of said McKenzie, pleaded as a bar to the account sought in the bill against the said representatives, is a sufficient bar thereto." This order is in perfect consistency with the principles which we have been maintaining, and is not contradictory of any of the cases cited. It will be recollected that, in an early part of this opinion, in anticipation of the very difficulty presented by this case, and, also, with a view of fixing more accurately the points involved in this question, I endeavored to give a more precise meaning to the words "alter, change and convert," than prevailed in some of the authorities cited, when they were used as defining the word administer. I said that the *change,* the *alteration,* the *conversion,* must be understood as applying to the *property,* and not to the goods themselves—that the property in goods, which themselves might remain *in specie,* might, nevertheless, be changed; and on the other hand, the goods might be altered *in specie,* and yet remain unchanged as to property. This distinction was illustrated and proved by the case of money received by an executor, in payment of a debt due to his testator, and kept by him in a bag, separate and apart, and distinguishable from his own money—it was held to belong to the administrator *de bonis non,* as not having been converted or changed as to property by the executor, because, by keeping it apart from his own money, he showed that he did not consider it as his own. 84

The application of this distinction to the case of Villard v. Robert, makes the judgment of the court consistent with the general conclusions at which we have arrived. The personal representative standing in the place of the deceased executor, pays over to the administrator *de bonis non* the assets of the first testator remaining in his hands, and by so doing, negatives the idea of a *devastavit,* or an intention to convert, on the part of him whom he represents. The goods may have been changed in specie, but that the *property* was not changed, is evidenced by the voluntary relinquishment of it by the executor, through his personal representative. When we remember that a creditor, in suing the personal representative, would have had to establish a *devastavit* against the executor, and that this cannot be done where the executor and his representative disprove the waste, by having always recognized the property as in the

original testator, and relinquished it as such, to his new representative, we perceive that this case forms no exception to the rule, and does not conflict with the principles we have asserted.

In the case of Hagthorp v. Hooks, administrator *de bonis non,* heretofore cited, the chancellor says: "In a court of equity particularly, an executor or administrator, who is there considered as a trustee for the creditors, legatees and next of kin of the deceased, is expected and required to preserve the property of the deceased, apart from his own, and by itself—to give it, as is said, an ear mark, that it may be always known, and readily traced to any one into whose hands it may happen to fall; *and if he does so,* the court will do every thing that can be done to protect and assist him."

In the case of Villard v. Robert, the executor, and his representative after him, "had preserved the property of the deceased apart from his own," and in accordance with the equitable rule laid down by Chancellor Bland, when this separation was consummated by the delivery of the property to the new administrator by the executor's representative, "the court did every thing which could be done to protect and assist him."

It remains to advert briefly to one or two points in the ingenious argument of the counsel for the appellant, which we have not noticed in the general consideration of the elementary law upon this subject. It is alleged to be "an uncontroverted doctrine, that the administrator *de bonis non* may pursue and recover from the purchases any specific chattel which has been collusively disposed of by the first executor; and yet he is denied the right to recover the proceeds of this property, because it happens to be in the hands of the representative of him who participates in the fraud." No authority is quoted in support of the proposition here set forth, but we take it to be unquestionably true. The case stated supposes a *fraud* on the part of both parties to the purchase, and the collusive fraud vitiates the contract. It was no purchase on the part of the purchaser—no conversion or change of property on the part of the executor, and therefore no administration. It remained of the goods and chattels of the testator *unadministered and undisposed of,* and belonged of right to the administrator *de bonis non.*

Again, it is alleged by counsel that no one in the character of heir can maintain an action at law (or in equity,) for the personal estate of the testator, and, to entitle himself to sue, he must obtain "a grant of administration," and distributees are supposed to be under the same inability Again we say this is undoubtedly true, but *non constat* that the distributee, though disabled from suing as such for the *personal estate* of the testator, may not sue the proper party for a *devastavit.* The legal maxim asserted by counsel obviously applies to the suit of heirs or distributees for property of their ancestor in the hands of strangers, and not to their suits against executors or their representatives.

This opinion has already extended to so great a length that we shall have to pass over, without remark, some of the minor difficulties which have been suggested. We think they may all be easily removed or explained by a careful reference to the general rules which we have deduced from the law, from precedents and from authority The great importance of these rules, in the settlement of the estates of deceased persons, and the necessity of their being well defined and clearly understood, have induced us to enter into the discussion of the principles upon which they are based, more elaborately than would be necessary on subjects of less interest, and we have regarded it as especially desirable to establish, thus early, some uniform and authorized practice in reference to the administration of estates, before loose and vicious precedents become established and consecrated by long usage, and thereby tempt the courts, through consideration of convenience, to swerve from the rigid discharge of the duties of their high commission. 87

Believing, as we do, that an administrator *de bonis non* has no authority to call to account the representatives of a deceased executor for a *devastavit,* and, by parity of reasoning, that he has no authority to call to account a removed executor, we are of opinion that the order of the court below, dismissing the bill of complainant, was correct, and it is therefore affirmed.

LOWELL HOLBROOK AND JAMES T. ARCHER, ASSIGNEES, &C., APPELLANTS, *vs.* B. F. ALLEN, APPELLEE.

The engagement of the drawer of a bill is collateral only, and ceases entirely upon failure of the holder to present it, when due, to the person who is directly liable. If it is presented and not paid, then notice must be given to the drawer—otherwise, all privity between the payee and the drawer is at an end.

An action for money had and received will lie for money paid by mistake. The acceptance of a bill constitutes the consideration of the indebtedness of the drawer to the acceptor.

The right of a debtor, in failing circumstances, (in making a deed of assignment) to give preference to one creditor over another, is unquestionable.

This was an action brought by Allen, in the Circuit Court of the County of Leon, against Holbrook and Archer, Assignees of the mercantile firm of Lloyd & Flagg, who failed in 1849. The suit was founded on two bills of exchange drawn upon and accepted by Lloyd & Flagg, prior to their failure. Judgment was rendered in favor of the plaintiff below at the Fall Term of the Circuit Court of Leon County, in the year 1850. From this judgment defendant appealed, and the case is brought up to this Court upon the following agreed statement of facts, to-wit:

George W. Galphin, on the 18th day of March, 1848, drew his draft on the firm of Lloyd & Flagg, payable on the 21st December, 1848, in favor of one Neeley, for the sum of one hundred and sixty-seven and twenty-hundredths dollars, which was endorsed by Neeley to the plaintiff and was accepted by Lloyd & Flagg, and charged to the debit of Galphin on their books. 88

Lloyd & Flagg were the factors or merchants of Galphin, who is a planter, and were in the habit of accepting his bills and making advances to him, receiving his crops when made, and which were either purchased by them or him, or sold for his account, and proceeds of sale carried to his credit.

The bill in question was presented to Lloyd & Flagg for payment at or about the time of his maturity, but was not paid. No notice of such non-payment was given to the drawer.

On the 10th of January, 1849, the acceptors failed, and assigned their property, effects and assets to the defendants, in trust, to pay their debts according to certain priorities in the deed specified, and to which, if deemed material, reference is to be had. On the 11th January, 1849, the drawer, Galphin, sold to Lowell Holbrook, one of the assignees, the cotton which had been delivered prior to the assignment, and which was stored in the yard of Lloyd & Flagg, and the proceeds of such sale were passed to the credit of the account due Lloyd & Flagg. Galphin owed Lloyd & Flagg, at the time of the assignment, a note of $2,326 43-100, and a current open account of about $600, in which latter sum was included the amount of the draft which, on acceptance, had been charged as before stated. The cotton was insufficient to pay the entire indebtedness of Galphin, and a new note was given to the assignees for the residue.

It is further agreed, that on the 18th day of March, 1848, William M. Footman drew his draft on the firm of Lloyd & Flagg, payable on the 21st December, 1848, in favor of one

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89 Neeley, for the sum of eighty-three dollars and sixty cents, which was endorsed by Neeley to the plaintiff, and was accepted by Lloyd & Flagg, and charged to the debit of Footman on their books.

The bill in question was presented to Lloyd & Flagg for payment, at or about the time of its maturity, but was not paid. No notice of non-payment was given to the drawer, according to the rules and principles of commercial law.

On the 10th January, 1849, the acceptors failed, and assigned their property, effects and assets to the defendants, in trust, to pay their debts according to certain priorities in the deed specified, and to which, if deemed material, reference is to be had. On the 11th January, 1849, the cotton which was delivered prior to the assignment, amounting to nineteen bales, was sold, and proceeds passed to the credit of Footman on the books of Lloyd & Flagg, by the defendants, assignees. Footman owed Lloyd & Flagg, at the time of the assignment, a note of $100 and an account of $100 and a debit for the amount of the draft, $83 60-100, all of which was paid by the sale of the cotton, and the residue of the proceeds of said cotton were, by agreement, passed to the credit of Edward Footman.

Judge BAKER, of the Middle Circuit, sat in the place of THOMPSON, Justice, who had been of counsel in court below.

Archer, for Appellants. *Allen* and *Woodward*, for Appellee.

ANDERSON, *Chief Justice*, delivered the opinion of the court, as follows:

This was an action of *assumpsit*, instituted in the Circuit Court for Leon county by B. F. Allen, against Holbrook and Archer, assignees of the mercantile firm of Lloyd & Flagg.

The following statement of facts was agreed upon at the trial:—

Galphin, on the 18th of March, 1848, drew upon Lloyd &
90 Flagg, in favor of one Neeley, for the sum of $167.20. The draft was payable on the 21st day of December, 1848. It was endorsed by Neeley to the plaintiff, Allen, and was accepted by Lloyd and Flagg, and duly charged to the debit of Galphin on their books. Lloyd & Flagg were the factors or merchants of Galphin, who is a planter, and were in the habit of accepting bills for him and making him advances, receiving his crops when made. These were either purchased by them or sold by them on Galphin's account, and the proceeds of the sale placed to his credit.

The bill in question was presented to the acceptors about the time of its maturity, but was not paid. No notice of this non-payment was given to the drawer.

On the 10th of January, 1849, the acceptors failed and assigned all their property to the defendants in this suit, in trust, to pay their debts according to certain priorities specified in the deed.

On the 11th of January, 1849, Galphin sold to Holbrook, one of the assigneees, the cotton which had been delivered prior to the assignment, and which was stored in the yard of Lloyd & Flagg. The proceeds of the sale were placed to the credit of Galphin on an account due by him to Lloyd & Flagg. At the time of the assignment Galphin was indebted to his factors, (Lloyd & Flagg,) by note $2,326.43, and a current open account of about $600, in which last sum was included the amount of the draft. The cotton was insufficient to pay the entire indebtedness of Galphin, and a new note was given by him to the assignees for the balance.

It was further agreed that one Footman had drawn on the same parties for $83 60, at the same time and under the same circumstances. The material facts are the same in this case as in the other, except that the proceeds of the sale of Footman's cotton exceeded the amount of his indebtedness to Lloyd & Flagg, and the excess was placed to the credit of Footman, by agreement between him and the 91
assignees.

These facts are specially set out by the plaintiff in two several declarations, and he avers that by the respective payments made to the assignees by Galphin and Footman, they, the assignees, became indebted to the plaintiff in the amount of the two bills, with interest. The declaration also contains the common money counts and, among them, the count for money had and received by the defendants, to and for the use of the plaintiff.

The defendants plead in each case *non assumpsit*. The Judge of the Court below was of opinion that the law was with the plaintiff, and judgment was rendered in his favor against the defendants for the sum of $278.12, with costs. From this judgment an appeal was taken to this court.

The action for money had and received is a species of equitable action very much in favor with the courts. Its principles are liberal beyond those of any other known to the law tribunals. It lies in almost all cases when a person has received money which, in equity and good conscience, he ought to refund. The want of privity is no objection to this action, for the law will imply a contract from the equity of the claim. "If the defendant," says Lord Mansfield, "be under an obligation, from the ties of *natural justice*, to "refund, the law implies a debt and gives this action, found-"ed in the equity of the plaintiff's case, *quasi ex contractu*, "as the Roman law expresses it." 2 J. Burrow, 1015.

The plaintiff, then, in the case before us, may assert his claim in the perfect confidence that the courts will afford him sufficient remedy against the defendants, if his demand against them is *equitable and just*.

The money which he seeks to recover is the amount paid by Galphin and Footman to the defendants, in consideration of the acceptance by Lloyd & Flagg of their respective bills of exchange, drawn in favor of Neeley and endorsed to the plaintiff.

In investigating the nature of Allen's claim to this money 92
it is necessary to consider, in connection with it, the claim which is in conflict with his. This conflicting claim is not that of Lloyd & Flagg, nor that of Galphin and Footman, nor that of the defendants to this suit. These last have no personal interest in this controversy. They represent, so far as this case is concerned, the preferred creditors of Lloyd & Flagg, and it is the justice and equity of the claim of these creditors to the fund in question that is really in conflict with the claim of Allen. The relation in which they stand to the other creditors of Lloyd & Flagg, as entitled to priority of payment, is fully sanctioned by well established principles. A debtor in failing circumstances, in making an assignment of his property, has undoubtedly a right to give preference to one creditor over another. 2 Story's Equity, 302.

To determine between the respective rights of these preferred creditors and Allen, it is necessary to refer to the circumstances under which the fund in dispute was paid to the defendants. Upon the acceptance of the two bills of exchange by Lloyd & Flagg, they became the primary debtors to Allen, and Galphin and Footman became the sureties of the debt, being only secondary liable. "As be-"tween the acceptor and the payee it is not a collateral, "but an original and direct undertaking. The payee accepts "the acceptor as his debtor, and he cannot resort to the "drawer but upon a failure of the payment of the bill.— "The engagement of the drawer, therefore, may more prop-"erly be termed collateral." 2 Wheaton, 387.

Allen became, then, with his own entire consent, the creditor of Lloyd & Flagg, though retaining for a while his right of ultimate recourse upon Galphin and Footman, as sureties for the payment of the debt. But even this relation ceased between them after the 21st of December, 1848. On that day the bills fell due but were not paid, and no no-

93 tice of non-payment was given to the drawers. There does not seem to have existed any sufficient excuse for the omission of this notice, the acceptors being the factors of the drawers and receiving the crops when made, and the effect of the omission is a very familiar principle of commercial law. When a bill is duly presented for payment on the day it is due, and it be not paid, notice must be given to the drawer; otherwise he will be discharged from all liability, not only to pay the instrument itself, but also the debt in respect to which he became a party to it. Chitty on Bills, 465.

From this period, then, all privity between Allen and the drawers of the bill was at an end. By the consent of all parties, and by the operation of well known and well settled rules, Lloyd & Flagg became the sole debtors to Allen, and Galphin and Footman were indebted to Lloyd & Flagg, and to no one else. While these parties stood in this relation to each other, the rights of the other creditors of Lloyd & Flagg intervened and became vested in the defendants, Holbrook and Archer, as trustees. These rights were regulated by the deed of assignment made on the tenth of January, 1849, and it may be inferred from the statement of facts, as it was admitted in the argument, that Allen's claim as creditor was postponed to those of others more favored. The debts of Galphin and Footman to Lloyd & Flagg were a portion of the effects of the latter, and were conveyed with the rest to the defendants to be applied for the benefit of preferred creditors. Should they not be so supplied ?—Any right that Allen might have once had to this particular fund he had voluntarily abandoned, when on the 2st of December, 1848, by omitting the notice of non-payment, he released Galphin and Footman from their obligation to him, and was content to look to Lloyd & Flagg alone for the payment of the bills they had accepted. The preferred creditors certainly had a claim which might have been en-
94 forced against the assignees for the fund in question, since these had received it as a portion of the effects of the assignors, and were bound by the provisions of the deed of assignment to pay it to those creditors; and it is difficult to conceive in what respect this claim can be called inequitable. Allen had abandoned his claim to it and contented himself with retaining his claim against Lloyd & Flagg alone.

But Allen, in his declaration, alleges that this money was paid to the assignees by Galphin and Footman by mistake, and he bases his right to recover it upon that allegation.—It is true that an action for money had and received will lie for money paid by mistake. Buller v. Harrison, Cowper, 567. But in this case is there any such mistake as the law here contemplates? It may be, that when Galphin and Footman paid the money, they were under the impression that their respective bills of exchange had been paid, and that if they had been informed that such was not the case, they might in ignorance of their legal rights and obligations, have declined paying the assignees. But this was a mistake as to the law which imports nothing; and their mistake or ignorance of the facts was not material. Though they might have hesitated to pay the money due by them, its payment could have been enforced by the assignees. Therefore it is that Allen is in no wise concerned in the mistake made by them, if any was made. He could not make them pay him, and they would not have volunteered to do so, when they found that they could be compelled to pay the assignees.

The right of the assignees to enforce payment against Galphin and Footman, is derived from the nature of the contract of these last with Lloyd & Flagg. The acceptance by this firm of their drafts was the consideration for their indebtedness to him—the amount was charged to them on the books of the firm. After the 21st of December, 1848, they were released from all liability to Allen—Lloyd &

Holbrook and Archer, Assignees, vs. Allen.—Opinion of Court.

Flagg were substituted in their stead, as the sole debtors of 95
Allen, with Allen's consent, and this, as we have said, was a sufficient consideration for the debt. Chitty on Bills, 85.

Lloyd & Flagg's liability to pay Allen still exists—their bankruptcy and assignment have not relieved them from it, and no delay or omissions of notice, on the part of Allen, will release them, until, by the operation of the statute of limitations, a presumption arises that payment has been made.

We think, then, that, regarding the rights of all the parties to this transaction, true equity dictates that Allen should be confined to the position he has selected for himself, that of a general creditor of Lloyd & Flagg, and that any attempt to relieve him, would only be at the expense of the paramount equities of others.

A case reported in 1st Barbour's Supreme Court Reports, at page 468, was relied on by plaintiff's counsel, as establishing Allen's right to look to the cotton, which is mentioned in the statement of facts, as the proper fund out of which the draft which he held should be paid. In the case referred to, a draft was drawn by a consignor of cotton upon the consignee, on account of such consignment, and was discounted by a bank, upon the faith of its being paid out of the proceeds of the cotton, and was accepted by the consignee—it was held, upon the failure of the consignee, that his assignees held the cotton, as a trust fund applicable to the payment of the draft. This was a proceeding in a Court of Equity. We are at a loss to discover in what material points this case resembles the one before us, even if we disregard the difference between the tribunals.

In the New York case, the draft was discounted on the credit of the cotton, and not of the consignee. In this, the cotton, which is claimed by Allen as an equitable fund for the payment of his drafts, was not in existence, and had not probably been planted at the date of the drafts. It does not appear that the drafts were drawn in reference to any 96
particular cotton, even in embryo, nor, indeed, upon the faith of cotton at all. They may as well have been supposed to be drawn on the corn, the tobacco, or the sugar, which the drawers during the year either did, or might, have sent to their factors to be sold; and still less does it appear that Allen's drafts were to be paid out of this particular cotton, rather than the remainder of the $2,936.21 due by Galphin, and the $283.60 due by Footman. All who dealt with the firm of Lloyd & Flagg, and become their creditors during the year 1848, were entitled to the same lien upon this cotton as Allen—that is to say, the lien belonging to them as general creditors, and nothing beyond, until a change was made by the operation of the deed of assignment. All traded with them alike, upon their general credit as merchants, and not upon the faith of any specified fund for security, as in the New York case.

We think, therefore, that the court below erred in deciding that the law was with the plaintiff, and in giving him judgment against the defendants. It must be set aside, and judgment for the defendants with costs.

SAME CASE, ON PETITION FOR REHEARING.

The Supreme Court cannot take original jurisdiction of a cause, even by consent of the parties, but an appeal from a final judgment of the Circuit Court may be heard and determined here, whether brought up regularly, according to prescribed forms, or when such forms are dispensed with by agreement.

Where a case is submitted to the Court, upon an agreed state of facts, for its judgment on the law, such submission is equivalent to a demurrer to the evidence. But where facts alone are submitted, and the court is only called on to weigh the evidence, and decide accordingly, there being no question of law upon which the merits of the case depend, an appeal, or writ of error, does not lie.

97 The counsel for appellee applied for a rehearing in this case, and filed their petition according to the rule, setting forth the grounds of their application, substantially as follows:

1st. That Lloyd & Flagg, in the assignment of their effects, could not rightfully transfer to the appellants the cotton received from Galphin and Footman, the drawers of the bill held by Allen. It was not their's absolutely, but only for the purpose of paying acceptances first, and then the accounts of those individuals. The property, therefore, passed *cum onere*. 2d Story's Reports, 630, 638. 13th Peters, 483. 1st Condensed Supreme Court Reports, 137.

2d. The cotton was bound by the acceptance, because the acceptance was absolute, and the acceptors cannot divert it from the payment of the bills held by an endorsee, who has advanced his money upon the acceptance. 15th Peters, 394, 5, 6, 7.

3d. The assignees cannot occupy a better or a higher position than Lloyd & Flagg would themselves have occupied, if the assignment had not been made. If the drawers had placed funds in the hands of the acceptors, (Lloyd & Flagg,) those funds were applicable to the payment of the acceptances, and could not be applied to other debts due from the drawers to the acceptors. In this case, Allen's claim was due, and his right to be paid out of the proceeds of the cotton attached prior to the assignment to Holbrook and Archer. See 16th Peters, 129, 130, 131, 132.

4th. The acceptance by Lloyd & Flagg is as if they had said in express terms, that the cotton in their hands should be held applicable, and should be appropriated to the payment of Allen's claims. See the principle in 5th Wheaton, 277. 4th Condensed Supreme Court Reports, 647. See, also, 5th Peters, 599.

5th. In answer to the view taken in the opinion of the court, that Allen had abandoned his claim against Galphin,
98 is submitted that this liability of Galphin was not considered as involved in the case; and if it was, it is insisted that Galphin was not entitled to the notice of non-payment, which the court thinks was necessary, but is liable for having withdrawn the fund which was properly applicable to the payment of the bill.

6th. The cotton in the hands of Lloyd & Flagg was a trust fund for the payment of the drafts. 1st Barbour's New York Reports, 488. They being the factors of the drawers, and receiving their crops, it mattered not whether the cotton was in existence or not at the time the bills were drawn. The cotton was actually delivered, as the record shows, prior to the assignment.

There were other reasons stated in the petition, as constituting a sufficient ground for the application, which are noticed in the opinion of the court.

ANDERSON, *Chief Justice*, delivered the following opinion:

The court have considered the petition filed in this case with the attention which the care and labor manifested in its preparation merit. They accede to most of the legal positions assumed by the counsel, but have been unable to perceive their application to the case as it is developed upon the record. A material fact is stated as if on the knowledge of counsel, but there is no evidence of it before us. It is said "Lloyd & Flagg could not hold the cotton, because they had engaged to apply it to Allen." We find nothing in this engagement in the agreed statement of facts. The same thing is substantially re-asserted, in characterizing the nature of Lloyd & Flagg's acceptance. It is said, "their acceptance is nothing more nor less than if they had said in express terms, the cotton in our hands shall be held applicable, and appropriated to the payment of Allen's demand." If this is meant as a mere legal inference, it assumes the fact that Allen's draft was the only 99
one drawn by Galphin during the whole year, or, at least, had precedence of all others. This nowhere appears. On the contrary, the record shows that Lloyd & Flagg were in the habit of accepting his (Galphin's) bills, and making advances to him; and it also appears that, at the close of the year, Galphin was indebted to them near $3,000, which we are left to infer was the aggregate of the acceptances and advances they were in the habit of making.

We agree to the law, as stated in the petition, on the subject of a factor's lien, but we cannot see its application.—The whole of Galphin's cotton was appropriated to the payment of his debt to Lloyd & Flagg, and the factor's lien upon it was consummated by this appropriation. If this factor's lien enured to the benefit of any particular part of Galphin's debt, it nowhere appears that it was the part contracted, on account of the acceptance in favor of Allen.

The whole difference between the court and the counsel appears to grow out of this, that the counsel seem to regard Allen's draft as the only one drawn during the year—while the court are compelled to consider it as only about the seventeenth part of the aggregate of all the acceptances and advances. There is no evidence that Allen's draft had priority. On the contrary, it fell due only twenty days before the failure and assignment of Lloyd & Flagg, and it may reasonably be presumed to be among the last in the order of precedence.

The court is referred by the petition to the record as a reply to a remark in the opinion of the court, "that the bill was not drawn upon any particular cotton, nor, indeed, upon the faith of any cotton at all." It was obviously the meaning of the court, in making this remark, that Galphin, though, perhaps, known to the counsel as a cotton planter alone, was only made known to the court as a planter, and who sent his crops to Lloyd & Flagg to be sold.

There may have been sugar, or tobacco, or corn, as part of 100
the crop, for these are all staples of the country, and, therefore, the court thought it a very vague supposition to identify a particular draft, constituting the seventeenth part of Galphin's whole indebtedness, with any particular lot of cotton which may constitute but the seventeenth part of his crop. There is nothing apparent to justify the identification; and if it be said that Allen might select what funds he pleased, after it had passed out of the hands of Lloyd & Flagg, it would lead to this absurdity, that none of the cotton, or sugar, or corn, or tobacco, which had once belonged to Galphin, and had been sold by Lloyd & Flagg, could ever escape the operation of this lien, no matter through how many hands it has passed, nor how many and various forms it had assumed.

The court is surprised to find at the conclusion of the petition, the following objection to the judgment of the court: "One other point remains to be noticed. This case was submitted to the Judge of the Circuit Court, upon an agreed state of facts. There was no demurrer to the evidence, and no bill of exceptions. Where, then, is the authority of this court to adjudicate points of law—to decide questions of law raised by the pleadings, and instructions to the jury? It cannot try the case as a jury, nor as the court did below, by an agreement of the facts."

Little need be said in answer to this objection, beyond a reference to the agreed statement, signed by the counsel, who signs as senior counsel to this petition. At the close of that statement, we find these words: "The foregoing are agreed upon as the facts of the case, and on which the judgment of the court is prayed. And it is further agreed, that if either party is dissatisfied with the judgment of the court, the cause is to be carried by consent, without bond, in appeal to the ensuing term of the Supreme Court, to be docketed and tried during the term."

101 It is true, that if the subject matter of this case was not within our jurisdiction, we should be bound to notice it, though the party were thus estopped by their own consent from raising the objection, but we do not so consider it. The maxim that consent will not give jurisdiction, is misunderstood, if it is supposed to mean that none of the forms prescribed as the ordinary mode of prosecuting appeals, may be waived by consent. The Supreme Court cannot take original jurisdiction, even by the consent of the parties, but they can hear and determine an appeal from a final judgment of the Circuit Court, either when brought up regularly, according to certain prescribed forms, or when those mere forms are dispensed with by agreement.

In 1st Florida Reports, 271, the Chief Justice, delivering the opinion of the court, says: "The correct rule in the cases tried by the court, sitting as a jury, would seem to be, that, where facts alone are submitted, and the court has only to weigh the evidence and determine accordingly, no writ of error lies; and where mixed questions of law and fact are presented to the court for its decision, no writ of error lies, *unless the court is called upon to decide questions of law,* or such questions of law arise necessarily out of the facts, and are distinctly presented to the court upon them, *so that the decision of the points of law* will decide the merits of the cause, and the decision of the court is wrong." In this case, such was the fact, and the submission of the agreed facts to the court for its judgment on the law, was precisely equivalent to a demurrer to the evidence. The same rule is sanctioned in the case of the Southern Life Insurance and Trust Company v. Gray, 3d Florida Reports, 262. 5th Cranch, 358. 3d Cranch, 174.

The petition for a rehearing must be denied.

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102 MARY ANN PORTER, EXECUTRIX, APPELLANT, v. GEORGE W. FERGUSON, APPELLEE.

The declaration of a party, made at the time of transaction, and expressive of its character, motive, or object, are indicative of a present purpose and intention, and are admissible in proof, like any other material facts.

Letters written and sent by a principal to his factor, with the goods consigned to his care, are indicative of the purpose and intention of the principal in regard to them, and are admissible in evidence to show the instructions and orders given to the factor, or agent.

An instruction or charge given by the court, which has nothing to do with the issue produced by the peadings, is erroneous. The jury should respond to the issue of fact made by the pleadings. An instruction or charge, therefore, which is outside the case, having a tendency to mislead or divert the minds of the jury from the true matter in controversy, is good ground of reversal.

Appeal from a judgment of the Circuit Court of Monroe county.

This was an action of *assumpsit,* brought by the appellee, George W. Ferguson, against the appellant, executrix of Joseph Y. Porter, and was tried at the Fall term of the court, in the year 1850, HON. JOSEPH B. LANCASTER, Judge of the Southern Circuit, presiding.

The declaration sets forth an alleged verbal agreement between Ferguson and Porter, by which the former undertook to make and send, from time to time, the latter, who was a merchant at Key West, arrow root, for shipment thence to New Orleans; and a promise, on the part of Porter, to receive the arrow root, and ship it to the port of New Orleans, for sale in that market, for and on account of Ferguson. The declaration then avers that plaintiff, in compliance with his agreement, sent to Porter seventeen hundred and twenty-five pounds of arrow root, worth $140,

which was received by him, but which, contrary to his 103
agreement, he shipped to Charleston, in the Fall of 1846, and that it was lost at sea. By reason whereof, the defendant became liable to pay to plaintiff the value of the said arrow root.

The defendant pleaded *non assumpsit.*

At the trial of the cause in the court below, the plaintiff introduced Thomas J. Ferguson as a witness, who was sworn, and deposed to the contract, as laid in the declaration.

On the part of the defendant, John W. Porter, who was a clerk at the time of the alleged contract of defendant's testator, being sworn as a witness, contradicted in every important particular the testimony of plaintiff's witness.—According to the testimony of J. W. Porter, it appeared that defendant's testator undertook to make advances, and did make advances, upon arrow root sent to him by Ferguson, and that the agreement between them was, that Porter was to take the complete management and control of the arrow root—sell it in any manner he might think proper, and to the best advantage, and ship it, if he pleased to do so, from Key West to any port where he might deem it expedient to sell it, or which he might think best for plaintiff's interest; and that, in the exercise of the discretionary power which he had under the agreement, he shipped the arrow root in question to Charleston, hearing that it was a better market than New Orleans at that time.

There was no other material or important evidence introduced or offered on the trial of the cause in the Court below.

The Court gave instructions, which presented the true issue to the jury; but, at the request of the counsel for plaintiff, the following instruction in substance was also given, viz: "If the jury believe from the testimony, that it was the usage of trade for consignees for shipment at Key West to insure on goods of others sent to them for shipment, 104
without instructions as to insurance, and that J. Y. Porter shipped the arrow root in question without insuring it, and it was lost at sea, he was liable for the loss, and they ought to find for plaintiff." To this charge, defendant's counsel excepted; and this instruction (among other errors alleged to have been committed by the court below on the trial of the cause, all of which are noticed in the opinion of this Court,) is assigned for error.

Verdict and judgment for plaintiff in the court below.

Hogue, for Appellant.

Towle & Papy, for Appellee.

THOMPSON, *Justice.* delivered the opinion of the Court.

Several grounds of error are assigned upon the transcript of the record of the proceedings and judgment in this cause, which will be noticed in their order.

1. The first error assigned is upon the admission of the affidavit of the respondent, to prove the loss and destruction of certain original letters of Porter, the testator of appellant, so as to let in secondary evidence thereof. This point was very properly surrendered and abandoned by the counsel for appellant on the argument here. The affidavit of a party, as to the loss of a deed, document, or other writing, after evidence of the existence thereof by other testimony, is clearly admissible. 1st Greenleaf on evidence, Secs. 349, 558, and authorities cited in the margin.

2. The second error assigned is founded upon the exception taken at the trial to the introduction of the letters of respondent to Porter, which were produced by the appellant under a rule, and offered in evidence by the respondent. These letters appear to have been written at the opening, and during the continuance of the correspondence between accompanied the respective consignments of the goods as the parties as principal and factor, and which seem to have

105 they were, from time to time, made. The declarations of a party, made at the time of a transaction, and expressive of its character, motive, or object, are regarded as verbal acts, indicating a present purpose and intention, and, therefore, admitted in proof, like any other material facts. 1st Greenleaf on Evidence, §108. These letters are to be considered as a part of the *res gestae,* having been written and sent by the principal to the factor, with the goods consigned to his care, and are indicative of the purpose and intention of the principal in regard thereto. They are the instructions and directions of the owner of the property to the factor, his agent, and if they are not proper evidence, it is difficult to conceive how a factor could ever be made responsible to his principal for a deviation from the orders given. It is true, they are not conclusive evidence, for the factor may have refused to receive the consignment under the instructions, or may have insisted on some modification, or alteration thereof; but this is for him to show. Upon every point of view, the testimony was properly received, and this exception is overruled.

3. The third assignment of error is upon the exception taken at the trial to allow question to be put to the witness, John W. Porter. This witness was introduced for the purpose of impeaching the credit of Thomas J. Ferguson, the witness for the plaintiff below; and the question propounded was, "Have you the means of knowing the general character of Thomas J. Ferguson, and if yea, from such knowledge, would you believe him upon oath?" The question being objected to by plaintiff's counsel, was ruled to be improper, and disallowed by the court.

In the English Courts, the practice is, to propound the question to the impeaching witness, in the precise terms employed in the questions asked of the witness here, and involving in its scope the entire moral character of the person in question. See Phillips on Evidence, 292. Mr. Greenleaf,

106 in his treatise on evidence, (volume 1, page 541, note 3,) says: "Whether this inquiry into the character and reputation of the witness, should be limited to his reputation for truth and veracity, or may be made in general terms, involving his entire moral character and estimation in society, is a point upon which the American practice is not uniform." In North and South Carolina, and in Kentucky, the common law doctrine is practiced and defended; in other States, the rule prevails, which limits the inquiry to the general reputation for truth and veracity. A majority of this court are in favor of the recognition of the limited rule, as that which is most consonant with reason and propriety. For my own part, amidst the conflict of doctrine in the American Courts, I prefer, as the safest course, to hold to the common law practice. However, we are all of opinion, that, in the present case, the evidence sought could have been of but little, if any, importance. Besides the attack upon the character and reputation of a witness, there are other modes of discrediting him; one of which is by *disproving the facts* stated by him, by the testimony of other witnesses. This was, also, sought in this case, by the testimony of the same witness, John W. Porter, whose statements were in direct opposition to that of the witness, Ferguson. Would the additional statement of Porter, that the witness, Ferguson, was a man of bad moral character, and in his opinion, unworthy of belief upon oath, give more, weight to his opposing statements, or further tend to weaken the impression made by Ferguson's evidence? We think not. While the veracity of both stood unimpeached by other evidence before the jury, if the opposing and contradictory statements of Porter did not intrinsically possess sufficient merit to contervail the statements of Ferguson, it is very clear to our minds, that an impeachment by Porter of Ferguson's character for truth and veracity, would not meet with any consideration from the jury. This exception is likewise overruled.

Porter, Executrix, vs. Ferguson.—Opinion of Court.

4. The fourth assignment of error is upon the instruction 107 given by the Court to the jury, upon the prayer of the counsel for respondent. If due attention had been given to the matter put in issue in this cause, it would have been found one of much simplicity; but the pleadings seem to have been disregarded at the trial by all parties, and questions wholly foreign to the issue have been raised, discussed and decided, and are now brought before this court for review. The object of pleading is to ascertain, with certainty and precision, the matters of fact which are affirmed on the one hand, and denied on the other, and are thus mutually proposed and accepted by the parties for decision; and the question, so produced, is called the issue. Under our practice, of allowing the defendant to plead as many pleas as he may think proper for his defence, even though they be inconsistent with each other, sometimes a case presents many issues of fact for the determination of the jury, but this case is not of that character.

The declaration is on a special *assumpsit,* and sets forth a contract or agreement by parol between Ferguson and the appellant's testator, which is in substance as follows: that Ferguson, who was a manufacturer of arrow root, would, from time to time, send and deliver to the said Porter, as his factor, parcels of the said arrow root, and that Porter should receive and ship the same to the port of New Orleans, and there sell, or cause the same to be sold, for and on account of Ferguson; that, in pursuance of said agreement, Ferguson, in September, 1846, delivered to Porter seventeen hundred and twenty-five pounds of said arrow root, of the value of $140, and which the said Porter, under the agreement aforesaid, should have shipped to New Orleans, but in violation of his agreement, and against the consent of Ferguson, he shipped the goods to Charleston, whereby the same were wholly lost.

The plea is *non assumpsit.* What is the question of fact evolved by these pleadings? By *Reg. Gen.* of January 108 Term, 1847, title "Pleadings in Particular Actions," § 1, it is provided that, "in all actions of *assumpsit,* except on bills of exchange and promissory notes, the plea of *non assumpsit* shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." Applying this rule, and guided in its application by the examples given in the succeeding paragraphs of actions of a kindred character, we say the point of fact in controversy raised by the plea of *non assumpsit* in this case is, whether such a contract or agreement as that alleged in the declaration, was, in fact, made between these parties—the breach of that contract is not put in issue thereby.

At the trial of the cause, the court, on the prayer of the respondent, instructed the jury as follows, viz: "If the jury believe, from the testimony, that it was the usage of trade for consignees for shipment at Key West at that time, to insure on goods of others sent to them for shipment, without instructions as to insurance, and shipped by them; and J. Y. Porter shipped the arrow root in question without insuring it, and it was lost on the voyage at sea, he became liable to pay plaintiff the value of it, and in that case, they ought to find for the plaintiff, &c." Now, what has this instruction to do with the issue which the jury were sworn to try? The instruction directs the attention of the jury to a breach of the contract or agreement, when the breach is not put in issue by any plea—a breach, too, which is not alleged in the declaration. The breach alleged is for shipping to Charleston, when he was bound by his undertaking to ship to New Orleans, whereby the goods were lost—the deviation is the gist of the breach; the negligence or omission to effect an insurance on the goods against the perils of the sea, which, by the usage of trade, he should have done, is not charged. Whether the instruction is or is not

109 correct in point of law, is here not necessary to be decided—it was not in issue, and, therefore, irrelevant, and should not have been given; and if it tended to mislead the jury, and withdraw their minds from the consideration of the true issue, it is erroneous.

The instructions given to the jury in conclusion, it is true, do put the issue made by the pleadings to the jury, but these instructions are also justly obnoxious to the same charge of introducing extraneous manner, for they also put to the jury the question of the breach of the contract, when, in fact, the breach was neither denied, nor confessed and avoided, by plea. As before remarked, the appellant had, in the court below, put her defence upon the simple and isolated ground, that her testator never made any such agreement as that alleged in the declaration. No evidence was pertinent or proper, save what would conduce to prove or disprove this fact, and saving, also, the proof the value of the goods, as a guide to the jury in the assessment of damages, in case they found the issue for the plaintiff.

It becomes, therefore, very important to inquire, whether the jury were probably misled by the instruction first given, and their attention thereby withdrawn from the consideration of the true, and directed to a false issue? It will be seen, from the evidence set forth in the bill of exceptions, that the testimony on the subject of the agreement was very contradictory—the witness for the plaintiff stating it distinctly and clearly as it was set forth and alleged in the declaration, and the witness for the defendant stating as distinctly and clearly the reverse, by affirmative allegations of other and inconsistent terms and conditions of the agreement in relation to the arrow root. In the absence of the first instruction, we should have presumed that the jury, under the last instruction, had duly exercised their province of weighing the testimony, and had responded to the issue, that there was such contract, agreement and undertaking as
110 that alleged in the declaration; but when we reflect that the task of deciding between the opposing and contradictory statements of two persons is at all times unpleasant, and that jurors, like other men, are ever ready to avail themselves of any fair and honorable means to decide the controversy without passing upon and impugning the veracity of any of the witnesses, and examine the first instruction given them, we are led irresistibly to the conclusion that the jury in this case must have based their verdict upon that charge. They could find this instruction upon the contract as stated by either witness. It placed the plaintiff's claim, not upon the contract set forth in the declaration, but upon the negligence of the defendant's testator in his capacity of factor, in omitting to do that, in the performof his duty as factor, which, by the usage of trade, he should have done, to wit, to insure the goods shipped against the perils of the sea, by means of which negligence, the goods were lost. Both witnesses proved a contract of factorage. The plaintiff's witness a special and particular agreement, that the goods were to be re-shipped by the factor to New Orleans, for sale there—the defendant's witness proved that the agreement was, that the factor was to ship to any port or place he pleased, or which he might think to the interest of his principal. By changing the issue from the one made by the declaration and plea, to-wit, the making the agreement itself, and putting it before the jury, on the question of negligence, it is evident the jury would conclude it unnecessary to decide the question of credibility resulting from the contradiction of the witnesses, because, if the liability of the factor depends on the question of diligence, and they find he has been negligent under the agreement proved, their duty is accomplished, by finding that issue. They could, under the statements of either witness as to the contract, respond to the case made by the instruction, and probably felt themselves bound to do so, although they may have

Porter, Executrix, vs. Ferguson.—Opinion of Court.

believed that the plaintiff had failed to prove the contract 111
as laid in his declaration; and yet the only issue they were sworn to try was, whether there was, in fact, such contract.

The breach laid in the count not being denied or confessed or avoided by plea, was admitted, and the jury finding the issue upon the agreement for the plaintiff, were authorized to proceed to the assessment of the damages sustained, according to the evidence on that point of the value of the goods. We may remark in this connection, that, although the declaration contains, in addition to the special count before referred to, a count for goods sold, and money had and received; yet it is not claimed or pretended that any evidence was offered to the jury to authorize a finding upon that count, and for which reason we did not notice it, in adverting to the case made by the declaration.

5. Three instructions were asked for in the court below by the appellant here, and upon the refusal of the court to grant the prayer an exception was noted, and this exception forms the fifth assignment of error. We do not express any opinion upon the principles of law asserted by these instructions, but we say, that, as they relate entirely to the question of the assumed obligation of the factor to procure insurance on the goods, a matter not legally and properly in controversy in the cause, they were irrelevant, and for that cause ought not to have been given.

We regret very much indeed, as the amount involved in this controversy is small, that we are compelled to remit the case for a new trial, but believing as we do that the jury were misled by the *oral issue* made at the trial upon a breach of contract, not the breach assigned in the declaration and not in any wise in controversy in this suit, we have but one plain duty before us, which is to order and adjudge that the judgment of the Circuit Court be reversed and set aside, and the cause remanded for a new trial, in accordance with this opinion.

KIDDER M. MOORE AND J. C. MONTFORD, EXECUTORS, APPEL- 112
LANTS, v. DANIEL HAMILTON, GUARDIAN, APPELLEE.

Executors have no authority to invest money belonging to the estate of their testators on personal security. If they do so, it is at their hazard, and on their own responsibility. They are personally liable, if the security proves defective.

The statute of this State requires executors, administrators and guardians to take mortgage security for the money of minors invested by them, and this power must be exercised under the direction, and with the sanction and approval, of the Court of Probate.

When the accounts of executors or administrators are finally adjusted and closed, it is their duty to pay over to the guardian of the minors their distributive share, and not loan it out, (if in money) even on mortgage security.

Bank bills are treated as money, and it is not to be presumed that the Legislature in using the word *money*, meant only gold and silver. It was not intended that executors and administrators should treat such bills as other personal property, and *sell them at public outcry*.

Where executors or administrators treat bank bills, left by a deceased person, as money, if they invest it in a mode not in accordance with the directions of the law, even though they act in good faith, and with an honest purpose of benefitting the estate, they are responsible for any loss that may ensue from the exercise of such discretion in a manner not warranted by the law.

On the 23d day of January, 1849, the accounts of Kidder M. Moore and John C. Montford, executors of the last will and testament of William Turner, deceased, filed as to the Spring Term of the Court of Probates of the County of Leon, was examined by James E. Broome, Judge of Probate of said County. Daniel Hamilton, guardian of the infant children of the deceased, who are distributees under the will, by Thomas Randall, his attorney, having notified the court that he objected to the allowance of an item claimed by said executors as a credit, amounting to $1,612

113 50, a sum due and owing from William P. Craig and Edward Lockerman, who, it was alleged, were insolvent; and the court having, on the testimony of Richard Hayward, considered that, at the time of the loan of said sum to Craig & Lockerman, the executors had acted in good faith and with prudence, and to all appearances, for the best interest of the estate of Turner, allowed the said executors a credit for the amount claimed as insolvent. To this allowance, Hamilton, guardian as aforesaid, excepted; on the ground that the loan made was contrary to law, and prayed an appeal to the Circuit Court of the county of Leon, which was granted.

The testimony of Richard Hayward, which was taken before the Probate Judge, was as follows: That he came to the Territory of Florida in company with Edward Lockerman, in 1828—that he knew said Lockerman in Maryland. He was, at that time, considered unembarrassed, and possessed ample means to carry on his business—that he did, apparently, a prosperous business up to the year 1840, or 1841. That deponent was well acquainted with the business of said Lockerman, and in the month of March, 1841, would have considered him (the said Lockerman) as good as any man in the Territory, and would have taken the endorsement of said Lockerman with as much confidence as he would have taken that of any other man of his acquaintance here. Deponent believes, in March, 1841, that the said Edward Lockerman was worth fifty thousand dollars over and above his liabilities. Deponent knew William P. Craig in the year 1841—supposed him to be good for his contracts. He held a large property—had lost largely in St. Joseph's speculations, but deponent supposed him solvent, and would, at that time, have loaned said Craig, without security, sixteen hundred dollars of the bills of the Union Bank of Florida, to be returned in good funds.

The Circuit Court of the county of Leon, Hon. Thomas
114 Baltzell, Judge of the Middle Circuit, presiding, at the Fall Term of said Court, A. D., 1850, set aside and reversed the decision of the Judge of Probate, and remanded the cause, with directions to disallow the said item, and from this judgment, Moore and Montford appealed to this court.

The consideration of the note given by Craig & Lockerman, for the $1,612.50 loaned by the executors, was Union Bank bills of that amount, which were admitted to be 25 per cent. below par funds at the time of the loan, and the note was made payable to K. M. Moore, *one of the executors* of William Turner.

The appellants, by their counsel, assign the following errors apparent of record in this cause:

First. The item of sixteen hundred and twelve fifty one-hundredth dollars, in the account rendered by the appellants, as executors in the Court of Probate, ought not to have been disallowed by the Circuit Court, as a credit in favor of the executors, who are appellants

Second. The proceedings are irregular, in not exhibiting to the court the names of any persons entitled to any interest in the subject matter in controversy.

Judge Baker, of the Middle Circuit, sat in the place of Justice Thompson, who had been of counsel in the Circuit Court.

Archer, for Appellants, contended—

That the Judge of the Circuit Court erred in deciding that the law, 207, Thompson's Digest, applied to this case. That law requires loans by executors to be made under the direction of the court, secured by mortgage. This was not, strictly speaking a loan, but a *sale* of personal property, which the executors are authorized to dispose of. See Thompson's Digest, 202. Union Bank paper was perishable property—which paper, at the time of the alleged loan, was depreciated 20 or 25 per cent. The executors made

the best disposition of it, by selling it to those who are 115
proved to have been good and solvent men at the time; and an executor can only be required to manage the estate as the testator himself would have done. Union Bank notes were not money, but *choses* in action.

As to the second error assigned, the infant children have no legal title to any portion of the estate, and can have none until the estate is closed and finally settled up. Citing argument of counsel in Moseley v. Williams, 2d Florida Reports.

Branch, for Appellee, cited—

Thompson's Digest, 207, to show the law prescribing the duty of executors, administrators and guardians, in cases like the one before the court. The executors in this case should be held to the consequences of their failure to do their duty according to law. If they should be so held, then they were not entitled to the credit which they were allowed by the Judge of Probate, and the Judge of the Circuit Court did not err in reversing the decision, and directing the item claimed to be disallowed, for the reason that the loan was made contrary to law.

Executors are responsible for money loaned on personal security. See 2d Williams on Executors, 1547. If they loan on personal security, it is at their risk. 9th Law Library, 122.

In this case, it appears from the account filed in the office of the Probate Judge, that these executors claimed and charged commissions on Union Bank money. They sold real estate in 1841, for Union Bank paper, and thus recognized it as money. Besides, in 1840, the paper of this Bank was current money in the country, though it did not pay specie, having suspended in 1837. But if these executors had regarded the paper of this Bank as perishable property, as is contended for by the counsel for appellants, why did they not put it in their schedule as such? Their account, stated by the court from accounts and vouchers in the of- 116
fice of the Judge of Probate, filed in 1844, shows not only that they did not so regard it, but that they actually were allowed, and got the benefit of the depreciation of the Union Bank notes.

SEMMES, *Justice*, delivered the opinion of the court.

This case comes before the court on an appeal from Leon Circuit Court, and the principle facts presented by the record are these: On the 30th of March, 1841, Moore, one of the executors of William Turner, deceased, having in his hands the sum of $1,612 50 in bills of the Union Bank, belonging to the estate of his testator, loaned the same to Craig & Lockerman, who executed and delivered to him their note, in the following words:

$1,612 50. On the first day of January, next, we, or either of us, promise to pay to K. R. Moore, one of the executors of William Turner, deceased, sixteen hundred and twelve fifty one-hundredth dollars, for value received.

W. P. CRAIG,
EDWARD LOCKERMAN, *Sec'y.*

The drawers of this note becoming insolvent, it remained uncollected in the hands of the executors. Afterwards, on the 25th of October, 1849, an account of the executors with the estate, bearing date in April, 1844, was filed in the office of Probate for Leon county, and in this account appears this item of $1,612 50, reported as insolvent. To this account is annexed a statement of the Judge of Probate, that the account as stated is on the supposition that the $1,612 50, received at the death of the testator, was in Union Bank notes, &c. On the same day, the attorney for respondent filed in the Probate office the following exception: "Daniel Hamilton, guardian of the infant children, who are distributees under the will of William Turner, deceased, by Thomas Randall, his attorney, appears in court,

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and makes exception to the decision of His Honor, the Judge of Probate, by which the executors are allowed a credit for $1,612 50, the amount of the loan made to Craig and Lockerman, on their returning the note and judgment thereon as being insolvent, on the ground that said loan was made contrary to law, and prays an appeal." 117

By evidence taken before the Judge of Probate, it appears that, at the time the loan was made to Craig & Lockerman, they were wealthy and amply able, as was supposed, to respond to their liabilities; and it further appears by the record, that the bills of the Union Bank, at or about the date of the note, were depreciated to the extent of twenty-five per cent.

The allowance of the credit of $1,612 50 constitutes the subject matter of the present controversy; and the question presented to the consideration of the court is, as to the authority of the executors to dispose of the bills of the Union Bank in the manner they did.

The authority of executors to invest money belonging to the estate of their testators on personal security, has been the subject of frequent adjudications in the English Courts. In some of the earlier decisions, a discretion to some extent, when exercised in good faith and with due caution, seems to have been conceded to executors in this respect; but the more recent cases make no such concession, and the doctrine may now be considered as settled in England that an executor cannot invest on *personal* security; if he does, it is on his own responsibility, and at his own hazard. Precedents in Chancery, 272. Wilkes v. Steward, Cooper's Equity Reports, 6.

In the case of Terry v. Terry, Chancery Precedents, 273, the court say, that the rule is now well established, that an executor or administrator, lending money of the deceased on bond, or promissory note, or other *personal* security, though not guilty of a legal *devastavit*, yet is guilty of a breach of trust in equity, and is personally liable, if the security proves defective. 118

It is true, that, where an executor exercises reasonable care and diligence in the strict line of his duty, he will not be liable for any deficiency of the money in his hands, or for the insolvency of any person who may be entrusted with it; yet, if he travel out of that line of duty, and assumes to invest any part of the property of the estate in funds, or upon securities not authorized by law, and a loss ensue by insolvency or otherwise, he will be liable, however unexpected the result, or however free his conduct may have been from improper motive. See Clough v. Bond, 3 Mylne & Cr., 496.

If an executor, without good reason, leave money due upon personal security, which, though good at the time afterwards fails, he will be responsible. 5th Vesey, 1839. 1st Maddock, 290. And the case is much stronger, where he makes the investment improperly, as upon personal security. 2d Williams on Executors, 1547. See, also, 7th Blackford's Reports, 529. 2d Wheaton's Reports, 32.

In a case reported in 2d Cox's Chan. Cases, 1, Lord Kenyon held that a trustee could not lend an infant's money on private security; if he did, he would become responsible, if the obligors became insolvent, though they were in very ample circumstances at the time of the loan; that the rule was a wise and excellent one, and should be adhered to.

Independent of the authorities referred to, the provisions of our statute seem comprehensive enough to determine the question before us. "Executors, administrators and guardians may, by leave of the court, retain in their possession the money of any minor, paying for the same lawful interest, or shall, under the direction of the court, put out the money of the minors at interest, upon such *mortgage security as the court shall allow*, and if such security be taken *bona fide*, and shall prove insufficient, it shall be the loss of the minor, &c." Thompson, 207. It will be observed that the statute not only restricts the powers of executors to *mortgage* security, but as a further protection of the interest of minors, very properly annexes to the exercise of that power, the sanction and approval of the Court of Probate. 119

To avoid the operation of this statute, it is contended by counsel for appellant, that these infant children, who are distributees under the will of Turner, have no *legal* title to this money, or any portion of the estate, and can have none, until the account of the executors is closed, and the estate finally settled up. This doubtless is true, and yet they have such an interest in this fund and the other property, as would authorize the courts to interpose their power, and protect the estate from waste and mismanagement. Our statute recognizes this interest as a direct and personal one, by empowering the court of Probate, upon their application, through their guardian, and proof of mismanagement on the part of the executors, to require of the latter bond and security for the due administration of the estate. Thompson, 210. Besides, the effect of the argument is to render the provision of the statute, as to executors and administrators, wholly unmeaning and inoperative; for upon their accounts with the estate being finally adjusted and closed, it is their duty to pay over to the guardian of the minors their distributive share, and not loan it out, (if in money,) even on mortgage security.

It is also insisted that these bank bills are not money, and are, therefore, not within this statute. That they are not *money* strictly speaking is conceded, and the same may be said of the bills of all other banks; and when depreciated, they lose, to a certain extent, even their representative character. Less their depreciation, like other bank notes, they are, in conformity with common usage and common understanding, regarded as money.

In the case reported in 12th Johnson's Reports, 220, the court say, that bank bills are treated *civiliter* as money, and a tender is good, unless specially objected to.

The Legislature, in the use of the word *money* in this statute, doubtless, intended to give to it its general signification; for it can hardly be supposed that it was contemplated to resrict the word to gold and silver, and require executors to loan that on mortgage security, while bank bills should be regarded and sold at public outcry, as other *personal* property. 120

But independent of these considerations, the defence set up by these executors is far from being a meritorious one; for in all their dealings with the estate, they have regarded the bills of the Union Bank as money. If they considered them as the other personalty belonging to the estate, why put them in their schedule as *money*? Why retain the bills of this bank in their hands, for the avowed object of paying the debts of the testator, and for which purpose it is not pretended they were not available? Besides this, by reference to their account, we find that in 1841, they sold the *real estate* of the testator for bills of this bank, amounting to the sum of $1,695, and charged commissions on this amount with interest, less the depreciation, at the rate of six per cent. As to the sum now in controversy, we find in their account this charge—"To commissions on *cash* on hand at the death of the testator—say $1,623 50, at 6 per cent—$97 41."

It further appears that, after being allowed by the Probate Court the sum of $553, for depreciation on the proceeds of their own sale of the real estate, they retain $750 in these bills to pay out as money, for and on account of the estate.

These facts sufficiently indicate their own opinion as to the character of these bills. The court is not disposed to give them a different character, and one, in its opinion, not contemplated by the statute. The court is of opinion that bank bills left by a deceased person, and coming into the hands of an administrator or executor, should be regarded as *money*, under the provisions of our statute; and that the executors in this case, having failed to invest this money in

121 the mode prescribed by law, the estate should not suffer on account of the misapplication of this fund.

In loaning this money, these executors no doubt acted in good faith, and with an honest purpose of benefiting the estate; but in discharging the trust committed to them, they have assumed to exercise a discretion which the law does not warrant, and it is out of the power of this court to shield them from its consequences.

The court can discover no reason in this case for relaxing the rule, as laid down in the authorities; but, on the contrary, many considerations of a public nature might be invoked, why the English rule, strict as it is, should be rigidly adhered to, and especially where the interest of minors is affected..

Let the judgment of the Circuit Court be affirmed.

JOHN B. DOGGETT, PLAINTIFF IN ERROR, v. MARCELLUS JORDAN, DEFENDANT IN ERROR.

When a petition for rehearing is postponed or continued, there should be an order made simultaneously with the order of continuance, vacating or suspending the judgment.

The principle settled and decided at the January Term, 1849 and 1850, in the case of Doggett vs. Jordan, approved and re-asserted. See 2d Florida Reports, 541, and 3d Florida Reports, 215.

It is not a good ground for the rehearing of a cause, and setting aside the mature and deliberate judgment of the court, that it differs from a previous judgment, made upon a misapprehension of the record. If this was allowed, it would be to perpetuate error, for the sake of consistency.

This cause was decided at the January Term, 1850. See 3d Florida Reports, 215. The defendant in error filed a petition for rehearing, which, for want of time, was not considered at that term.

122 The petition sets forth the ground of the application, and is as follows, viz:

Defendant in error by his counsel moves and petitions the court for a new hearing of this cause, and assigns the following reason:

The court, in the opinion pronounced on yesterday, reversed the judgment of the Circuit Court in favor of Jordan, for a cause which was assigned as error at the last term of this court, and expressly overruled *"per curiam."*

The Chief Justice, delivering the opinion of the court in this cause, at the last term, (See Reports 1849, page 551, 552,) says: "The *fifth* error alleged seems to have been assigned under a misapprehension of the provisions of our judiciary act, the 12th section of which (Duval's Compilation, page 92—Thompson's Digest, page 327, No. 2,) declares "That when any original writ or summons has been sued out against two or more defendants, and returned by the sheriff, or other officer, served upon one or more of the defendants, and that the other defendants do not reside in said district or county, as the case may be, it shall be lawful for the plaintiff, at his option, to proceed to judgment against those upon whom process has been served, or to obtain from the court time to perfect service," &c. We have seen that the summons in this case was issued against John B. Doggett and Henry Doggett, and that it was returned "served on John B. Doggett, and that Henry Doggett did not reside in this (Leon) county." This brings the case within the provisions of that statute. The plaintiff elected to proceed to judgment against John B. Doggett the defendant upon whom process had been served, and we see "no reason to doubt his right to do so. The fifth error, therefore, is not sustained."

It will be perceived, by reference to the "fifth" error here alluded to and overruled, that it is identical with the only error now assigned and sustained. The facts in regard to this point were exactly the same at the last term 123 as at this. We contend, therefore, that this court has already decided his point in this cause. The defendant in error (Jordan) has acted upon that decision, by going to trial with the pleadings and return of the sheriff the same as they were at the last term. Had the court, when this case was brought before it at the last term, sustained the "fifth" error assigned, Jordan would have had it in his power, at the new trial, to have altered his pleadings, so as conform to the opinion of the court; but the court having refused to sustain the "fifth" error, and having decided that it was not error in him to proceed as he then did, and now does, in regard to this point, he went into the new trial with the pleadings and return of the sheriff unaltered. At the new trial, he obtained another verdict and judgment. We respectfully submit whether that verdict and judgment should be now set aside and reversed, for a cause which was then determined by this court, after argument and deliberation, to be no proper ground for error.

Long & Walker, for Petitioner.

Branch, for Defendant.

ANDERSON, *Chief Justice,* delivered the opinion of the court.

The petition for a rehearing in this case was filed during the last term of the court, but for want of time, its consideration was postponed to the present term.

We have found no precedent for an order of continuance in relation to a petition of this nature, but we suppose that it is a necessary incident to the general powers of the court, and so deeming, we have no hesitation in considering it. The difficulty which it has been suggested might arise from granting a rehearing after the former judgment was executed, might be avoided by an order vacating or suspending the judgment, made simultaneously with the order of con- 124 tinuance. This was omitted at the last term, but we understand no action has been taken upon the judgment in this case, and, therefore, no inconvenience can result from the consideration of the petition. The future observance by the court of the practice of suspending its judgment, when it finds it necessary to continue a petition for rehearing, will sufficiently provide against the occurrence of any difficulty hereafter.

The ground upon which the petitioner asks for a new hearing is a single one, and is thus stated: "The court, in the opinion pronounced on yesterday, (during the term of 1850,) reversed the judgment of the Circuit Court in favor of Jordan, for a cause which was assigned as error at the last term of this court, and expressly overruled *"per curiam."*

In proof of this allegation, the petition refers to the opinion of Chief Justice Douglas, upon the fifth error assigned in the record of 1849, which error is in these words: "The court erred in entering judgment against John B. Doggett alone, if John B. Doggett was liable as a partner of Henry Doggett." This error was not sustained, for the reasons given by the Chief Justice, which was based upon the return on the writ first issued in the case. In the argument of counsel in this case, printed at length in the report of the case, no reference is made to this fifth error whatever.

The case having been sent back for a new trial, was brought up again to the Supreme Court in 1850, and the only error assigned was the same in substance with the fifth error as assigned on the previous appeal. On this occasion, the error was sustained.

On looking into the opinion of the court, it will be at once perceived that the attention of the court was called to a different state of the record from that which they supposed it to be in the year previous. In the first case, the

attention of the court was directed to the return on the first writ, and we think their decision in reference to that return was correct. In the second case, their attention was directed to the fact that, subsequently to the return on the first writ, the plaintiff procured, by order of the court, an *alias* summons to issue to Henry Doggett, upon which the sheriff made return in the following words, to wit: "Not in the county."

It also appeared from the record, that judgment was rendered in favor of the plaintiff, Jordan, against John B. Doggett, and that there was no order of the court, showing what disposition had been made of the suit as to Henry Doggett.

The error assigned was "a departure in the judgment from the writ and declaration, which renders said judgment reversible—that the writ and declaration being joint against John B. Doggett and Henry Doggett, and the judgment against John B. Doggett alone, there should have been some order or judgment of court, showing what disposition had been made of said suit as to Henry Doggett." For reasons which seemed sufficient to the court, and which, to our minds, are conclusive, this error was sustained and the judgment below was reversed.

If there was error in the first decision of this case, it arose from the fact that the court did not have their attention called to a particular portion of the record, to which it was called on the second occasion, by a more particular assignment of error. The granting of a new hearing now, having in contemplation the setting aside the more mature and deliberate judgment of the court, because it differed from a previous judgment, made upon a misapprehension of the record, would be to perpetuate error, for the sake of consistency——a policy which is vicious in all professions, but in a Court of Law of the last resort, it would be evidently unbecoming and mischievous.

126 We are relieved from all apprehension of any injustice being done in this case, by the fact that the judgment now complained of being an order for a new trial, is not conclusive as to the rights of either party. A simple amendment of the sheriff's return, would effectually remove any obstacle that the opinion of the court interposes to the prosecution of the plaintiff's claim in the court below. New trials are available for the correction of the mistakes of the courts, as well as those of the jury.

The petition for rehearing is denied.

SAMUEL B. LOVE, SHERIFF, APPELLANT, v. WILLIAM WILLIAMS, APPELLEE.

The lien of an execution does not constitute, *per se*, a right of property in the thing itself, but a right to levy upon and sell it, for the satisfaction of the debt. But any sale or assignment of the defendant's personal property after the delivery of the writ of *fieri facias* to the sheriff is ineffectual as to the lien of the writ.

Where two writs of execution are delivered to the sheriff, and he executes the one last delivered first, the property of the goods is bound by the sale, and the money must be paid over to the plaintiff in the writ under which the sale was made. The plaintiff in the writ last delivered has his remedy only against the sheriff, for the breach of duty in not executing first that writ which was first delivered to him.

Where the sheriff has been guilty of a breach of duty in not levying the execution which was first delivered, the courts cannot give relief summarily, by motion rule. The proper remedy is an action on the case for a false return, or for not levying the writ.

The record in this case shows the following state of facts and proceedings in the court below, viz:

William Williams, on the 14th November, 1842, obtained judgment against James Lanier, Robert L. Harrison and Uz Wood, for $1,328 10, in the late Superior Court in Gads- 127
den county. A *fieri facias* issued thereon, and on the 11th May, 1844, an *alias* writ of *fieri facias* was sued out, returnable when satisfied, which was delivered the same day to John G. Camp, Marshal of the Middle District, and was in his hands, unexecuted, when the State government was organized, and on the 1st November, 1845, was turned over by him to Benjamin C. West, who had been elected sheriff of the county.

A few days prior and up to the 12th November, 1849, (the appellant, Samuel B. Love, having been elected sheriff,) the late sheriff was engaged in delivering the precepts and papers in his office to his successor, the appellant, which was thus effected:—Robert C. Lester, the Clerk of the Court, was employed by the late and newly elected sheriffs to prepare a list or schedule of the executions, and which the new sheriff, Love, receipted to his predecessor for. Lester does not recollect whether the above mentioned *fieri facias* was among the papers so turned over; but James Hine, who was deputy for the former sheriff, says he saw the *fieri facias* among the papers so turned over to Love.

On the 12th November, 1849, the court-house at Quincy was destroyed by fire and, with it, all the records and papers of the clerk's and sheriff's offices, except the files of the causes for trial at the approaching term.

On the 14th November, 1849, Richard H. Wilson, executor of James Wilson, recovered judgment in the Circuit Court of the Middle Circuit for Gadsden county against Robert L. Harrison, for $2,057 29, on which he sued out a *fieri facias* on the 27th November, 1849, and which was delivered to the appellant, Love, the sheriff of the county, on the same day, and by him levied on the 29th of the same month upon three slaves and 400 bushels of corn, the property of the defendant in execution. The property was sold on the 7th January, 1850, for the sum of $1,050; of which
sum, thirty-four dollars and two cents were levied for his 128
costs and commissions, leaving a balance of one thousand and fifteen dollars and ninety-eight cents nett proceeds of said sale.

On the 7th January, 1850, the plaintiff in the first *fieri facias* served the sheriff with a notice, in the following terms:

William Williams, plaintiff, v. James Lanier, R. L. Harrison and Uz Wood, defendants.—Assumpsit.

In November term, A. D., 1842. Judgment for, to wit, $1,500, in late Superior Court for the county of Gadsden, State of Florida. Last *alias* writ of *fieri facias* came to the hands of the proper officer, 11th day of May, A. D. 1844. The above described writ of *fieri facias* is in your hands, and there is still due and owing upon the same to the said William Williams the sum of, to wit, $1,600.

You are hereby notified that the said William Williams will hold you accountable for any property or money that is now, or may hereafter, come to your possession, belonging to said James Lanier, Robert L. Harrison and Uz Wood, or either of them, until said writs of *fieri facias* are fully and completely satisfied. WILLIAM WILLIAMS,
by his Attorney, John Erskine.

To SAMUEL B. LOVE, Esq.,
Sheriff of Gadsden County, State of Florida.

Endorsements thereon, viz: I accept due, and sufficient, and timely service of the within notice.

S. B. LOVE, *Sheriff.*

QUINCY, *January 7*, 1850.

And on the 10th January, 1850, the said Williams filed his petition to the Circuit Court, praying the establishment of the record of the judgment and of the writ of *fieri facias*, which had been destroyed by the fire of the 12th November, and such proceedings were had, that, on the 20th day of May, 1850, the court ordered that the judgment be

129 revived and substantiated, with the same force and effect as if it had not been destroyed; and on the 22d day of May, 1850, ordered and directed that a substantial copy of the writ of *fieri facias*, which issued on the 11th May, 1844, should be prepared by the clerk and issued, and that, when issued, should be substituted in the place of the original, which was destroyed.

On the 21st May, 1850, Williams, the plaintiff in the *fieri facias* against Lanier, Harrison and Wood, moved for and obtained a rule upon the appellant, to show cause why he does not pay over to the plaintiff $1,050, in his hands, collected from the defendants in said suit.

To which rule, the appellant answered as follows, viz: "In answer to the rule entered in this case, on the motion of John Erskine, Esq., attorney for the plaintiff, the sheriff says that he does not know whether any execution ever came to his hands in the above stated case; but if the execution in this case did come to his hands, it was destroyed in the fire, which consumed the sheriff's office on the 12th day of November, A. D., 1849. That, afterwards, on the 27th day of November, 1849, an execution came to his hands in favor of Richard H. Wilson, executor of James Wilson, against Robert L. Harrison, for the sum of $2,057 29-100, which he levied on the following property: Judy, about 24 years of age, and her three children—Sarah, about 6 years—Kinch, 4 years, and John, about 2 years; which property was sold, under and by virtue of said execution, for the sum of $1,150, which, after deducting $34 02-100, left a balance of $1,015 98-100—of which sum, he paid over to R. E. Gibson, attorney of Richard H. Wilson, executor as aforesaid, $1,000, leaving in his hands $15 98-100, subject to the order of this court. S. B. LOVE, *Sheriff.*"

Exhibiting with his return a copy of the *fieri facias* of Wilson's executor v. R. L. Harrison, with the levy and sale endorsed thereon.

130 On Thursday, November 21, 1850, the Circuit Court made the rule absolute, directing the sheriff to pay over to the respondent's attorney the amount collected by the said sheriff on the *fieri facias* in favor of R. H. Wilson, executor, v. R. L. Harrison, and to be applied, it is presumed, to the satisfaction of the *fieri facias* in favor of respondent, against Harrison, *et al.*

From this judgment the sheriff brought this appeal to this court.

Gibson, for Appellant.

This is a rule on the sheriff to show cause why he has not paid over the money. The rule is designed to be in accordance with the statute to be found in Thompson's Digest, page 358. Tidd's Practice, pages 58-9.

This remedy was only given by the statute, in cases where money has been actually collected on an execution. The rule should have alleged that the money mentioned in the rule had been collected on the execution of Williams v. Harrison, *et al.*

The English practice is to rule the sheriff to return the writ, and if the party is not satisfied with the return to sue the sheriff for a false return. Clerk v. Withers, 1 Salkeld, 322, 323. Tidd's Practice, page 309. Thompson's Digest, page 355.

The court below confounded the practice under the statute and the English practice, by ruling the sheriff to return the writ, and then declared the return false, and entered up judgment.

The sheriff had a mandate from Gadsden Circuit Court to execute, to wit, the execution of Wilson v. Harrison, and this he must do, until a superior mandate supervenes.

The notice was incomplete, in not stating that the execution was lost, but if complete, was not sufficient to stop the execution of the *fieri facias.* Thompson's Digest, page 360.

The only remedy the appellee had, if any, was to have 131
filed a bill, making the sheriff, Wilson, and the defendants in his execution parties, and to have obtained a writ of injunction, which would have come with authority.

Supposing this proceeding to be proper, yet the execution which appears on the records is irregular, and not authorized by either of the orders which appear on the record.

The first order simply says that the judgment shall be established, and that the plaintiff may have execution thereof.

The second order, which authorizes the establishment of the original execution, (for which the one on the record seems to be designed,) though entered at the May term, was suspended until the Fall term; yet this execution was issued in May.

This case simplified, resolves itself into this, that the sheriff had an execution in his hands, which was destroyed by fire; in the meantime, another execution comes to his hands, which he executes. When ruled on the first execution, he returns that he never had it, but it is proved that it was in his hands, and that it was burned in the fire which consumed the Court House, which is a sufficient excuse. 1 Hill's South Carolina Reports, 69, Mitchell v. Anderson.

The execution of Williams was dormant—it had slept for years, and there was a manifest want of diligence, in not procuring it to be satisfied, before the judgment in favor of Wilson was obtained. On the subject of dormant executions, see 17th Johnson, 274. 11th Johnson, 107. 1 Bayley, 295.

Erskine, for Appellee, said—

1. If the sheriff had paid over to Wilson's attorney the money received from the sale of Harrison's property, under the execution in favor of Wilson, before the notice, there might be a question; but as notice was given, he should have paid it over to Wiliam Williams, the plaintiff in the elder *fieri facias.* Sanders v. Bridges, 3d Barnewall & Al- 132
derson, 95.

2. The first execution must have the priority, though the levy and sale were under the younger. Hutchison v. Johnson, 1st Term Reports, 729. Citing, also, Willis v. Shepard, 2d Florida Reports, 397.

3. The property of a defendant in execution is not divested by the levy—not till sale, or execution executed.

Archer, in reply, referred

To the rule served in this case, contending that there was a want of particularity and certainty in it—that the proceedings to establish the destroyed record and writ of execution were not evidence against the sheriff in this controversy. The plaintiff, Williams, it is true, had a lien from the time the execution came to the hands of Camp, the marshal; but the question here is, ought not the sheriff to be excused, under the special facts of the case?

There is a difference between the existence of a lien, and a complaint against an officer for not enforcing the lien. The question is, what was the proper course to pursue, admitting the existence of the lien? Manifestly the remedy was not by summary proceedings by motion. The proper course was, first to produce a return, and if that return was false, then the remedy was by action on the case.

THOMPSON, *Justice,* delivered the opinion of the Court.

At the Spring term, 1850, of the Circuit Court, sitting in Gadsden County, Williams, who was plaintiff in a judgment and execution against Robert L. Harrison and others, obtained a rule against the appellant, to "show cause why he should not pay over to the plaintiff one thousand and fifty dollars collected from the defendants."

The appellant in his answer to the rule says: He does not know whether any execution ever came into his hands in

Love, Sheriff, vs. Williams.—Opinion of Court.

the said case, but if it did come to his hands, it was destroyed by the fire which consumed the sheriff's office on the 12th November, 1849. That the sum named in the rule was made by a seizure and sale of Harrison's property on a *fieri facias* in favor of Richard H. Wilson, executor, against said Harrison, which was delivered to him on the 27th November, 1849, and that he had paid to the attorney of said Wilson $1,000, and after deducting his costs and expense in making said sale, he had in his hands the sum of $15 98.

Upon this answer, evidence was introduced showing that the execution of Williams against Harrison and others, which was of the date of the 11th May, 1844, had been delivered to the Marshal of the Middle District on the said May 11th, 1844, and had been transferred and delivered to B. C. West, late sheriff of the county of Gadsden, on the 1st of November, 1845, and was by the said West turned over to the appellant, together with a number of other writs, a day or two prior to the fire.

Williams places his claim to the sum of money on the ground that his execution was first delivered to the sheriff and had priority, and that the money should have been paid to him, notwithstanding it was made by a seizure and sale of Harrison's goods by virtue of the junior writ of *fieri facias* in favor of Wilson's executor.

Two questions are presented for the decision of the court upon the argument here:—First, as to the character and extent of the lien of an execution upon the goods of the debtor; and, secondly, whether the respondent, if he has sustained an injury, did in the court below pursue the proper remedy in the assertion of his claim?

1. As to the lien of the execution. At common law, the *fieri facias* had relation to its *teste,* and bound the defendant's goods from that time, which was always some day in the term in which the judgment was entered; but this *relation* proving inconvenient and mischievous in practice, the goods continuing liable in the hands of those who had purchased *bona fide* and for a valuable consideration from the defendant, between the *teste* of the writ and the day of its actual issue, the statute 29th Car. II, c. 3, § 16, was intended to correct the mischief. This statute, which is of force here in this particular, enacts that "no writ of *fieri facias,* or other writ of execution shall bind the property of the goods of the party against whom such writ of execution is sued forth, but from the time such writ shall be delivered to the sheriff," &c. See Tidd's Practice, 1,000.

"Neither before the statute nor since," sayse Mr. Tidd, is the property in the goods *altered* by the delivery of the writ to the sheriff, but it continues in the defendant till execution executed." And this, no doubt, upon the principle that a lien does not constitute, *per se,* a right of property in the thing itself, but a right to levy upon and sell it for satisfaction of the debt. In Lowthal v. Tompkins, 2 Equity Cases Abridged, 380, Lord Hardwicke explains what is meant by goods being *bound* from the delivery of the execution; that if defendant makes an assignment of his goods, unless in market *overt,* the sheriff may take them in execution, and this view is sustained in all the cases. We have no markets *overt* in this country, and therefore any sale or assignment of the defendant's personal property, after the delivery of the *fieri facias* to the sheriff, is ineffectual as to the lien of the writ. But the contest here is not between the purchaser of goods from the defendant and the plaintiff in the *fieri facias,* but it is between the plaintiff in one execution and the sheriff, in which the former claims that the money which the latter made on another writ shall be paid to him, because, as alleged, he holds the elder writ and his lien is prior in point of time. Is this position correct? Do the liens of different executions attach in the order of priority of the time of their respective delivery to the sheriff upon the property of the defendant in execution, or upon the proceeds of the sale of it in the sheriff's hands, so as to authorize a rule upon the sheriff to pay the money over as the money of the plaintiff in the first writ delivered?

It is true that all the authorities lay down the proposition that, as between different plaintiffs, if two writs of execution are delivered to the sheriff on the same or different days, he ought to execute that first which was first delivered, unless it be fraudulent or dormant; but if he executes, that is, levies and sells, by virtue of the writ last delivered, the property of the goods is bound by the sale, and the party cannot seize them by virtue of the writ first delivered. Tidd's Practice, 1000, and authorities cited in the margin. Bradley v. Wyndham, 1 Wilson's Reports, 44. Hunt v. Hooper, 12 Meeson & Welsby, 664. Thus, in Smallcombe v. Cross and the sheriff of London, 1 Lord Raymond, 252, the sheriff levied on the defendant's goods under the writ last delivered and sold them to Smallcombe. By the direction of the plaintiff in the elder writ he again levied on the same goods under that writ and sold them to Cross. The first purchaser, though under the junior writ, brought *trover* for the goods and recovered. The Court, *per* Holt, Chief Justice, resolved that the sheriff has not an election to execute that writ which he pleases, but should proceed upon the writ first delivered; yet that if he do otherwise and execute the writ last delivered first, the property of the goods is bound by the sale, and the party cannot seize them by virtue of his execution first delivered, but may have his remedy against the sheriff. The reason given is, "that sales made by the sheriff ought not to be defeated; for if they are, no man will buy goods levied upon a writ of execution." And in the subsequent case of Payne v. Drewe, 4 East's Reports, 523, 545, the case of Smallcombe v. Cross and other precedent cases were commented upon and approved; and Lord Ellenborough, in delivering the judgment of the court, lays down the rule thus: "that where there are several authorities equally competent to bind the goods of a party when "executed by the proper officer, that they shall be considered as effectually and for all purposes bound by the authority which first actually attaches upon them in point "of execution, and under which an execution shall have "been first executed."

Upon the authority of these cases it is clear that the lien of Williams' execution did not attach upon the property, so as to defeat the sale by the sheriff under the junior writ of Wilson's executor, for both authorities were equally competent to bind the personal property of the defendant, Harrison, and the latter having first attached in point of execution, the property is to be considered bound by it to the exclusion of all others. In Rankin v Scott, 6 Peter's Condensed Reports, 506, a distinction is well taken between the lien of a judgment on land and the lien of an execution upon personalty. In the first case the lien is by matter of record; in the other it is not, not even by the writ, except from the time of delivery to the sheriff. The purchaser of personalty cannot suppose that the officer has committed any impropriety in the performance of his duty, and even if he desired to examine into the propriety of his action, he has not the means of doing so; while, on the other hand, if land is offered for sale by the sheriff, the lien being by judgment, it is a matter of record, and the purchaser can, by examination of the records, satisfy himself whether there are any other and superior or prior liens upon the property. This case of Rankin v. Scott is cited approvingly by this court, in the case of Moseley v. Doe ex dem. Edwards, 2d Florida Reports, 438, 439.

Has the plaintiff in the writ first delivered, any lien on the money in the hands of the sheriff, made by the seizure and sale under the second writ? The case of Payne v. Drewe, before cited, as well as the cases of Rybot v. Peck-

137 ham, 1 Term Reports, 731, n., and of Rowe v. Tapp, 9 Price R. 317, are conclusive that he has not. The last case is directly upon the point. Two writs of *fieri facias* had been delivered to the sheriff at different times, at the suit of different plaintiffs, against the same defendants; being ruled to return the second writ, he returned that he had levied on certain goods and chattels of the defendant, which remained in his hands for want of buyers; the plaintiff then sued out a *venditioni exponas*, to which the sheriff returned that he had sold the goods and returned the proceeds of sale, to apply to the other writ of *fieri facias*, which had been first delivered him. The court, on motion, quashed the return, and made the order absolute upon the sheriff to pay over the money to the plaintiff in the second *fieri facias*.—The case of Saunders v. Bridges, 3d Barnewall & Alderson, 95, cited by the counsel for the respondent here, is not opposed to the case last cited. In Saunders v. Bridges, which was an action for a false return, the sheriff had levied the elder writ and made the money; subsequently the defendant obtained an order setting aside this writ, and directing the money to be returned to him; the sheriff paid over the money to the defendant, and returned *nulla bona* to the junior writ—the court held he should have retained it to satisfy the second writ; that as he did not ask the court for directions, nor give notice to the plaintiff in the second writ of the service of the rule upon him, he had paid the money in his own wrong, and made himself liable.

It would seem, from Hutchinson v. Johnson, 1st Term Reports, 729, that, if the sheriff having two writs in his hands, should levy under the second, he may afterwards sell under the first, and thus escape liability; but it is equally clear from all the authorities, that, if he levies and sells, by virtue of the writ last delivered, he must pay the money over to the plaintiff in that writ; **and the plaintiff in the writ first delivered has his remedy only against the**
138 sheriff, for the breach of duty in not executing first that writ which was first delivered to him.

2. As to the remedy pursued by the respondent in the court below. The rule *nisi* obtained on the 21st May, 1859, from its structure, is based on the act of February 17th, section 7, (Thompson's Digest, 358,) which gives a summary remedy by rule against the sheriff to pay over, with twenty per cent. damages, money which he has collected upon an execution, and has retained for the space of thirty days after its receipt; and the argument of respondent's counsel in this court is upon the superior right of the plaintiff in the elder writ, by virtue of his supposed prior lien upon the property levied on, or its proceeds when sold, to consider the money thus made by the sheriff as applicable to his execution. As we have seen, he has no such right; but if the sheriff has been guilty of a breach of duty in not levying his writ first, his remedy is against the sheriff; and can the courts proceed summarily by motion, or rule, to administer to his relief? We are not aware of any such authority, either by the common law, or by statute of this State, and none has been cited in the argument. The case of Willis ex. v. Shepard, 2d Florida Reports, 397, has been cited by the counsel for respondent; but although this court does there suggest a form of proceeding by rule in cases of this sort, yet the authority, we think, is against the present case. The court suggests that where there are adverse claimants to money in the sheriff's hands, "the proper course is for each claimant to take a rule against the sheriff; the allowance of one will be the refusal of the other; by an order of consolidation, all can be tried together, and in case of appeal by any, the stay of the others may be had, as directed, until final decision." Yet in that case, the rule which was entered, being by one execution creditor against the sheriff and the other execution creditors jointly, presented the same state of case as several rules by each of the execution creditors against the sheriff would do, after an order 139
of consolidation had passed. The parties all appeared before the court and litigated each other with their respective claims, and the court having decided upon the questions made, and ordered distribution of the funds, the dissatisfied party appealed to this court. The judgment was reversed, the court saying that there was "no such proceeding at common law, or by statute, as a rule between two individuals to try the right of money in the hands of a third person, the sheriff," and we think the judgment was right. In like manner, we are compelled to say that we are not aware of any such proceeding at common law, or by the statute of this State, which authorizes a summary proceeding by motion or rule against the sheriff for a false return, or for not levying an execution in his hands to be executed. A statute was passed in 1833, authorizing the plaintiff in execution, upon a return of *nulla bona*, to controvert the same, and make up an issue thereon, to be submitted to a jury in a summary manner, and authorizing a judgment to be entered on the verdict of the jury, (Duval's Digest, 9, § 8;) but this section of the act was repealed by the act of February 15, 1834, (Duval's Digest, 13, § 5.) The suggestion in Willis, executor, v. Shepard, as to the remedy by rules, probably, was not well considered, as the attention of the court was not drawn to the subject as a point necessary to the decision of the cause.

We are satisfied that the proper remedy, if the plaintiff in the elder *fieri facias* has been in fact injured by any malfeasance or nonfeasance of the sheriff, is that which was presented and urged in argument by the counsel for appellant. The plaintiff has a right to call upon the sheriff for a legal return upon the process at every term of the court, by section 8 of the act of March 15, 1844, (Thompson's Digest, 355.) **If the return is false, as where the sheriff returns *nulla bona* when he might have made the money, or**
has given undue preference to a writ subsequently deliver- 140
ed, the plaintiff must resort to his action on the case, for a false return or for not levying the writ. Tidd's Practice, 1022. In such an action, the facts upon which the liability of the sheriff is claimed to be founded, as well as his defence, will, under the guidance and instruction of the court, be passed upon by a jury. This is his right, and he cannot be deprived of it, without his express consent.

The conclusion at which we have arrived, renders it unnecessary that we should consider the other points made and discussed in the argument at the bar.

The judgment of the court below is reversed with costs.

SEMMES, *Justice*, dissented:

I regret I am compelled, in this case, to differ in opinion from the court, but a sense of duty requires me to dissent from some of its views. The execution in favor of Williams, while in possession of the sheriff, it is true, was destroyed by fire; but this does not affect the question. The execution was still in full force, and its lien and priority were unimpaired. The lien acquired by this execution on the *property* of the defendant in *fieri facias* was, I admit, defeated by the sale; but its *priority* over the junior writ was still subsisting and unaffected as to their respective rights. The fact that the sale was made under the junior execution did not defeat or affect this priority over the proceeds of the sale, which stood in lieu of the property. *No act of the sheriff could defeat it.* It was the duty of that officer to look to the outstanding executions, to determine to whom the money belonged; and the time each execution came to his hands determines their respective priorities.

Had the sheriff retained in his hands, as it was his duty to have done, the proceeds of this sale, to be applied to the senior execution, it would, in my opinion, have been a sufficient answer to any rule or action against him by the

141 junior execution creditor—money must be paid on executions according to their priorities. 2 Watt's Reports, 303.

The sale in this instance was *valid*, and, consequently, the lien of Williams' execution was gone, *because* the *law* here interposes and protects the rights of an *innocent* purchaser. See 10 Watts' Reports, 212. And this is the only reason which can be assigned why the *sale* under a junior execution is *valid*. One of the great objects designed to be effected by the statute 29th Charles II, was to secure the possession of purchasers under execution. 1 Term Reports, 729.

The *levy* of the junior writ did not in any respect affect the priority of the senior, and the *only effect* of the sale was to divest the defendant in execution of the title, and vest it in the purchaser. If the elder execution creditor attempted to assert his previous lien on the property, it then became a question with him and the purchaser, and the law favors the latter—not by reason, however, of the junior writ having acquired any *priority* by virtue of the *levy* and *sale;* but, when the creditor claims the proceeds of sale, the question is then between him and the sheriff; or, if the junior creditor interposes, still the priority of the claim determines the then respective rights. Numerous authorities in England and in this country could be referred to which show that where several executions are levied on the same property, and it is sold under all, the proceeds of sale are always applied to the senior writ. If the doctrine be true, as is asserted, that the *levy* and *sale* of property under a junior execution, entitles it to the proceeds, then the principle in all these authorities is false, and the executions should be satisfied *pro rata* out of the fund raised by their joint levy and sale. But the principle in these cases is true, and is a necessary consequence from the statute giving priorities to executions—that no matter under what writ the sale is made, the proceeds of right belong to the senior execution. I do not understand the authorities referred to in 1 Term Re-
142 ports, 729 and 4 East, 523, 545, as asserting any other principle than that the sale is valid, though under the junior writ; a doctrine which no one questions.

But the American authorities, so far as I have had time to examine them, decide on principle "that it is wholly immaterial upon whose execution the sale was made; the execution first in the hands of the officer is entitled to the proceeds of the sale." 6 New Hampshire Reports, 73 and the numerous authorities referred to. 3 Watts & Sergeant, 438. 2 Hawks' Reports, 309. Also, 5 Cowen's Reports, 396. In the last authority, it is true, the *levy* was under the first execution, but this did not give it any greater preference than the law had previously given it, and the court decided that the proceeds of sale of right belonged to the senior writ *though made under the junior.*

If, then, it be true that the execution which first comes into the hands of the sheriff has a priority to the proceeds of sale, why compel the execution creditor to resort to his action against the sheriff to recover that which is in the hands of the latter, and which he has no right to control? The principle is not altered by his having paid it out; for whether a fictitious or a real payment, he did it voluntarily, after notice by the attorney of Williams, and, consequently, with a full knowledge of his liabilities. The money raised on execution is always considered in the custody of the law, and the sheriff, being the ministerial officer of the court, should, under its order and direction, make the proper application of it. Why allow this officer a discretion in this matter which the law does not warrant but in every instance condemns? I fully accord with the court in the case reported in 1st Strobbart's Reports, 24, that it belongs to the court to advise and command its own officers—to dispose of the funds collected under its process—to decide the conflict of suitors as to such funds, and that in the exercise of these functions its power is complete. Where a case ari-

ses in which *equitable* rights are involved and it is doubt- 143
ful who is entitled to the money, the court may, in its discretion, forbear a summary order, and leave the claimants to litigate their rights by suit.

In this case, it is no answer to say, that the sheriff is liable by suit to the injured creditor. So he is, where he refuses to make a *return;* and it cannot be doubted but that it is competent to the court to compel him by attachment to do his duty in this respect. Without this summary remedy in the court, its officer is placed above and beyond its control, and execution creditors can only recover their money at his option and pleasure. If it is conceded that the court has the power to order a *return* of executions, the principle itself is conceded, and the court can direct the application of the money.

In this case, no action for a *false return* could be maintained; the return of the sheriff, as far as it went, was true; it was not controverted. Williams may have a right of action against the sheriff for neglect of duty, but I cannot see the propriety of compelling him to resort to an action at law against the sheriff and his securities, when, in my opinion, he has, through the aid of the court, an efficient and summary remedy. I am not aware of any principle of law which denies to an execution creditor the remedy allowed in this case by the court below. The power is incident to every court, and its exercise is highly salutary, and prevents tedious and protracted litigation. The practice which has prevailed in the courts of the State, I believe to be sound in principle, and its obvious utility no one doubts. A contrary practice will, I fear, make an execution, which is the end, but the beginning of a law suit.

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cutor of Jonathan Thomas, Defendant in Error.

An estate in remainder may be limited after a life estate in personal property by will and effect should be given the intention whenever it is manifest that such estate was designed to be created.

The legal estate in a chattel bequeathed by will remains in the executor until he assents to the legacy; and when there is an estate in remainder created by the will, the assent to the estate for life will enure to the benefit of the remainder-man.

T. bequeathed the whole of his personal estate to his wife for life, and directed that at her death the whole of his property, real and personal, should be sold and equally divided between his six children—Held, that it was clearly the intention of the testator that his children should not take the property *in specie*, but that the title to the property, on the expiration of the life estate, vested in the executor, as remainder-man, in trust, to be sold by him for the benefit of the children; and the exercise of the power of sale in such a case, unless otherwise directed, belongs to the executor exclusively, *virtute officii*.

When there is a trust reposed in an executor, and a power of sale coupled with it in order to execute the trust, is not competent to the Court of Probate to discharge the executor until it appear that he has performed the duty.

Banks Meacham, executor of Jonathan Thomas, brought an action of *replevin* against the plaintiff in error, in the Circuit Court of Gadsden County, for the recovery of certain slaves, alleged to be the property of the plaintiff as executor.

The defendant pleaded not guilty—*ne unques* executor, and that the goods and chattels in the declaration mentioned were the property of him, the said defendant, and not of the plaintiff.

At the trial of the cause in the circuit court, before the Hon. Thomas Baltzell, Judge of the Middle Circuit, at the Spring term, 1848, the plaintiff, to prove and maintain the issue joined, offered in evidence a certified copy of the will

Lott vs. Meacham, Executor.—Statement of Case.

145 of Jonathan Thomas, and the following clause, relating to the property in dispute, was read to the jury, viz:

"Item. I lend to my beloved wife, Mary Thomas, for her own use, support and maintenance during her widowhood, the following property, viz: the tract of land whereon I now live, eight negroes, Old Will, Chloe, Tom, Mary, James, Patsey, Ben and Rachael, together with one horse, four mules, all the balance of my stock of cattle, hogs, goods, &c., with all my household and kitchen furniture and farming utensils of every article and kind; to have and to hold all and singular the above mentioned property, for and during her single state, or widowhood, and no longer. And in the event of her marrying, I will and order that my executors take charge of the above mentioned property, so as to handsomely support and maintain her, my beloved wife, for and during the whole remaining part of her life; and at her death, I further will and order that the whole of the above property be sold, and equally divided between my six children here below named, viz: Elizabeth McCall, John F. O. Thomas, Micajah Thomas, Joseph Thomas, Ann Mariah Thomas and Susan C. Thomas, their heirs or assigns forever."

The said plaintiff further proved that he was named executor in said will, and that, on the 13th February, 1832, he made probate thereof in the County Court, and letters testamentary thereon were issued to him in due form of law. He also proved that he, as executor, delivered the possession of the property in said devise and bequest specified, to Mary Thomas, the devisee and legatee of the life estate given therein, which was by her held to the period of her death; that said Mary did not intermarry after the death of the said testator, and that, after the death of the said Mary Thomas, the said property was taken possession of by the persons named in said will to take the proceeds of the same after her death, and that, by amicable agree-
146 ment among themselves, they distributed and divided the said property. He also proved that the property taken from the defendant by the writ of *replevin* here, was of the said property, so delivered by the said plaintiff to the said Mary Thomas, under said will.

The plaintiff then introduced and read in evidence an order and decree of the County Court of Gadsden county, made July 16th, 1836, discharging him, the said plaintiff, from the executorship, according to the statute in such case made and provided, "excepting that in regard to the property bequeathed to Mary Thomas, and which, upon her marriage, is to be taken charge of by said executor, and upon her death, to be sold by him and divided," as provided in the will, he was, by said order and decree of the County Court, required fully to execute and perform said duty, on the occurrence of either of said events.

On the part of the defendant, it was proved that he had, before the institution of the suit, intermarried with Ann Mariah Thomas, one of the persons named in said clause of said will, and that he was in possession of the slaves in dispute, with the consent and concurrence of all the persons so named. This being all the testimony offered, and the case closed as to the evidence, the following instruction was given by the court to the jury, towit:

The court instructs the jury that the plaintiff, as the executor of Jonathan Thomas, on the death of the widow, is entitled to the possession of the property devised to her, to administer the same, according to law, and the directions of the will—the court stating at the same time, that, unless there were debts of the estate to pay, or some cause of interference by the executor, it was not disposed to allow an amicable division made by the heirs to be disturbed.

And the defendant prayed the court to instruct the jury as follows, viz:

1. That the devise and bequest in the will of Jonathan Thomas of the property in dispute, created an estate in re- 147
mainder in the persons appointed to take, after the death of Mrs. Mary Thomas, the tenant for life, and that this estate in remainder was created at the same time with the creation of the particular, or life estate.

2. That the assent of the executor to the bequest, by the delivery of the property in dispute to Mary Thomas, the tenant of the particular estate, is an assent to the remainder granted to the persons named to take in remainder, and having so assented, he cannot now retract that assent.

3. That the property in dispute, being in the possession of the defendant, as one of the persons entitled to take in remainder, in virtue of his material rights, he was entitled to that possession, as against the plaintiff in this action.

4. That the plaintiff having by his own showing, been fully discharged by the County Court of Gadsden county, from all the duties of such executor, on the 16th July, 1836, cannot now maintain this action;

Which said instructions, so prayed by the defendant, the said Judge refused to give to the jury, and the jury found for the plaintiff.

And the said defendant by his counsel, to the instructions so given by the said judge to the jury, and to the refusal of the court to instruct the jury as prayed, excepted.

The plaintiff in error, by his counsel, assigned the following errors, viz:

First. The court erred in the instructions given to the jury.

Second. The court erred in the refusal to instruct the jury, as prayed by plaintiff in error.

Hon. GEORGE S. HAWKINS, Judge of the Western Circuit, sat in the place of Justice THOMPSON, who had been of counsel in the court below.

Dupont & Maxwell, for Plaintiff in Error.

Davis, for Defendant in Error.

SEMMES, *Justice*, delivered the opinion of the court: 148

This was an action in *replevin*, brought in the court below by respondent, executor of Jonathan Thomas deceased, against appellant, for the recovery of certain negro slaves.

The appellant claims the property in right of his wife, formerly Anna Mariah Thomas, one of the legatees under the will of the testator, bearing date the 16th of April, 1830.

The respective rights of the parties to this suit depend upon the construction to be given that portion of the will which bequeaths the property in controversy, with other slaves, to the widow during her life, and the proceeds of it, after her death, to the children of the testator.

It is contended by counsel for appellant: 1. That the devise and bequest, in the will, of the property in dispute, created an estate in remainder in the persons appointed to take after the death of the widow, the tenant for life; and that this estate in remainder was created at the same time with the creation of the life estate. 2. That the assent of the executor to the bequest, by the delivery of the property in dispute to Mary Thomas, the tenant for life, is an assent to the remainder granted to the persons named to take in remainder, and having so assented, he cannot now retract that assent. 3. That the property in dispute being in possession of the defendant, as one of the persons entitled to take in remainder in virtue of his marital rights, he was entitled to that possession as against the plaintiff in this action. And 4. That the plaintiff, having been fully discharged by the County Court of Gadsden county from all the duties of such executor, on the 16th of July, 1836, cannot now maintain this action.

Whatever may have been the rule at common law, the principle is now well settled that an estate in remainder may be limited after a life estate in personal property, and the courts will sustain and give effect to the intention, whenever it is manifest from the will that such estate was

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149 designed to be created. 6 Peters' Reports, 68. 13 Pickering's Reports, 330.

It cannot be doubted that, if the will of Jonathan Thomas created an estate in remainder in his children to the property in dispute, to take effect on the death of Mary Thomas, the tenant for life, the plaintiff in *replevin*, not having the right of possession, could not recover under the proofs in this case. The whole merit in the controversy is embraced in this point, and to its consideration the attention of the court has been mainly directed.

That an estate in remainder was created under the will, to take effect on the termination of the life estate and for the benefit of the children of the testator, cannot be questioned. But in whom did this estate in remainder vest?—Was it the children, directly, or the executor in trust for these beneficiaries?

On the death of the testator, the title to his whole personal estate vested under the will, in *autre droit*, in the executor; and this interest can only be divested by the act of the executor, or by operation of law.

The tenant for life, although having an inchoate right to this property under the devise in her favor, could not take possession of it and thereby acquire the title, without the assent of the executor; and so well settled is this principle that the legal estate in a chattel bequeathed by will remains in the executor until he assents to the legacy, that, before such assent, he may maintain *trover* or *detinue* for the recovery of the property from the possession of even the legatee; though the latter acquired that possession under the sanction and direction of the will itself. And this right and control in the executor, over the entire personal estate of his testator is for his protection, and results from his liability to creditors. 2 Williams on Executions. The assent to a legacy being once given, being evidence of assets in the hands of the executor, cannot as a general proposition,
150 be retracted. The specific legatee acquires the right of possession to the legacy, subject to such restrictions and conditions as are imposed by the will; and it is equally true, as is contended, that, whenever an estate in remainder is created under a will, the assent on the part of the executor to the estate for life will inure to the benefit of the remainder-man. The title vests in the latter immediately on the termination of the first estate, and he may maintain *trover* and recover, even against the executor. 5 Term Reports, 374. 6 Iredells Reports, 88. 3 East, 120.

In this case the executor of Thomas, having delivered the property into the possession of the life tenant, the assent on his part was express, and she thereby became vested with the title to the life estate. Had the bequest been limited to the words, "I lend to my wife for her use," &c., there would have been force in the argument of counsel for respondent, that the use and enjoyment of the property by the tenant for life did not divest the executor of the title, but that it remained in him, as trustee. But the direction of the will that she should "have all and singular the said property for and during her single state," is a sufficient indication that it was the intention of the testator that the title to the property should pass and remain in his wife during her widowhood. Had she afterwards married, (an event contemplated in the will,) she was to be divested of the possession and that, with the right of possession, was to revert back to the executor. But whether this even happened or not, it could not affect the estate in remainder after the termination of the life interest. The words of the will are, that, on the death of the widow, "I further will and order that the "whole of said property *be sold* and equally divided between "my children," &c. The import of these words is too plain to be misunderstood; and it is manifest that it was not designed by the testator that his children should take the property *in specie*, but the *proceeds* of it *when sold*. This is not only a legitimate, but the only sensible and consistent in- 151
terpretation which can be given the words of this will; and it follows that, by the terms of this bequest, the title to this property, on the expiration of the life estate, vested in the executor, he being the remainder man—holding the property, it is true, in trust, to be sold by him for the benefit of his children. But it is said this power of sale is not vested in the executor or any one by name. The power is an incident to the office of executor, and its exercise, unless otherwise directed, belongs exclusively to him, *virtue officii*.

If a testator directs any part of his estate to be sold, without making a trustee of the power, it naturally and by implication devolves on the executor. See 2d Johnson's Chancery Reports, 20, 254. 3rd Atkinson, 714. This power of sale would, of necessity, imply that the title to the property was in the executor—the title is indispensable to the exercise of the power. But under the will, it is not a mere naked power to sell which is vested in the executor, but a power coupled with a trust. The legatees have a title, at least in equity, to the proceeds of the sale when realized, though no title in law to the specific property. The power to sell reposes a personal trust, which cannot be delegated.

Where the terms of a will create a trust in personal property, and no one is appointed to execute it, the executor becomes the trustee. 2d Story's Equity, § 976. 13 Pickering's Reports, 330.

In this case, the executor is bound to carry out the trust by a sale of the property and a distribution, as directed by the will. Any material deviation will render the exercise of his power void. Where the power and the trust are blended as here, and the latter can only be executed by an exercise of the former, the power is imperative, and equity will compel a sale, and an execution of the trust. See 1st W. Black., 162.

The entire argument of counsel for appellant is based upon an assumed state of facts, (and which are contradicted 152
by the terms of this bequest,) that the children were to take the *specific* property embraced in the devise to the life tenant. If this were true, there could be no question but that they would take the estate in remainder, and that the title to it would vest in them immediately on the death of the widow; and his absolute property in the specific chattel would negative all idea of a trust being created or contemplated by the testator. But here the children were not to take the property, nor was it to be *divided*, as in the authorities referred to by counsel, but it was directed to be *sold*, and the *proceeds* divided among them.

In the event that the widow had married, the property would have passed to the executor, and been held by him in trust. Would his right to the possession have terminated on her death? or could these legatees have recovered that possession by an action at law, or suit in chancery? Manifestly not. If the life tenant had disposed of her estate, and delivered possession of the property to the purchaser, the right of action, on the termination of the life estate for the recovery of the property, would have been in the executor, and not in the legatees.

But it is said the object and purpose of the testator has been as effectually accomplished by the legatees dividing this property, as could be done by a sale by the executor, and a distribution of the proceeds. This may be true, but it does not invest this court with the power of giving a different direction to the property from that the testator designed.

The great rule in the exposition of wills is, that the intention of the testator, as expressed in his will, shall prevail. 1st Blackstone's Reports, 672. And if he has directed a particular mode as to the disposition of his property, and it can be accomplished without violating any legal principle, it is not the province of the courts to make a

153 new will for the testator, but to carry out the one he has made for himself.

It is contended by counsel for appellant, that the respondent was discharged from his office of executor, and that he cannot, therefore, maintain this suit. Had the order of the Court of Probate referred to, been designed to operate as a final discharge, it could not have the effect intended. It is not competent for the Probate Court to discharge an executor on his application, unless he has fully administered, or in the words of the statute, unless it appear he has faithfully discharged the trust reposed in him. Thompson, 211. It is not pretended that the administration of this estate was completed; but, on the contrary, independent of the subject-matter of this suit, the order of the Court of Probate itself affords conclusive evidence that the executor had not fully discharged the trust confided to him under the will. But the order was not designed as a final discharge—the sale of this property, and a distribution of it under the will, were expressly excepted, and the executor was required to perform these duties, and make his return according to law. If the proceedings before the Court of Probate, on the 16th of July, 1836, are to be regarded in the light of an annual or partial settlement on the part of the executor, they, doubtless, for that purpose, would be valid; but if they are to operate as a partial *discharge* in the strict sense of that term, the order itself is a nullity.

It is further insisted by appellant's counsel, that, if the respondent is considered in the character of trustees, as to the sale and distribution of this property, he cannot recover in this suit as executor. The court cannot appreciate the force of this argument. It was not necessary that the respondent should have used his title as executor in the suit for the recovery of this property—it was a mere *descriptio personae;* the legal title being in him, he could have recovered in his own right. 5th Cowper's Reports, 265. Inde-

154 pendent of this, although it is manifest that a trust is created as to this property, yet, in the opinion of the court, the character of executor is not merged in that of trustee. As executor, the respondent holds the property in trust for the purposes contemplated in the will, and as such he is liable to the legatees.

In a case reported in 9th Pickering, 395, where a testator directed his executor to invest the residue of his personal estate in public funds, and apply the income thereof to the support, maintenance and education of his children during their minority, &c., it was held that, though a trust was created, it was incumbent on him *as executor* to discharge these duties, and failing to do so, he was liable on his administration bond. See, also, 4th Massachusetts Reports, 634. 6th Massachusetts Reports, 37. 3d Maddock's Reports, 73.

The court, in the discharge of its duty, is compelled to sustain the judgment of the court below; but, in view of the amicable division of this property by the legatees, it does not hesitate to say, that, upon a proper application to a Court of Chancery, full and adequate relief can be obtained.

Let the judgment below be affirmed.

[Judge HAWKINS dissented from the judgment of the Court, on the ground that defendant in error was, under the will, a trustee, and could not maintain the action, as executor.]

MOSES E. LEVY AND OTHERS, APPELLANTS, v. JOEL B. SMITH, TAX ASSESSOR AND COLLECTOR.

The act of 1845, which provides that all land in this State *subject* to taxation, shall be classed into three classes or grades, exempts only land belonging to the United States, to public schools, and charitable and religious institutions.

Every description and quality of land in the state subject to taxation must, necessarily, fall within some one of the grades established by law, and it is for the owner to discriminate and assign his land to the class to which, according to its quality, it belongs.

The classification made by the Legislature of land subject to taxation, does not 155
contravene that article of the Constitution (Article 8, Section 1,) which requires "the General Assembly to devise and adopt a system of revenue, having regard to an equal and uniform mode of taxation, to be general throughout the State."

This case was brought up by an appeal from a decree of the Hon. THOMAS DOUGLAS, Judge of the Eastern Circuit. A similar decree was made by the Judge in the court below, in the cases of Benjamin A. Putnam and Henry G. Marquand against Joel B. Smith, tax assessor, from which, also, appeals were taken by the complainants, and questions involving the same principles brought up for the decision of this court. The facts presented by the records in these cases, and the nature of the decree appealed from, are sufficiently stated in the opinion pronounced by the court, affirming the decree of the Judge of the Circuit Court.

Fairbanks & Forward, for Appellants.

Hogue, A. G., for Appellee.

SEMMES, *Justice,* delivered the opinion of the court.

The principal facts presented by the record in this case are these: In the year 1848, the tax assessor for the county of Alachua assessed for that year the State tax on certain lands belonging to appellants, known as the Arredondo grant; and on the appellants refusing to pay this assessment, the tax collector advertised the lands for sale. On the third of May, 1849, the appellants filed their bill in chancery against the respondent, praying for an injunction, and alleging, among other things, that a large portion of said lands was not embraced within either of the classes designated by the revenue laws of the State, and consequently was not subject to taxation under their provisions.

According to the proofs, it appears that the said grant contains two hundred and sixty-two thousand six hundred and forty-six acres; that thirty-four thousand acres of this 156
tract is permanently covered with water, and that about one hundred thousand acres, over and above that covered with water, is unfit for agricultural purposes. The court below sustained the bill, so far as to decree that the thirty-four thousand acres were not subject to taxation, but dismissed it as to all other matters; and from the decree, this appeal is taken.

The counsel for appellants contend—first, that the lands contained in this grant are exempt from taxation under the revenue laws of the State; and, secondly, that these revenue laws are unconstitutional.

The court has had no difficulty in considering these points, and it feels no hesitancy in saying that neither can be sustained.

The second section of the revenue law passed in 1845, and which is now in force, provides that "all the land in this State *subject* to taxation, shall be classed into three classes, or grades, viz: first, second and third rates," and upon lands falling within each of these grades, there is assessed a specific tax. Thompson, 87. By section fifth, (Ibid, 91,) it is made the duty of the owners of land to return to the assessors a particular description of the situation and quality of the same, and to which class it belongs.

It is said the provision of the act implies that there are lands in the State which are not subject to taxation, and that it is to be inferred that the Legislature designed to exempt pine and other lands unfit for agricultural purposes; otherwise, they would be put on the same equality with arable lands. The answer to this is obvious. The lands referred to in the statute, as being exempt from taxation, are those belonging to the United States, to public schools, and charitable and religious institutions. Thompson, 87. In order to establish an uniform system of taxation, the Legislature has seen proper to divide all other

lands in the State into three classes, and every description 157
and quality of land must, of necessity, be embraced in one or the other of these grades.

It is not true that the effect of this revenue law is to place good arable lands on an equality with pine and other lands of inferior quality. They belong to different classes—there is a difference in the tax imposed, and the law has authorized the owners to discriminate, and assign to the proper class the respective qualities. It is in proof that these appellants exercised this power, and returned to the respondent the respective portions of the lands contained in this grant, as first, second and third qualities; and we do not understand why this classification, made by themselves of their own lands, should now be complained of as unjust or oppressive. It would be a most arbitrary construction of the revenue law to exclude from its provisions any land liable taxation, however, poor or inferior its quality. Such an interpretation would be against the manifest intention of the Legislature, and defeat the obvious end and purpose of the statute.

But it is said the constitution of the State authorizes the "General Assembly to adopt a system of revenue, having regard to an equal and uniform mode of taxation, to be general throughout the State;" and that the system adopted by the Legislature is not equal and uniform, for the reason that some lands embraced within the third class are of inferior quality to others. This may be true, and the same may be said of lands embraced within the other classes; but this is no reason for believing that the system is not one of equal and uniform character *throughout the State*. Some slight inequality in the value of lands included in the same class doubtless does exist; but it is not confined to one section, but prevails throughout the whole State; so that lands belonging to one person, and coming within any of the three classifications are subject to the same specific tax as all
other lands of a like character. The tax is *equal*, because 158
it is in just proportions; it is uniform, because it conforms to the same rule. It is a specific, and not an *ad valorem* tax; and if it is not the most equitable and just, it is for the Legislature and not the courts to correct the evil. The system may not be free from defects. It is not the best and only mode by which equality in taxation can be secured still it cannot be expected that the Legislature could devise any mode whereby taxation could be so apportioned in every particular, as to operate with precise uniformity upon every individual.

The court is, therefore, of opinion that the revenue law of 1845, classing all lands in this State subject to taxation into three grades, and imposing a specific tax upon the same, is equal and uniform throughout the State, and that the law is constitutional.

Let the decree of the court below be affirmed.

JOSEPH DAWKINS, APPELLANT, v. LUKE W. SMITHWICK, APPELLEE.

In *assumpsit* upon a parol contract, the day upon which it is made being alleged only for form, the plaintiff is at liberty to prove that the contract, whether express or implied, was made at any other time.

When time enters into the contract and becomes material, it is traversable, and the plaintiff must prove it; and when time is material, it makes no difference that it is alleged under a *videlicet*.

When the time laid in the declaration was the Sabbath, the court will take judicial cognizance of the fact; yet, if the time is immaterial and laid under a *videlicet*, the court cannot judicially know that the contract declared on was actually made on that day.

In such case the defendant, having failed to plead the fact and thus make the time material, cannot move in arrest of judgment.

Luke W. Smithwick brought an action on the case, in 159
the Circuit Court for the county of Leon, against Joseph Dawkins, to recover damages for deceit practiced by defendant in an exchange of horses—the horse of defendant being represented to be sound when, in fact, he was diseased at the time, and continued so to be, so that he was of no value to plaintiff. The exchange was alleged to have taken place on the first day of July, 1849.

Plea not guilty, and verdict for the plaintiff at the Spring term, 1850.

The defendant then moved in arrest of judgment on the ground that the contract mentioned in the declaration was made on Sunday. The motion was overruled, and from the judgment of the court thereon this appeal was brought.

Maxwell, for Appellant.

1. Whenever there is any defect appearing upon the face of the record, for which a writ of error would lie, and which has not been attacked by demurrer, the court, upon motion, will arrest the judgment. If the declaration presents a case which would not entitle plaintiff to judgment, and the defendant fails to demur, advantage can be taken of the defect by motion in arrest. 2d Archbold, 247.

2. The court will take judicial notice of the days of the week, so that having any date given, it will look to the Almanac, which is the law of the land, to see the day of the week, and will apply any law that may arise accordingly. 1st Chitty's Pleadings, 249, 218. See, also, Hoyle v. Cornwallis, 1st Strange, 387-9, which is precisely in point with this case on this question. Upon the principle there established, if the record only states the day of the month, and that day is found by reference to the Almanac to be *Sunday*, this is sufficient to authorize a court to consider the fact that the day was Sunday an *intrinsic* part of the record. In the present case, the plaintiff bases his right to recover upon a contract stated by the declaration itself to have been made 160
on a day of the month which the Almanac shows was Sunday. The fact, therefore, under the authorities cited, is sufficiently apparent upon the record.

But it was contended below that the time being stated under a *videlicet*, the plaintiff, under the rules of pleading, cannot be held to it strictly, but may prove any other time, and, therefore, the defendant could not avail himself of his objection by motion in arrest, but should have pleaded it. The rule of pleading does not apply where time is *material*, or of the essence of the contract, for then the "real day must be truly stated." 1st Chitty's Pleadings, 287. 3rd Durnford & East, 531. 2d Cowper, 671. These authorities show that where an usurious contract is declared upon the day must be truly stated, and if proof of any other day is made, the variance is fatal. So here, if the law is, that such a contract is void by reason of the day on which it was made, the day forms the *gist* of the matter, and must be correctly stated. If the plaintiff had alleged a different day, then the defendant, to avail himself of his defence, might have pleaded the fact that the contract was made on Sunday, or else he might have proved that fact, and then urged the variance as fatal, because of the materiality of that day to the rights of the parties.

The court not having given any opinion upon the other question presented by the counsel, viz: whether the contract, having been made on Sunday, is in violation of the statute of this State, and, therefore, void, it is not necessary to state the argument on that point.

Walker, for Appellee:

The error assigned by appellant is that the court refused to arrest the judgment.

The court could not arrest the judgment, unless for some error patent in the record. Appellant points out as error

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161 in the record the allegation in the declaration that "the said plaintiff heretofore, to wit, on the first day of July, in the year 1849," &c., exchanged horses, &c. Appellant says that the court will judicially take notice that the first day of July, 1849, was Sunday. We admit the court will take notice that the first of July, 1849, was Sunday, but deny that the court will take notice that the contract stated in the declaration was made on the day laid therein, it being laid under a *videlicet*. Plaintiff is not concluded by that averment, but might have proved that the trade was made on another day. 1st Chitty's Pleadings, 318.

If defendant intended to rely upon the supposed fact that the contract was made on Sunday, he should have pleaded it specially. 1st Chitty's Pleadings, 517, note h.

SEMMES, *Justice,* delivered the opinion of the court.

This was an action on the case commenced by the respondent against appellant, in Leon Circuit Court, on a contract of warranty, in the exchange of horses. To the declaration, the appellant filed his plea of the general issue, and at the March term of said court, 1850, a verdict was found for respondent, assessing his damages at seventy-five dollars. Afterwards, at the same term, on the 3d of April, the attorney for appellant moved the court in arrest of judgment, on the ground that the declafation seeks to recover on a contract which is void, by reason of having been made on the Sabbath. This motion was overruled by the court below, and from its decision, this appeal is taken.

The rule of law, as laid down by appellant's counsel, in regard to motions in arrest of judgment, is fully recognized by this court—that, whenever there is any defect appearing upon the face of the record, for which a writ of error would lie, and which has not been attacked by demurrer, the court, upon motion, will arrest the judgment. 2d Archbold, 247.

162 If the contract declared on in this case was void under the statute, by reason of its having been made on the Sabbath, it is very evident the plaintiff in the court below was not entitled to a judgment, if the fact was properly presented by the pleadings.

An important preliminary question is presented for the consideration of this court, and which arises from the pleadings in the case. It is, whether the appellant, having failed to set up by special plea the defence relied on in his motion in arrest of judgment, is not concluded by the verdict of the jury? But it is insisted by counsel for appellant, that, by reason of matters intrinsic appearing on the face of the declaration, he was not driven to his special plea, but that his defence was available, either by general demurrer, or by motion in arrest of judgment. It is true that, if the declaration presents a case which would not entitle the plaintiff to judgment, by reason of substantial error appearing on its face, the motion in arrest should have been sustained.

That portion of the declaration which is important to the decision of the case is in the following words: "Luke W. Smithwick, plaintiff, by attorney, complains, &c., for that whereas the said plaintiff, heretofore, *to wit, on the first day of July, in the year one thousand eight hundred and forty-nine, at Leon County,*" *&c.*

It is said that the first day of July, as laid in the declaration, was the Sabbath, and that the court will take judicial cognizance of the fact. This is true. 1st Chitty's Pleadings, 217. 1st Strange's Reports, 388. It does not, however, relieve the question from the difficulty but involves another and an important inquiry, whether the time stated in the declaration was material to the issue? If so, it was competent for the defendant to move in arrest of judgment; but if, on the contrary, the time was immaterial, the only mode of making the defence available was by special plea.

The time stated in the declaration is laid under a *videlicet,* but this cannot affect the question; for if the time be 163 material, it can be traversed, notwithstanding the *scilicet.* The general rule, as laid down by Sir William Blackstone, is doubtless the correct one. He says, the true distinction is, where the time when a fact happened is immaterial, and it may have happened on another day, if alleged under a *videlicet,* it is not traversable; but when the precise time is the very point and gist of the action, then the time alleged under the *videlicet* is conclusive and traversable. 1st Blackstone's Reports, 495. 4th Johnson's Reports, 456, and see 2d Saunders, 291.

In personal actions, the pleadings must allege the time, including the day, month and year, when each traversable fact occurred. See Stephens' Pleadings. And although it be true, that the time at which each material fact stated in the declaration took place, must be alleged, yet, as a general rule, the plaintiff is not bound to prove the time as stated, nor is it essential that the time as stated accord with the truth. Archbold's Pleadings, 115.

The same rule of law which governs the *venue,* applies, also to the stating of time—it extends to traversable facts only. In the case of the *venue* in transitory matters, the place is not material to the issue, and one may be alleged, and another proved. See Stephens' Pleadings.

In illustration of the foregoing general principles, it has been held, that in *assumpsit* upon a contract, the day upon which it is made being alleged *only for form,* the plaintiff is at liberty to prove that the contract, (parol,) whether it be express or implied, was made at any other time. 2d Strange's Reports, 806. 2d Salkeld, 561; and it is no objection that the day of the promise, as laid under a *videlicet,* brings it within the statutes of limitations. 1st Chitty's Pleadings, 257.

The statement, therefore, of the real and precise time is not necessary, or if stated, the party is not concluded by it, unless it constitutes a material part of the contract declared 164 upon, or unless a written instrument is professed to be described. 4th Term Reports, 590.

In all actions on promissory notes, bills of exchange, &c., the date, being a material part of the contract, must be stated, so as to conform to the contract itself—the slightest variance will be fatal. 1st Chitty's Pleadings, 115. But the day laid in a declaration on a parol contract is not material upon evidence. Ibid, note 66. In the case of an usurious contract, where time is the very gist of the matter, the real day must be stated and proved; (Stephens' Pleadings; and so it may be said in every case where the precise date of any fact is necessary to ascertain and determine with precision the cause of action.

In the case before the court, time did not enter into the contract—it was no part of it. The plaintiff in the court below was not concluded by the time stated in the declaration—it was competent for him to have proved the contract to have been made on any other day than that alleged.

If the time did enter into the contract and, consequently, was material, then it was traversable by the defendant; but in this case, the time could not be traversed, because the plaintiff was not bound to prove it as laid.

The case relied on by appellant's counsel, in 1st Strange's Reports, 388, is not inconsistent with the opinion of this court. In that case, the question before the court arose upon a writ of inquiry, which appeared to have been executed on the 15th day of June, which was Sunday—the court determined that it would take notice of the day, without its being specially assigned for error, and that the execution of the writ being on Sunday was void by statute. 29th Car., 2, 5, 7. But in that case, the time was material—it was not controverted, it could not be controverted—it was a part of the record, and a material part in the execution of the writ—the court was bound by it, and could not,

165 in its judgment, look beyond it. The only principle determined was, that the court would take judicial cognizance that the day on which the writ was in fact executed was Sunday. In this case, the first day of July, it is conceded, was the Sabbath; yet this court cannot judicially know that the contract declared on was made on that day, though averred in the declaration, for the time as laid, may be altogether different from the time as proved.

The court is, therefore, of opinion that the judgment of the Circuit Court, overruling the motion in arrest of judgment, was correct.

Judgment below affirmed.

Ex parte Robert W. White. On Petition for a Mandamus.

The 2d section of the 5th article of the Constitution of Florida provides that "the Supreme Court, except in cases otherwise directed in this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, under such restrictions and regulations, not repugnant to the Constitution, as may, from time to time, be prescribed by law; provided, that the said court shall always have power to issue writs of injunction, *mandamus, quo warranto, habeas corpus*, and such other remedial and original writs as may be necessary to give it a general superintendence of all other courts:"—Held, that the jurisdiction of this court is two-fold—first, appellate jurisdiction proper, and, secondly, a general superintendence and control of all other courts, and this by means of all appropriate, original and remedial writs known to the common law. No original proceeding can be instituted in this court, unless it be to exercise this power of superintendence or control over some other court. The exception in the first clause of the section points to the power contained in the proviso, and this power the court would not have had from the mere grant of "appellate jurisdiction only."

The term, "other remedial and original writs," means writs *ejusdem generis*, such as writs of *procedendo*, prohibition, &c.

166 On the 6th day of January, 1851, Robert W. White filed in the office of the Clerk of the Supreme Court the following petition:

To the Honorable the Supreme Court of the State of Florida:

The petition of Robert W. White, of Jefferson County, in this State, respectfully showeth unto your Honors, that, on the 9th day of December, A. D. 1850, he purchased of David S. Walker, Register of Public Lands for the State of Florida, the west half of the southeast quarter of section sixteen, township one, range three, south and east, at the rate of five dollars per acre, amounting to four hundred 80-100 dollars, and that your petitioner paid one-fourth of the purchase money, and interest on the balance, and gave his bonds for the said balance, as required by the laws of this State. That at the same time, your petitioner entered into a written agreement with said Walker, as Register as afore said, by which it was "understood that, notwithstanding said sale, said land was to be offered at public sale, and if it should sell for five dollars per acre, then said White was to take it that price. If it should sell for over five, he was to take it or not as he liked; but if it should sell for over two dollars and fifty cents per acre, and under five dollars, he was to take it at that price"—a copy of which, your petitioner annexes hereto. Your petitioner further shows that, at the same time, it was understood by and between your petitioner and said Walker, but not in writing, that your petitioner could, at any time before said sale, perfect his purchase, by agreeing to take the land at the price of five dollars per acre, and thus rescind the understanding or agreement in writing above referred to. That afterwards, and on the 19th day of December, 1850, your petitioner wrote to said Walker, as Register, as aforesaid, a letter, in which your petitioner stated that he had concluded "to take the land at five dollars per acre, instead of waiting for it to be sold under the last appraisement"—which last appraisement fixed the value of said land at two dollars and 167 fifty cents per acre. That your petitioner subsequently tendered the balance of the money for said land to said Walker, Register as aforesaid, and demanded a deed from said Walker for the same; but the said Walker refused either to accept the amount tendered, or make a deed to your petitioner, for reasons based on said written agreement, in conjunction with other matters, which your petitioner insists had no connection with this purchase, and should not operate against your petitioner in the premises. Your petitioner, therefore, prays that a rule on the said David S. Walker, Register as aforesaid, to show cause why a writ of *mandamus* should not be issued by this honorable court, commanding the said Walker, Register as aforesaid, to convey by deed the said land to your petitioner, upon the payment of the balance of the purchase money due, may be granted, and that, finally, the said Walker, Register, may be commanded to convey said land, as prayed to be directed in said rule, and your petitioner, as in duty bound, will every pray, &c.

ROBERT W. WHITE,
By M. D. Papy.

A rule was taken, returnable at a future day, and on the 3d day of February, 1851, David S. Walker, Register of Public Lands, made the following return to the rule served, viz:

In obedience to the rule upon the Register to show cause why he should not convey by deed to said R. W. White certain land purchased by said White, viz: the west half of the southeast quarter of section sixteen, township one, range three, south and east, upon the payment to him of the balance of the purchase money due therefor, the Register most respectfully shows cause, as follows, to-wit:

On or about December 9, 1850, said White called at the office of the Register and made inquiry about the terms on which he could purchase said tract, and was told that he could have it at five dollars per acre. Said White replied 168 in substance that the land was not worth that price and refused to give it unconditionally, but, after much solicitation, persuaded the Register to enter into the arrangement with him evidenced by the following agreement in writing, signed by said White and the Register, to-wit:

"R. W. White has this day purchased the west half of the southeast quarter of section sixteen township one, south of range three, east, at five dollars per acre, one quarter of which he has paid and given his notes for the balance, as the law requires; but it is understood that, notwithstanding said sale, said land is to be offered at public sale, and if it shall sell for five dollars per acre, then said White is to take it at that price. If it shall sell for over five, he is to take it or not, as he likes; but if it sells for over two dollars and fifty cents per acre, and under five, he is to take it at that price.

[Signed] R. W. WHITE,
[Signed] D. S. WALKER.
December 9, 1850."

After said White had entered into this written agreement and was about leaving the office of the Register, he remarked in substance, that he presumed he would have the right at any time to enter said land, absolutely, at five dollars per acre, to which the Register replied affirmatively.

On or about the 19th December, 1850, the Register received from said White the letter herewith filed and prayed to be taken as part of this answer, stating that he had concluded to take said tract at five dollars per acre, at which it had been originally appraised, instead of waiting for it to be sold under its last appraisement of two dallars and fifty cents per acre. The Register would certainly have acceded to this proposition and have entered said land in said White's name, which has not yet been done, but before he had acted in the matter, one K. M. Moore came to

Ex parte Robert W. White.—Opinion of Court.

169 the office of the Register and complained that he had applied to enter said land long before said White, and had been refused the privilege of doing so, on the ground that said tract could not be purchased at private sale until it should first have been offered at public sale at the reduced price, in pursuance of section 6, Thompson's Digest, 115.—Said Moore stated that his application to enter said land was to the predecessor of the present Register in the Register's office, and said Moore also reminded the present Register of a conversation said Moore had with him about the purchase of said land some time since, at Newport, which the Register did not think of at the time of said arrangement with said White. And said Moore insisted that great injustice would be done him, under the circumstances, if said land should not be put up at public auction in pursuance of the written agreement between the said White and the Register, so as to allow said Moore to bid on the same.

Under this state of facts the Register informed said White that he felt it his duty to decline to give him a deed, but would adhere to the written agreement herein set forth, or the Register now offers to rescind that agreement altogether, and refund to said White the money he has paid and return him his notes.

The case was argued by *Papy* for the petitioner, and by *Walker* for the respondent.

THOMPSON, *Justice,* pronounced the opinion of the court.

Upon the rule on the Register to show cause why a *mandamus nisi* should not issue, the question presents itself—Has this court jurisdiction, or the power to entertain this application and award the relief asked for?

The 2d section of the 5th article of the Constitution provides that "the Supreme Court, except in cases otherwise directed in this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, un-
170 der such restrictions and regulations, not repugnant to the Constitution, as may, from time to time, be prescribed by law; provided, that the said court shall always have power to issue writs of injunction, *mandamus, quo warranto, habeas corpus,* and such other remedial and original writs as may be necessary to give it a general superintendence and control of all other courts." Thompson's Digest, 50.

It cannot be doubted that this is an application to this court for the exercise of an original jurisdiction; and it is argued for the petitioner, that the section above cited gives the power to this court to issue the writs specially named in all cases as its original jurisdiction, and that the phrase with which the sentence concludes: "as may be necessary to give this court a general superintendence and control of all other courts," is to be restricted to the "other remedial and original writs," not specifically named. And it is further contended that this interpretation is necessary in order to render operative the exception in the first clause of the section, that 'the Supreme Court *except in cases otherwise directed in this Constitution,* shall have appellate jurisdiction only;" for, unless the jurisdiction excepted is original and contained in the power to issue the writs specified, there is none given by the Constitution but the appellate jurisdiction, and effect should be given to every part and clause of the instrument.

The exception in the first clause of the section under consideration was probably inserted by the Convention *ex abundanti cautela,* although it would hardly have been necessary, if any original jurisdiction had been granted in any other part of the Constitution to have enabled this court to exercise it. The language is general; it does not refer to any particular grant of jurisdiction; the general character of the court was to be one of appellate authority, and it was to be confined to that, "except in cases otherwise directed." It does not necessarily follow that some other jurisdiction must be intended to have been conferred by the 171
Constitution, or if other jurisdiction is given, it should be original. The exception, however, may, and we think does point to the power contained in the proviso. The office of a proviso generally is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the Legislature to be brought within its purview. Minis v. The United States, 15 Peters' Reports, 445. As before remarked, the general character of this tribunal was intended to be appellate only. An appeal is defined to be the removal of a cause from an inferior to a superior court (3 Blackstone's Commentaries, 55); and it is said to be the essential criterion of appellate jurisdiction that it revives and corrects the proceedings in a cause already instituted, and does not create that cause. Marbury v. Madison, 1 Cranch, 137.—1 Peters' Condensed Reports, 282. By a strict application of the term *appellate jurisdiction* it would seem that neither a *mandamus* nor any other original and remedial writ could issue from a superior court to any subordinate tribunal, unless it results as an incident to the appellate power in the revision and correction of the proceedings of a cause therein. Smith v. Jackson, 1 Paine Circuit Court Reports, 454. Hence the necessity for the *proviso* in this section of the Constitution, to qualify and restrain the generality of the language used in the enacting clause, and to except therefrom the powers mentioned in the *proviso.* By this *proviso* power is given to issue writs of injunction, *mandamus, quo warranto, habeas corpus,* and such other remedial and original writs as may be necessary to give this court a general superintendence and control of all other courts, a power which we think was not necessarily included in the grant of appellate jurisdiction. It places this court, with regard to all other courts of this State in the same position, in this respect, which the Court of King's Bench, in England, oc- 172
cupies in relation to the inferior courts of that kingdom. It gives a superintending authority and control—the power to overlook and to govern, check and restrain all other courts.

The position, that the exception in this section may refer to the power to issue the writs specifically enumerated as the original jurisdiction, and that the "other remedial and original writs" not named, are to be alone controlled by the clause, "as may be necessary to give this court a general superintendence and control of all other courts," cannot be maintained upon any proper rule of construction. The proviso forms but one sentence; the writs specifically named are designed to illustrate the meaning intended more clearly than could be done by general terms; the terms "other remedial and original writs," means writs *ejusdem generis,* of a kindred character, such as writs of *procedendo,* prohibition *certiorari,* &c., which are to effect a like object, the exercise of a superintendence and control of all other courts. It is true that some of the writs thus specifically designated do not seem appropriate to the exercise of this power. An injunction, for instance, though often used to restrain proceedings in another court, yet is directed to and acts upon, the parties alone; it neither assumes any superiority over the court in which they are proceeding, nor denies its jurisdiction; but it is granted on the sole ground that, from certain equitable circumstances, of which the court that issues it has cognizance, it is against the *conscience* of the party to proceed in the cause. Eden on Injunctions, 14. So a *quo warranto* is a writ which lies for the government against any person or corporation claiming or usurping any office, franchise or liberty to inquire by what authority the claim is supported, in order to determine the right. Wharton's Dictionary of Jurisprudence, 859. Cases, however, may arise, in which these writs may be used in exercising this power, but if they do not, it is a

matter of but little moment—it cannot alter the construction, or change the meaning of the instrument. It is very certain they can only be used, if at all, for the purposes and objects expressed. 173

By the interpretation which we give to this section of the Constitution, effect is given to every part of it, and from it, we deduce the conclusion that the jurisdiction of this court is two-fold—first, appellate jurisdiction proper, by which we understand the revision of the proceedings of the subordinate courts, and the correction of errors in their judgments; and, secondly, a general superintendence and control of all other courts, and this by means of all appropriate, original and remedial writs known to the common law. No original proceeding can be instituted in this court, unless it be to exercise this power of superintendence or control over some other court.

Reference has been made to the Constitution of the State of Alabama, and to the action of its Supreme Court, in the cases of Mead v. Dunn, and Murray v. Ayers, cited from Minor's Reports, 46, 323, as affording some aid in the proper interpretation of this section. On comparison of the Constitution of Alabama with that of our State, it is found that in the clauses defining the jurisdiction of the respective Supreme Courts, the only difference consists in the use of the terms "inferior jurisdictions," in the place of "all other courts," in the conclusion of the section. In the cases above mentioned, the question of jurisdiction was not raised or decided—in one of the cases, it is suggested by the court as a doubtful point. In the case of Davis v. The Tuscumbia Railroad Company, 4th Stewart & Porter, 421, 440, which was an original application by bill in equity for an injunction to stay waste, the court says: "We have no doubt that this court has authority to issue writs of injunction, when a case calling for the exercise of such authority is presented by the bill;" but does not give the reasons for such opinion. It was probably deemed unnecessary, inasmuch as the injunction asked for was refused, because of a want of equity in the bill. In the case of the State *ex relatione* v. Paul, 5th Stewart & Porter, 40, the question of the authority of the Supreme Court of Alabama to exercise the original jurisdiction of granting a *quo warranto* in the first instance was expressly waived, and the writ denied on other grounds; but in *ex parte* Simonton *et al.*, 9th Porter, 383, 389, which was an application for a writ of *habeas corpus*, praying that the right of the petitioners to be admitted to bail might be considered and allowed, the question of jurisdiction was brought directly before the court for its determination, and it was held that the Supreme Court "does not possess the constitutional power to award the writ which the petitioners have asked for, unless it be to give it a general superintendence and control of inferior jurisdictions. To bring a case within these qualifying terms, it should be shown either that some Court, or that some Judge of a court, invested with authority to act in the premises, has undertaken to decide upon the case of a party aggrieved, or else without any just cause therefor, has refused to entertain the same." This may now be considered the settled interpretation of this section of the Constitution by the Supreme Court of Alabama, having been recognized in the subsequent cases of John, a slave v. State, 1st Alabama Reports, 95. *Ex parte* Mansony, Ibid, 98. State v. Williams, Ibid, 342. *Ex parte* Tarlton, 2d Alabama Reports, 35. In the case of the State v. Porter, 1st Alabama Reports, 688, 708, the Supreme Court of Alabama extend the authority of that court to entertain original jurisdiction of a writ of *quo warranto* to cases in which no court subordinate of the Supreme Court could act. Without expressing any opinion of the propriety of the decision in the case last cited, we consider that the view taken by the Supreme Court of Alabama, in the case of Simonton, 174

of the Constitution of that State, agrees substantially with that we have expressed in relation to the Constitution of Florida; and as the position in this case does not ask for the exercise of the superintending and controlling power of this court upon the action of any other court, the prayer of the petition must be denied, and the rule discharged with costs. 175

IN RE JOHN INERARITY, ADMINISTRATOR OF JOHN FORBES DECEASED, v. CURTIS AND GRISWOLD, TRUSTEES, &C.

The late Territorial Government was the creature of the Government of the United States—to continue in existence during the pleasure of Congress, or until the admission of the Territory into the Union as a State.

The powers exercised by the Federal functionaries, after the admission of Florida into the Union were exercised by State authority, under the State Constitution, and by virtue of the express provisions of the schedule and ordinance, in order that no inconvenience might arise from a change of government. For this purpose, and *pro hac vice*, the Federal officers were continued, and acted as State officers.

The records of the Territorial courts are records of the General Government, and the assent of Congress is necessary for their transfer to any other court. Upon the admission of a state into the Union, the concurrence of both the State and Federal Government is requisite to the transfer of records in cases of appropriate State jurisdiction.

The Congress of the United States, by the act of February 22d, 1847, authorized the transfer of certain classes of records and pending causes to the District Court of the United States, thus claiming and exercising the power of ownership over such records. The exercise of this power by Congress was a rightful exercise of power; and so far as Congress has not claimed these records as belonging to the General Government, it may be regarded as a sanction of the action of State authority over the subject.

The records and papers of the Territorial Courts did not pass to any court or courts, until the government, whose records they were, provided, either expressly or by implication, for the transfer, and the judicial action of some other tribunals; and, consequently, the mere fact that the courts of the State became possessed of such records, did not warrant jurisdiction; nor was the mode by which they are said to have become possessed, rightful and proper. 176

The Supreme Court of Florida is not the successor of the Court of Appeals of the Territory, and cannot award process to execute the decrees of that court.

The act of the General Assembly of July 25th, 1845, section 13, does not place the records therein mentioned in the custody of the Supreme Court, nor does it authorize any judicial action upon them. The Clerk of the Supreme Court is merely made the keeper of the records, &c., of the Court of Appeals; but as such, he is not amenable to this court, and might refuse to obey its mandate in relation thereto.

The nature and object of the petition filed in this case, the grounds of the application, and of the argument of counsel for defendants in opposition to the motion, are fully stated in the opinion of the court.

Judge BAKER sat in the place of ANDERSON, Chief Justice, who had been of counsel in the case.

Davis, for the Petitioner.

Archer, for the Defendant.

THOMPSON, *Justice*, delivered the opinion of the court.

This is a petition for the transfer and delivery to the District Court of the United States for the Northern District of Florida, of the record of the proceedings of the court of Appeals of the late Territorial Government of Florida in a cause wherein Curtis and Griswold, trustees of the Apalachicola Land Company were appellants, and John Inerarity, administrator of John Forbes, and James Inerarity were respondents, removed by appeal from the Superior Court of the Western District, for Escambia county, to the

177 said Court of Appeals. The application is made by John Inerarity, who was the plaintiff in the original suit in the Superior Court.

The decree of the Court of Appeals was pronounced at the January Term, 1844, and both parties appealed therefrom to the Supreme Court of the United States. While the cause was pending in that court, on the 3d of March, 1845, Florida was admitted into the Union, as a State, by an act of Congress of that date. The appeal in the Supreme Court of the United States was decided at January Term, 1848, and the decree of the Court of Appeals was by that decision affirmed. The petition sets forth that the mandate of the Supreme Court of the United States has issued to the District Court for the Northern District of Florida, according to the provisions of the 3d section of the act of Congress of February 22d, 1847, (Acts 2d Session 29th Congress, Chapter 17,) commanding the said District Court to proceed to the execution of the decree of the Court of Appeals; but that the said court cannot execute the said mandate for want of the record of the judgment and proceedings in said cause, which it is alleged are in the archives of this court; and praying that an order may pass directing the delivery of the same to the Clerk of the District Court, &c.

This application is resisted by Messrs. Delafield and Curtis, Trustees of the Apalachicola Land Company, who are represented herein by counsel, on several grounds: 1. That the General Assembly of Florida have vested power in this court to take the papers and keep them. 2. That the subject matter of the suit is not cognizable by the Federal Courts, under the acts of Congress; and 3. That this court has jurisdiction over the subject-matter of the suit, and ought itself to do whatever is necessary to execute the judgment of the Court of Appeals, if the same appear to be affirmed, and grant process, &c.

In the consideration of this subject it will be important to

178 ascertain the character of the courts of the late Territorial government, and to what power the records of the said courts appertained on the dissolution of the government; and also, whether this court has now any judicial or other power over them, *de facto* or *de jure*, so as to authorize an order directing their delivery to the District Court, as prayed for by the petitioners, in case we find the District Court is entitled to the records in question.

The Territorial government of Florida was the creature of the government of the United States, under the authority of the second clause of the third section of the fourth article of the Constitution, which vests in Congress the power to "make all needful rules and regulations respecting the ter- "ritory and other property belonging to the United States." By the act of March 30th, 1822, amended by the acts of March 3d, 1823, of May 26th, 1824, of May 15th, 1826, of May 23d, 1828, and of July 7th, 1838, and by other acts, (see Thompson's Digest, Appendix, 585 to 612,)) all the territory ceded by Spain to the United States, known by the name of East and West Florida, was erected into a Territory of the United States, under the name of the Territory of Florida, and the power and authority of that government ascertained and distributed into and among three departments, executive, legislative and judicial. The judicial power was vested in a court of appeals, in five superior courts and, also, in such inferior courts and justices of the peace as the legislative department should from time to time establish. The superior courts were courts of general original jurisdiction at common law and in equity, and had also jurisdiction of matters peculiarly cognizable by the courts of the Federal judiciary; and the Court of Appeals was a court of appellate jurisdiction over the judgments, sentences and decrees of the superior courts; the judgments and decrees of which latter court were subject to review by appeal or writ of error in the Supreme Court of the United States, under certain rules, regulations and restrictions.

This Territorial government was to continue only during 179 the pleasure of Congress, and until the admission of the Territory into the Union of the States. Upon the happening of the latter event, by virtue of the act of Congress of March 3d, 1845, the Territorial government was displaced and abrogated fully and entirely, and no power or jurisdiction existed within the Territorial limits of Florida except that derived from State authority. It is true that the Governor, judges and other officers, continued to exercise authority and jurisdiction after the 3d of March, 1845, and until the full and complete organization of the State government; but the power and jurisdiction so exercised were by State authority and under the Constitution. The Schedule and Ordinance, forming the 17th article, in order that no inconvenience might arise from the organization and establishment of the new government, declared by section 1st, That all laws and parts of laws then in force, or which might thereafter be passed by the Governor and Legislative Council of the Territory of Florida, not repugnant to the provisions of the Constitution, should continue in force until, by operation of their provisions or limitations, the same should cease to be of force, or until the General Assembly of the State should alter or repeal the same; and by section 4, That all officers, civil and military, then holding their offices and appointments in the Territory under the authority of the United States or under the authority of the Territory, should continue to hold and exercise their respective offices and appointments, until superseded under the Constitution; and that all actions at law or suits in chancery, or any proceeding pending, or which might be pending in any court of the Territory of Florida, might be commenced in or transferred to such court of the State as may have jurisdiction of the subject matter thereof. By force of these provisions the State Government was put into immediate operation, and the interregnum that must have otherwise intervened, thus avoided. The officers civil and military 180 were *pro hac vice* State officers, and the government a State authority and jurisdiction. It was not a continuation of the former Territorial government, but the adoption and adaptation of the machinery of the old, to the purposes of the new government.

That the effect of the admission of the Territory into the Union, as a State, was to deprive the several departments of that government of all their power, authority and jurisdiction is clear and incontrovertible. The right of sovereignty in the General Government which gave life and vigor to them was gone. The officers and the courts of the old system were continued, but they held by a new tenure; they could point no longer to the government of the United States as the source of their power but to the Constitution of the State of Florida. It was a government *ad interim*, to prevent anarchy and confusion during the period of time necessary to be consumed in arranging the new government, electing officers, &c., &c. The recent decision of the Supreme Court of the United States in Benner v. Porter fully supports this view of the subject. 9 Howard's Reports, 235. On the subject of the records of the courts of the Territory, the Supreme Court, in the same case, commenting on the previous case of Palao v. Hunt, 4 Howard's Reports, 589, says that there is no ground for qualifying the opinion expressed in that case, believing it to be sound and incontrovertible; but deem it proper, in the reiteration of that opinion, to do so with more fullness, as to its effect in respect to cases of State jurisdiction. The court says: "The "Territorial courts were the courts of the General govern- "ment, and the records in the custody of their clerks, the "records of that government; and it would seem to follow "necessarily from these premises, that no one could legally "take the possession or custody of the same without the "assent, express or implied, of Congress. Such assent is

181 "essential, upon the plainest principles, to an authorized "change of custody. On the admission of a Territorial "government into the Union, as a State, the concurrence of "both the Federal and State authorities would seem to be "required in the transfer of the records, in cases of appro- "priate State jurisdiction, from the old to the new govern- "ment. An act of Congress would be incapable of passing "them under the State jurisdiction, as would be an act of "the Legislature of the State to take the records out of the "custody of the Federal government. Both should concur."

The paragraphs quoted from this decision are in entire consonance with our own views and opinions, and fully expressive thereof. We think it is entitled to great weight, as well from the ability and learning of the judges, as from the character of the forum in which they preside, the determination of such political questions being within its peculiar province; and, besides, the opinion is expressed upon the examination and review of the former opinion of the court, in Palao vs. Hunt, before alluded to, and may, therefore, be considered as a judgment pronounced upon the fullest deliberation.

The decision of the case of Palao v. Hunt produced the action of Congress by the act of February 22d, 1847, before adverted to, which placed the records and proceedings of certain classes of cases under the control and jurisdiction of the District Court of the United States, established and organized within the State of Florida, under the 1st section of the 3d article of the Constitution of the United States. The causes and matters of record of the old Territorial Courts thus transferred to the District Courts may be stated as follows:

1. Causes pending in the Superior Courts of the Territory, under the acts of Congress of May 23d, 1828, and May 26th, 1830, providing for the settlement and confirmation of private land claims in Florida,

182 2. Causes which were pending in the Court of Appeals on the 3d of March, 1845;

3. The records and proceedings of the several courts in causes determined before the said period, and from which writs of error could have been sued out, or appeals could have been taken and prosecuted to the Supreme Court of the United States, according to the laws in force prior thereto;

4. The records and proceedings of the several courts, in causes determined therein prior to said March 3d, 1845, on which writs of error had been sued out, or appeals taken, under the laws then in force, to the Supreme Court of the United States;

5. All causes pending in any of the Superior Courts, or Court of Appeals, on the 3d of March, 1845, not legally transferred to the courts of the State, and which the said courts continued to hold cognizance of and proceeded to determine after that day, or which are claimed to have been since pending therein as courts of the United States; and

6. All cases of Federal character and jurisdiction commenced in said Territorial Courts after said day, and in which judgments or decrees were rendered, or which are claimed to have been since pending therein

The record of the decree and proceedings of the case of Curtis and Griswold, trustees, &c., appellants, and Inerarity, respondent, falls within the class fourthly above described, the decree of the Court of Appeals in said cause having been appealed from prior to the admission of Florida into the Union, and, of course, pending in the Supreme Court of the United States at that time.

The Supreme Court, in Benner v. Porter, explaining the opinion expressed, that the assent of Congress was essential to the authorized transfer of the records of the Territorial Courts, in suits pending at the time of the change of government, to the custody of State tribunals, says, that "it is

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"proper to add of avoid misconstruction, that we do not 183
"mean thereby to imply or express any opinion on the
"question, whether or not without such assent, the State
"judicatures would acquire jurisdiction. That is altogether
"a different question; and, besides, the acts of Congress
"that have been passed in various instances on the admis-
"sion of a State, providing for the transfer of Federal
"causes to the District Court, as in the case of the admis-
"sion of Florida already referred to, and saying nothing at
"the time in respect to those belonging to State authority,
"may very well imply an assent to the transfer of them
"by the State to the appropriate tribunal. Even the omis-
"sion on the part of Congress to interfere at all in the mat-
"ter, may be subject to a like implication, and a subsequent
"assent would, doubtless, operate upon past acts of trans-
"fer by the State authority." There is, we think, much force in this view of the question, as to causes pending of which the courts of the United States have not exclusive jurisdiction, or cannot, under the constitution and laws of the United States, take jurisdiction at all; and where, as in the case of Florida, the act of February 22d, 1847, provides for the transfer of the records and proceedings of certain classes of cases, saying nothing about other classes of which the State Courts could take jurisdiction, the inference is irresistible that Congress intended that the State authorities should assume jurisdiction over the latter, or if they had already assumed it, the omission may well be considered as a tacit acquiescence in, and ratification of, the authority thus claimed and exercised; and in view of the difficulties and confusion which would otherwise arise, in case of a hasty or improvident assumption of authority over the subject by the new State, we should be so inclined to consider the question. Concurring as we do in the opinion expressed by the Supreme Court of the United States in the cases referred to, we feel no hesitation in declaring that the courts of the Territory of Florida were courts of the United 184
States, and the records of said courts the records of that government—that the State authorities had no just right to assume the exercise of any authority or jurisdiction over them, except so far as the government of the United States. by express authority or just implication, shall accord the power to do so. So far as Congress, by the act of February 22d, 1847, claimed to exercise jurisdiction over certain classes of records and pending causes, it is in our opinion the exercise of a rightful power, and the courts to which the jurisdiction and authority over them is granted are entitled to the custody; and so far as Congress has not claimed these records, it may be considered as the sanction of the General government to the exercise of jurisdiction by the State authorities over the subject.

We are not unaware that the cases of Stewart v. Preston, (1st Florida Reports, 1, 9,) and Beatty v. Ross, (1st Florida Reports, 198, 210,) decided in this court, hold a contrary doctrine to that which we have announced; but the question was a new one, and there were no reported adjudications to aid the court in arriving at a proper conclusion, and if under these circumstances, this court has proceeded upon an erroneous view of the subject, the better course is to retrace our steps as the error becomes apparent. The case of Stewart v. Preston was decided in 1846, at the first term of the court, and before Congress had taken any action on the subject. The act of the General Assembly of Florida of July 25th, 1845, provided that all cases pending in the said court of Appeals should be transferred to this court, and should be tried and determined therein and thereby, excepting from the operation of the enactment cases cognizable by the Federal Courts; and the Clerk of the Supreme Court having obtained possession of the records and files of the court, the cause was docketed for hearing in this court. The counsel for res-

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185 pondent made a motion to strike the cause from the docket, on the ground amongst others that this court had not jurisdiction, the case being brought before it neither by writ of error, nor appeal, nor consent of parties, and because it had not been transferred by any competent authority. The court expressed no opinion upon the questions raised in the very able argument of the counsel for respondent, but placed their judgment upon the authority of the General Assembly to transfer the case, and upon the inconvenience which must inevitably result from a different view. The court did not perceive any sufficient cause for questioning the power of the Legislature to pass the law, and considering that the cause was to be disposed of by some tribunal, and as no law had been passed by Congress providing for the transfer of such a cause, by appeal or writ of error, from the Superior Court to a District or Circuit Court of the United States, or to the Supreme Court, it was ruled that the case must be tried by this court, or not be tried at all.

Entertaining the opinions which we have expressed, we are compelled to disapprove of the conclusion, as well as the argument of the court in this case; and we feel well assured that if Congress had at the time asserted the claim subsequently made by the act of February 22d, 1847, the opinion of the court would have been otherwise. The concluding clause of the 4th section of the 17th article of the Constitution, as well as the 14th section of the act of Assembly of July 25th, 1845, must be considered ineffectual to give jurisdiction of those pending suits to the State Courts, until they received the concurrent sanction of the Congress of the United States, as before mentioned.

The case of Beatty v. Ross had been commenced by the service of process from the Superior Court of the Middle District prior to the 3d March, 1845; before the return day of the process, the Territory was admitted into the Union of the States, and the Territorial Government was thereby abrogated and displaced. The process was actually re-
186 turned to the Superior Court after that time, and when by force and operation of the Constitution, it was a State Court. The plaintiff filed his declaration, and the defendant entered his appearance by counsel, which, according to the practice, was so far equivalent to the plea of the general issue, as to prevent a judgment by default at that time. Thus the Superior Court, as a State Court, became rightfully possessed of jurisdiction of the cause—the subject matter was clearly within its jurisdiction, and the defendant, by his appearance by counsel, had acknowledged it as to his person. At the trial term, and after the cause had been transferred to the Circuit Court of the State, the defendant, after a default noted for want of a plea, at the intervening rule day, filed his petition to remove the case to the District Court of the United States, on the ground that he was an alien. The court refused the prayer of the petition, and final judgment by default was given against him, and on appeal to this court, the judgment of the Circuit Court was affirmed. We have made this allusion to the circumstances of the case, because we believe the judgment of the court was correct, although we cannot concur with the learned judges who then sat here, in the course of reasoning which led them to the conclusion. The recital of the facts shows that the case was rightfully in the Superior Court, as a State Court, and it was fully competent for the General Assembly to transfer it to the Circuit Court, on the organization of the latter tribunal. Being in the Superior Court, as a State Court, this application of the defendant to remove it to the District Court of the United States, should have been made at the time of entering his appearance, (section 12th, act of Congress, September 24th, 1879,) and was too late when made at the trial term of the cause in the Circuit Court, (Gibson v. Johnson, Peters' Circuit Court Reports, 44.) The court, in Beatty v. Ross, is undoubtedly correct in the position, that the District Court, established by Congress within the State upon its admission, was not entitled of right to the records and papers of 187
the Superior Courts of the Territory, and to try suits commenced and pending therein; that it is not the successor of the Territorial Courts, and that the courts of the United States, established by Congress under the Constitution, take only by grant, and can exercise jurisdiction in those cases only where it is conferred upon them. But these principles do not, in our opinion, conduce to prove that the State Courts are successors of the Territorial Courts; for if they are such successors, then they must continue under the authority which created their predecessors—when the very reverse is the case, the State Courts claiming the authority of the Constitution and laws of the State, and having and possessing the power and jurisdiction thereby conferred. We do not consider that the State Courts follow and come in *the place of the* territorial courts, although the former may sit in the same counties, and dispense justice as the latter courts did, by the same rules of practice, and to the same people. They may be, in one sense of the term, successors, but certainly are not in that sense which would imply power, authority and jurisdiction over the records and pending suits. The records and papers of the Territorial Courts did not pass to any court or courts, until the government, whose records they were, provided, either expressly or by implication, for the transfer to and judicial action of some other tribunals. With this view, we cannot sanction as rightful and proper the mode by which the courts of the State are said to have become possessed of the said records and pending suits, nor can we approve of the conclusion deduced from such acquisition. The court says, "that the Judges of the Superior Courts, and other officers of the Territorial Courts, having been adopted and continued by the Constitution until the organization of the State Courts," "took possession of the records and papers after our admis-
"sion, and exercised jurisdiction over suits pending and in-
"stituted in those courts." "They administered the local
"laws of the State, deciding suits between citizens and citi- 188
"zen, and trying indictments for assaults and offences of a
"like character. The *State* Judges succeeded them in the
"different counties, and thus became possessed of the rec-
"ords and suits; being so possessed, it was, in the opinion
"of the court, not only competent for them to adjudicate
"the cases presented for trial, but it was their bounden du-
"ty to do so." This, we think, cannot be sustained on any just principle, and would be very mischievous in practice. If a court should take jurisdiction of a cause instituted in another court, merely because it has acquired the actual possession of the record of the suit, no matter how acquired, and without authority of law, it would lead to perpetual conflicts of authority, as unseemly as they would be destructive of good order; and the mischiefs would be increased, where the respective courts were created by different governments.

The learned court, for the purpose of showing that they were not mistaken on this point, make a reference to Smith v. McIvor, (9th Wheaton's Reports, 532,) and the principle decided therein that, in all cases of concurrent jurisdiction, the court which first has possession of the subject-matter must decide it conclusively, is invoked for the purpose of sustaining the argument; but it is very clear to our minds, that the force and effect of the principle decided is misapprehended and misapplied. The jurisdiction alluded to is one which is rightfully obtained by authority of law, not a mere possession of the records of another court, and of the files or issue books of causes depending therein obtained by force, artifice, or accident. An examination of the case cited will show that the principle decided was there applied to a case where a suit in equity was brought for the purpose of litigating the same question that had been previously adjudicated between the same parties in a court of law, without the addition of any equitable circumstances to give jurisdiction, and of which question courts of law and equity had

189 concurrent jurisdiction——it was held that the decision at law was conclusive upon the rights of the parties, and that if a court of equity entertained such a suit, it would act as an appellate court to affirm or reverse a judgment already rendered by a competent tribunal. Besides, in the application of this principle, the court assumed the jurisdiction of the State courts, which was the very question at issue, and which was to be proved.

But it seems to us the great error in the argument of the learned court is the assumption that the courts established by Congress in the Territory of Florida were not courts of the United States. The court says, "We attribute no im- "portance to the fact that Congress established the superior "courts. This did not make them United States Courts." What, then, did it make them? It would seem that every court must be the court of the power which creates it; and it is admitted they were created by Congress, in which body the legislative department of the General government is deposited. But this error seems to have arisen from a misapprehension of the decision of the Supreme Court U. S. in the American Insurance Company v. Canter, (1 Peters' R., 546,) and which is cited to sustain the position. We understand the Supreme Court in that case to have decided that the courts established by Congress in the Territory of Florida were "not *constitutional* courts, in which the judicial power conferred by the Constitution on the General Government can be deposited;" but declared them to be *legislative* courts created under the power which Congress possesses over the Territories of the United States. Neither in this, nor in any other case, has the Supreme Court declared that they were not courts of the United States; but, on the contrary, in the recent cases before cited, they are expressly asserted and claimed to be courts of the United States, and their records the property of the United States.

Whether the District court of the United States to which Congress has assigned the power and jurisdiction over the
190 record in question, can rightfully take judicial cognizance of the subject matter of the suit, is a question with which we have no concern. If it be well founded it must be urged in that court. We decide only that the records in question may be rightfully disposed of by the General government, and that this court is not the successor of the court of Appeals, and is not authorized to exercise judicial power over the cause, or to award process to execute the decree of that court.

It remains to be inquired whether the record in question is in the archives of this court, or we have such power over it as will enable us to grant the prayer of the petition. No power or authority is claimed in the Constitution of the State over the records of the courts of the Territory in causes which had been determined in the Court of Appeals prior to the admission of the State, but by the act of the General Assembly of July 25th, 1845, section 13, it is provided "that the clerk of the Court of Appeals of the Terri- "tory of Florida shall, on the demand of the clerk of the "Supreme Court of this State, forthwith deliver to him all "the dockets, records, writs, files, books and papers of said "Court of Appeals, and property and furniture of every "nature and kind whatsoever, and the seal thereof, to be "kept by said clerk of the Supreme Court in a room to be "assigned him by the Governor in the Capitol, for his office." There can be no doubt as to the proper interpretation of this act. It does not place the records in the custody of this Court, neither does it authorize any judicial action upon them, nor give this Court any power over them. It is no doubt competent for the General Assembly to require of the clerk of the Supreme Court the performance of duties in addition to the duties-proper of his office and wholly foreign thereto, and such we understand to be the scope and effect of the 13th section before referred to. But it does not follow, as a legitimate deduction therefrom, that this Court would thereby acquire power and jurisdiction over him in relation to those additional duties.

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As keeper of the records and papers of the Court of Ap- 191
peals, the clerk is not amenable to this court in the same manner and to the same extent that he is as the keeper of our records. We cannot exercise a summary jurisdiction over him in relation thereto, nor order him to deliver up, nor make any other disposition of the matters so given him in charge by the State; and he might well refuse obedience to our mandate in respect to them, unless it should be in some proceeding instituted in and decided by the Circuit Court as a court of original jurisdiction, and brought before and decided by this court, in the exercise of its legitimate appellate authority. This is also the view taken of the statute by the Supreme Court of the United States, in Palao v. Hunt, (4 Howard's Reports, 589); indeed, it is not susceptible of any other.

The only records and papers of the Court of Appeals over which we have any control, are those of the suits pending and undetermined therein at the time of the change of government, and which were, by the section 14 of the act of Assembly of July, 1845, transferred to this court, and of which the court assumed jurisdiction and decided.

We have not the authority to give the petitioner the relief which he asks and to which he seems to be entitled, but are compelled to deny his prayer and refer him to the remedy pointed out by the section 2d of the act of Congress of February 22d, 1847, or to some other appropriate remdy, if there be any, in the Circuit Court, as a court of original jurisdiction.

Motion denied with costs.

THE DIRECTORS AND TRUSTEES OF THE ST. ANDREW'S BAY 192
LAND COMPANY, PLAINTIFFS IN ERROR, v. NICHOLAS MITCHELL, DEFENDANT IN ERROR.

Parties to a contract liable according to the form in which they respectively execute the contract. One party may be liable in an action of *assumpsit*, while the other is liable in covenant.

The form of an action against a corporation is not determined by the form in which its agent contracts, nor is it material whether an agent of a corporation is appointed by an official act under the corporate seal, or by a mere resolution of the directors.

Where a contract has been made by an agent or a committee for a corporation, it is necessary, in a declaration upon such contract by the corporation, to allege that the plaintiff made the contract by an agent or committee.

But when an action is brought with the view of making a party personally liable, who pleads that he entered into the contract with plaintiff as director or agent of a corporation, it is incumbent on him, in order to exonerate himself from the claim against him in his individual capacity, to aver and prove that he had authority to make the contract.

It is not necessary for the existence of the right, that the charter of a corporation should confer the power of contracting by an agent or committee; but where the charter prescribes any mode in which the officers or agents of a corporation must act, that mode must be strictly pursued, to render their acts or contracts obligatory on the corporation.

The plaintiffs in error brought an action of covenant against N. H. Mitchell, in the Circuit Court of Walton county, upon the following instrument, signed and sealed by said Mitchell:

TERRITORY OF FLORIDA—WASHINGTON COUNTY.

This memorandum of an agreement made and entered into between the St. Andrew's Bay Land Company on the one part, and Nicholas H. Mitchell of the other part, witnesseth: That the said company has this day leased to the said Mitchell, until the first day of January, eighteen hun-

193 dred and forty-five, the block or square, lying on St. Andrew's Bay, the houses and premises known as the hotel block, for and in consideration of one dollar, the receipt whereof is hereby acknowledged, and for the further consideration that the said Mitchell shall, as soon as he can, take possession of the premises, keep or cause to be kept, until the said first day of January, eighteen hundred and forty-five, an orderly and comfortable hotel, for the accommodation of such persons as may visit or move to said bay. The said company to finish the buildings, and the said Mitchell to furnish his own furniture, and provisions, and other articles convenient for such an establishment, and to make such fencing and other arrangements as he may deem necessary, the said company furnishing the plank and nails that may be required.

The said company further agrees that, at the expiration of the term of the lease, it will purchase from said Mitchell the furniture which may be in said house, at such price as may be fixed by two persons selected by the parties, one by each, and in case of their disagreement, an umpire selected by them.

The said Mitchell is to have the use of the house near said premises, known as Long's house, as a stable, until a stable shall be erected by the company.

Signed, sealed and delivered duplicates, this 11th day of May, 1841, the words "the said Mitchell" being inserted in the first line.

[Signed,] The St. Andrew's Bay Land Company by

RICHARD H. LONG, [Seal.]
WM. NICKELS, [Seal.]
A. H. BUSH, [Seal.]
N. H. MITCHELL, [Seal.]
} Committee.

The defendant demurred to the declaration, on the ground that the action did not lie, and the court below sustained the demurrer.

194 *Keyes,* for Plaintiff in Error.

Covenant was brought by the company against Mitchell, upon an agreement signed and sealed by Mitchell, and to which the signature of the company was made by Richard H. Long, William Nickels and Allen H. Bush, who, as a committee, signed their names, and made scrawls after them.

The objections taken upon the demurrer to the declaration were—

1. That the action was misconceived. It is answered that covenant is the remedy for breach of agreement under seal. 1st Chitty's Pleadings, 115. 1st Archbold's Nisi Prius, 250.

2. That there was a want of mutuality of contract. It is answered that Mitchell might maintain *assumpsit* upon the agreement, and, therefore, that there is no want of mutuality. The Bank of the Metropolis v. Guttchlich, 14th Peters, 19. Bank of Columbia v. Patterson's administrator, 7th Cranch, 299. 1st Archbold's Nisi Prius, 250.

3. That there was not a reciprocity of action. It is submitted that reciprocity of action is not essential to the validity of a contract. 1st Comyn on Contracts, 3 (margin.) But on the contrary it is believed that the common law regards one remedy, when applicable, as efficacious as another.

Yonge, with whom was *Woodward,* for Defendant in Error.

"A contract is an agreement, upon a sufficient consideration, to do or not to do a particular thing." In this case, there is nothing to show that the *St. Andrew's Bay Company* made *any* agreement. The paper that purports to be an agreement is signed by N. H. Mitchell, of the one part, and A. H. Bush, William Nickels and R. H. Long, as a committee, of the second part. The signature is in these terms, "St. Andrew's Bay Land Company, by A. H. Bush, William Nickels, R. H. Long, committee." They do not sign as

agents, but as committee, and there is nothing to show what 195
powers were conferred upon that committee, or by whom they were appointed, nor is it alleged in the agreement or the pleadings, that they were the agents or committee of the company. Had it been so alleged, of course the demurrer would have admitted the fact; but without the allegation of agency, no body is bound by the contract but the individuals themselves, to wit, Bush, Nickels and Long—certainly not the company. White v. Skinner, 13th Johnson, 307. 2d Caines' Reports, 254. 5th East, 148.

The charter of the St. Andrew's Bay Land Company confers no power to contract by committee, and still less does it confer such power on these particular persons, Bush, Nickels and Long. Not having pursued their charter, the company are not bound, and here, for want of mutuality of obligation, N. H. Mitchell is not bound. Chitty on Contracts, page 13.

It is stated in the body of the agreement, that the agreement is given under the hands and seals of the parties, which parties are stated in the body of the agreement to be N. H. Mitchell and the St. Andrew's Bay Land Company. Now, there being no seal affixed to the name of the company, but only to the names of the committee, it is not sealed by the company. Randal v. Van Vechten, 19th Johnson, page 60. The intention of the parties, then it is clear, was to make a special agreement, which was not accomplished. It is imperfect, incomplete and inchoate, and therefore, not binding.

THOMPSON, *Jusaice,* delivered the opinion of the court.

The plaintinfl in error, who was plaintiff in the court below, brought covenant against the defendant in error, on an agreement which was signed and sealed by Mitchell, but which was not sealed by the Company, but was sealed by the committee who represented the corporation, with their private seals.

On demurred to the declaration, judgment was given for 196
the defendant. At the foot of the demurrer, the following point is stated, viz: "That the form of action is misconceived herein, to wit, that the corporation, having contracted through a committee not authorized under its corporate seal, and thus not being liable in an action of covenant, the defendant is not liable in this form, but only in *assumpsit.*"

It has been further urged in argument here, that there is nothing to show that the St. Andrew's Bay Land Company made any agreement, the writing having been signed by certain persons as a committee, who do not allege that they were agents, or set forth their powers—that the charter confers no power on the company to contract by committee, and, therefore, the company is not bound, and the agreement is void, for want of mutuality.

That the action of covenant is the remedy which the law assigns for all breaches of a contract under seal, has been too long and too well settled to be doubted at this day, and there can be no reason to doubt the fact that the defendant in this case did both sign and seal the writing upon which the suit is founded—it is so alleged in the declaration, and admitted by the demurrer. But the position here seems to be, that because the plaintiff may not be liable in this form of action for any breach of the contract on his part, the defendant is not—that the respective parties to a contract can only have their remedies against each other for breaches of the same contract in the same form of action. We do not so understand the law. The parties are liable according to the form in which they respectively execute the contract—it is not necessary that the form of the remedy should be the same. In Sutherland v. Lishman, (3d Espinass' Reports, 42,) the plaintiff had sealed as well as signed the agreement—the defendant had not; the plaintiff brought his action in *assumpsit,* and Lord Eldon ruled, the objection that the action was misconceived having been taken, that the binding by deed ought to be mutual, to make it nces-

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197 sary for the plaintiff to sue in covenant; the defendant never having sealed the articles, could not be sued in that form of action, and *assumpsit* was rightly brought. In Randall v. Van Vechten, 19th Johnson's Reports, 657, Platt, Justice, says that the form of an action against a corporation is not determined by the *form* in which the agent contracts, though it is otherwise in the case of individuals. He says further: "Nor will it make any difference whether the agents for the corporation were appointed under the *corporate seal*, or by a *resolution* in the journals. It may legally be done in either mode; and whether it be in the one mode or the other, cannot vary the form of the action against the corporation."

The case of Rose v. Poulton, (2d Barnewall and Alderson, 822,) is directly in point; the deed was intended to be executed in full by the respective parties, and there were mutual covenants; the plaintiffs, who had not signed and sealed the deed, brought their action of covenant, and it was sustained.

As to the second point, it seems that the fact that this action is brought by and in the name of the St. Andrew's Bay Land Company, has escaped the attention of the counsel for defendant in error. The declaration alleges that the deed in question was signed and sealed by the defendant, and by him delivered to the company, and throughout treats the contract as made to and with the company—all which is admitted by the demurrer. The deed itself, of which *profert* is made, and which is filed with the declaration, states that it is a "memorandum of an agreemnt made and entered into between the St. Andrew's Bay Land Company on the one part, and Nicholas H. Mitchell of the other part," and it is signed, "The St. Andrew's Bay Land Company by

"RICHARD H. LONG,
"WM. NICKELS,
"A. H. BUSH, } Committee.

As, also, signed and sealed by the defendant.

198 Although it is signed and sealed by the committee, the deed professing to have been made by the corporation, the signatures of the committee will be presumed to have been made on its behalf, and this presumption will amount to full proof where, as in this case, the corporation ratifies and adopts the act, by bringing suit against the other party for a breach of the contract, as upon a contract made with *it*. Nor do we consider it necessary that the committee, acting for the corporation, should state their authority to do so, and set forth whether it was by deed or otherwise. The defendant when the contract was entered into, might have required the exhibition of the authority of the committee, or he might have waived such exhibition, and have relied on the personal responsibility of the individuals composing the committee, in the event that they had assumed to act without sufficient warrant, and the corporation had refused to acknowledge their action. But we have here to do with the declaration, which alleges that the co mpany made the contract, and which allegation is in due form, the facts being stated according to their legal effect. It was unnecessary to allege that the plaintiff entered into the contract by an agent. Bank of Metropolis v. Guttchlich, 14th Peters' Reports, 27.

The effect of the ruling, in White v. Skinner, cited by counsel for defendant in error, from 13th Johnson's Reports, 307, is misapprehended. In that case, the defendant, who was director of a manufacturing company, was sought to be held personally liable on a contract which he had entered into, as a director of the company, with the plaintiff. He pleaded in bar that he was one of the directors and an agent of the company, and had executed the agreement in that capacity, and not otherwise, of which the plaintiff had notice. On demurrer to the plea, it was held that, to exonerate himself from the claim made upon him in his private, individual capacity, he was bound to aver and prove that he had authority to seal for his co-directors, and, therefore the plea was bad, in not setting forth that he had such au- 199
thority; that if he was not personally bound, he ought, by his plea, to have shown that, upon the covenant, the plaintiff had a right of action against some other person. The difference between this case and the point in support of which it is cited, is so obvious that further comment is deemed unnecessary. There is no doubt that if the committee acted without authority, the individuals composing it would be individually liable; but that question cannot arise here, the company having adopted and ratified the act of the committee, and are here complaining of a breach of the contract by the other party thereto

3. The remaining point to be considered is, that which alleges a want of power by the charter in the company to contract by a committee. All aggregate corporations from necessity must act and contract through any by means of agents, but we have never thought it of any importance by what name or description the agents were known and designated. The agent or agents employed may be called president, director, trustee, cashier, or secretary, or even a committee, without altering substantially their character as agents. Where the charter or act of incorporation prescribes the mode in which the officers or agents of a corporation must act, to render their acts or contracts obligatory on the corporation, that mode must be strictly pursued; but we do not understand from the charter of this company that there is any particular mode prescribed by which it is to contract within the limits of its authority, nor is there any particular officer designated whose sanction or signature is necessary to give validity to the act. In the Bank of the Metropolis v. Guttchlich, 14th Peters, 27, the agreement had been made by the president and cashier of the bank, and the objection was, that the act was not within the competency of those officers as such. The court says, "it was unquestionably in the power of the bank to give authority to its own officers to do so." From the charter of this company, we do not see any objection to the authori- 200
zation of a committee to make the agreement in question for it. It might well be questioned whether this position, if well founded, properly comes up on this demurrer book, but we have considered it as if it was rightfully presented, and do not think it sufficient.

Upon the whole record, we are of opinion that the Circuit Court should have overruled the demurrer, the declaration and the matters therein set forth being clearly sufficient to enable the plaintiff to sustain the action, and, therefore, we order and adjudge that the judgment of the Circuit Court, sustaining the demurrer of defendant to plaintiff's declaration, be reversed and set aside, and the cause remanded to the Circuit Court of the Western Circuit, sitting in and for the county of Walton, with authority to said court, upon application of defendant, to give leave to answer over to said declaration, and for such other and further proceedings as may be necessary and proper in the premises.

Judgment reversed, with costs.

NICHOLAS H. MITCHELL, PLAINTIFF IN ERROR, THE PRESIDENT, DIRECTORS AND TRUSTEES OF THE ST. ANDREW'S BAY LAND COMPANY, DEFENDANTS IN ERROR.

The private seals of a committee, professing to act for a corporation, are not the seals of the corporation; and though the corporation may have authorized the committee to contract, and may, therefore, be liable in some form of action, yet *covenant* is not the proper remedy.

"An action of covenant can only be maintained against a person who has executed a deed under seal."

201 Nicholas Mitchell brought an action of covenant in the Circuit Court of the County of Jackson, against the President, Directors and Trustees of the St. Andrew's Bay Land Company, upon a certain indenture or memorandum of an agreement signed and sealed by Richard H. Long, William Nickels and Allen H. Bush, who were alleged to be a committee of, and acting for, and duly authorized by, the St. Andrew's Bay Land Company.

The defendants pleaded that the said persons named in the declaration were not authorized under the seal of said company to execute the writing named in the declaration. To which plea, there was a replication that the said persons were authorized; and, further, that their act, or execution of the said writing under seal, was ratified by the president, directors and trustees of said company. Special demurrer to the replication, which was sustained in the court below.

The writing upon which this suit was brought is the same as that set out in the case of the St. Andrew's Bay Land Company against Nicholas Mitchell.

Woodward and *Yonge,* for Plaintiff in Error.

Keyes, for Defendants in Error.

This case was decided upon special demurrer to replication for duplicity. Upon which, exception was taken to the declaration.

The point adjudicated by the circuit court was, that covenant could not be maintained by Mitchell on the agreement set out in the declaration. The case is submitted upon Randall v. L. VanVechten et al, 19th Johnson's Reports, 60, m. The Bank of the Metropolis v. Guttchlich, 14th Peters, 19.

ANDERSON, *Chief Justice,* delivered the opinion of the Court.

The decision of the court below in this case was, "that the said declaration, and the matters and things therein con-
202 tained, are not sufficient in law for the plaintiff to have and maintain his action against the said defendants."

The correctness of this decision is the point submitted to this court, and we shall, therefore, disregard the other questions which would arise on the pleadings, if it were material to notice them.

Nicholas Mitchell complains of the president, directors and trustees, constituting the St. Andrew's Bay Land Company, of a plea of breach of covenant: "for that whereas, heretofore, to wit, on the eleventh day of May, in the year of our Lord eighteen hundred and forty-one, at the county of Washington, to wit, at the county aforesaid, by a certain indenture or memorandum of an agreement then and there made and entered into and sealed with the respective seals of Richard H. Long, William Nickels and Allen H. Bush, composing and constituting a committee of, and acting and duly authorized for, and on behalf of the St. Andrew's Bay Land Company, the said defendants, which said memorandum of agreement, so sealed, said plaintiff brings now here into court, bearing date the day and year aforesaid, after reciting that the same was made between the St. Andrew's Bay Land Company of the one part, and Nicholas H. Mitchell of the other part, leased unto the said Nicholas," &c.

The question is, can an action of covenant be sustained against the St. Andrew's Bay Land Company on the indenture here described? To use the words of Mr. Chitty, "covenant is a remedy provided by law for the recovery of damages for the breach of a covenant, or *contract under seal.* It cannot be maintained except against a person who, by himself, or some other person acting in his behalf, has executed a deed under seal."

The defendants certainly did not execute the indenture described by themselves, and the only inquiry is, whether they executed the deed under the seal by some other person? The declaration says the indenture was sealed with the respective seals of Long, Nickels, and Bush, and though it is

alleged these persons were duly authorized by the Land 203
Company, such allegation can only mean they were authorized to make the agreement, not to affix the seal of the company; and what is still more material, there is no allegation that the seal of the company was affixed, and no such seal is in fact affixed, to the agreement which is appended to the declaration. The committee might have been fully empowered to make the agreement and, having made it, the company would be fully responsible for a breach of it to the plaintiff, in some form of action; but surely not in an action of covenant, which "cannot be maintained except against a person who has executed a deed under seal."

The private seals of the committee are not the seals of the corporation, and consequently the plaintiff is here suing a defendant in covenant, who, according to his own showing, has not executed a deed under seal.

We refer, in support of these familiar positions, to White v. Skinner, 13 Johnson's Reports, 307; Randall v. Van Vechten and others, 19 Johnson's Reports, 60, and Taft v. Brewster and others, 9 Johnson's Reports, 334.

The judgment of the court below on the demurrer must be affirmed.

BENJAMIN MEGIN, APPELLANT, v. JAMES FILOR AND OTHERS, APPELLEES.

An appeal or writ of error from a decree *pro confesso*, or a judgment by default will not be entertained, unless there has been a judgment on demurrer, or otherwise, prior to the default, and even then the defendant will not be heard upon these matters occurring subsequent to the default. But when questions affecting his interests are brought up to the Appellate Court by the other party for adjudication, he must be cited

The statute of this State requires notice of appeals and writs of error, in the 204
case of non residents, to be served in one of two modes—either upon the agent or attorney of the party defendant, or by publication in some newspaper having the most general circulation, for the space of thirty days; and this must be done, as well where there is a decree *pro confesso*, or a judgment by default against the defendant in appeal or writ of error.

Benjamin Megin filed his bill in the Circuit Court of the Southern Circuit for the county of Monroe, against Thomas Taylor, Philip Sawyer and James Filor, alleging that he was a creditor of Taylor, one of the defendants; that Taylor in 1843 purchased certain town lots in the city of Key West from Sawyer, and that the latter conveyed said lots to Filor, in trust for the infant daughter of Taylor; that this transaction was in fraud of creditors, one of whom was the complainant, and that the arrangement was made and contrived for the purpose and with the view of securing the lots so purchased from judgments and executions at law.

The bill states that the infant daughter of Taylor died in the spring or winter of 1847 without issue, and that her father had left the city of Key West some three years before the filing of the bill, and had been since residing in England; that he left no property in Key West other than the aforesaid lots, to which complainant could have recourse for satisfaction by execution, of his claims or demands against Taylor.

The bill prays that the lots purchased from Sawyer may be decreed to be the property of Taylor, and subject to the payment of his debts, and that for this purpose, they be sold, and that complainant be paid out of the proceeds the amount of his demand, &c.

The bill was filed 11th of January, 1848. Both Taylor and Sawyer were *non* residents, but notice was properly given to them for publication. Filor answered the bill, and denied the fraudulent intent charged therein in reference to the execution of the deed of trust to himself, for the benefit of the infant daughter of Taylor. The answer states

205 that, at the time of the execution of said deed, Taylor's means were ample, and his debts, if any, small, and within his ability to pay; that Taylor abandoned his wife and left Key West in 1844, and has not since been heard from; that defendant executed and discharged his office of trustee faithfully up to the time of the death of Betty Taylor, who is stated to be the only child of the said Thomas Taylor, and for whom the aforesaid provision was made; that after her death, defendant purchased all the right, title and interest of her mother. It was also insisted in the answer, that one of the notes which complainant claimed to hold against Taylor, was barred by the statute of limitation; that another was dated subsequent to the date of the conveyance by Sawyer to defendant, as trustee; that the third bore no date, and that the whole together did not constitute a ground for the proceeding of complainant, or authorize a sale of the lots to pay his alleged claims.

A decree *pro confesso* was taken against Taylor and Sawyer, and the cause coming on to be heard as to Filor upon the bill, answer and proofs taken, and it appearing to the court that there was no equity in complainant's bill, it was ordered, adjudged and decreed, that the bill be dismissed. From this decree, an appeal was taken by the administrator of Megin, who died soon after the decree was pronounced; and citation was served according to law upon Filor, but not upon the other defendants by either of the modes prescribed in such cases.

The solicitors on both sides argued the case upon its merits; but the only question considered by the court was, whether the cause was in such a condition as to entitle it to be heard at this time.

Woodward for Appellant, and *Papy* for Filor, Appellee

ANDERSON, *Chief Justice,* delivered the opinion of the Court.

This case is not in a condition to be heard by this Court.

206 The complainant, Megin, filed a bill of complaint in the Circuit Court for Monroe County, against Taylor, Sawyer and Filor, in which he sought to have certain property which Taylor had bought from Sawyer subjected to the payment of a debt, which the complainant alleged was due to him by Taylor. The obstacle which he prayed to have removed was a deed for the property in question, which Sawyer, at the instance of Taylor, had executed to Filor in trust for Taylor's infant daughter, the consideration money having been paid by Taylor. Filor answered the bill, but Taylor and Sawyer, being non residents of the State, did not appear, though publication of notice was duly made acording to law, as to them.

On the 11th of May, 1849, a decree *pro confesso* was rendered against Taylor and Sawyer, but at no subsequent time was this decree made absolute.

On the 18th day of May, and during the same term of the court at which the decree *pro confesso* was taken, the complainant and Filor were heard by their counsel upon the bill, answer and testimony, and it appearing to the court that the complainant had no equity in his bill, "it was "ordered, adjudged and decreed that the said bill be dis-"missed upon its merits."

In the following December an appeal was taken to this court by the complainant, and citation issued and was duly served upon the defendant, Filor, but not upon the other defendants, Taylor and Sawyer, either personally or by publication.

It is true that this court would refuse to entertain a writ of error or an appeal from a judgment or decree entered by default or *pro confesso* in the court below against a defendant, unless there had been some antecedent judgment or demurrer or otherwise, and even then, he would not be heard on the subsequent matter. He would be required to purge himself of the contempt there, before he could be heard here upon such judgment or decree. But the converse of the rule does not hold good, that when questions affecting 207 his interest are brought by the other party to this court for adjudication, he shall not be cited.

In the first case the appellate court refuse to hear him from respect to the court below, to whose order he has refused obedience; but in the other case they are called upon to reverse a decree of the inferior court in his favor, and it is no want of respect to that court for us to give the party the benefit of the general law requiring citation.

In the first case, also, we refuse to allow him to seek here to evade the judgment of the court to which he is in contempt; but in the other it might be that the judgment of this court would deprive him of rights which he now holds under the judgment of that court.

A decree *pro confesso* determines nothing except as to the facts alleged in the bill. These are to be taken as true, and if they entitle the complainant to relief upon his own statement, it will be granted in the subsequent proceedings which result in the final decree. But a chancellor cannot be expected to grant relief when the complainant's own uncontradicted showing demonstrates a want of equity in his prayer. It may or may not be error in such circumstances to dismiss the bill absolutely, without a decree for costs; but in the case before us it has been done, and as long as it stands unreversed, the defendants though not yet purged of their contempt, are entitled to its benefits and protection as a final decree of a court of competent jurisdiction upon the subject matter in controversy.

For this court to interfere with this right without requiring the party to be cited to defend it, is a very different thing from turning a deaf ear to his own complaints for relief.

The defendants, Taylor and Sawyer, are *non* residents, and the statute of February 17th, 1833, provides that in all cases wherein any final judgment, order or decree may be pronounced or rendered in any of the courts of this State, from which an appeal or writ of error lies to any other court of this State, if the party defendant in appeal 208 or error be a non resident, notice of such appeal or writ of error shall be served upon the agent or attorney of said party defendant, or notice of said appeal or writ of error may be given by publishing the same in such newspaper in this State as may have the most general circulation, for thirty days; and the court to which said appeal or writ of error is had, upon satisfactory proof that such notice has been given, shall proceed to hear and determine said cause, as if personal service had taken place.

Here the requisition for a constructive notice of the appeal is imperative, and it is not in conflict with any of the considerations which would prompt an appellate court to decline hearing an appellant while in contempt.

If in this instance Taylor and Sawyer are "parties defendant in appeal," there is no escaping the requirements of the statute that has been quoted; and that they are properly and truly parties defendant in appeal, results from the fact that the appellant is seeking the reversal of a decree in their favor.

The appellant himself recognizes them as appellees, by executing his appeal bond in their favor, as well as in favor of Filor.

The court being of opinion that the appeal cannot be heard as to Taylor and Sawyer, for want of notice to them, will not entertain it as to Filor, until the others are brought in; for the relation in which the parties defendant stand to each other, would make it impossible to render any effective decree against the appellee now in court, without invading the rights and interests of at least one of the parties who is not here.

The court will grant an order for the continuance of this case until its next regular session at Tallahassee, at which time it will be heard and considered, if it shall be made to appear to the court that due notice of the appeal has been given to Taylor and Sawyer, as provided by law, in the case of *non* resident defendants.

209 JOHN W. SIMONTON, APPELLANT, v. PEDRO A. GANDOLFO, APPELLEE.

Where it is to be inferred from the pleadings and issues in a cause, that the jury passed upon the true merits of the case, and where it is clear that the setting aside of the verdict would be of no benefit ultimately to the party seeking it, the verdict will not be disturbed, on account of mistakes in pleadings, or where it is questionable whether a particular plea is sufficient to present a proper issue.

A release executed by J.W.S., *cestui que trust*, to F. A. B., of all claims or demands of every nature whatsoever which J. B., trustee, who is in possession of the legal estate, has against F. A. B., on account of a mortgage executed by the latter to the trustee, is not a conveyance of the estate of J. B. Such a conveyance, therefore, is not a compliance with an agreement to convey the interest of J. B., the trustee. This can only be done, if it is a freehold, by deed sealed, or in the case of a chattel interest, signed by J. B. himself, or some one having authority to convey for him, to seal for him, or to sign for him.

John W. Simonton brought *assumpsit* in the Circuit Court of the County of Monroe, against Pedro A. Gandolfo, for the sum of six hundred dollars, which he claimed a right to recover under the following state of facts set forth in the declaration, viz:—Fielding A. Browne, on the fifteenth day of January, 1847, and for some years previous thereto, was possessed of certain lots and parcels of land in the city of Key West, which he had purchased of one John Barcroft, who was trustee of the plaintiff under and by virtue of a deed of trust executed by plaintiff and wife and bearing date the tenth day of December, 1829 Browne had mortgaged the said lots and parcels of land to Barcroft, trustee as aforesaid, to secure the payment of the purchase money. Before the fifteenth day of January, 1847, the defendant (Gandolfo) purchased from Browne a part of one of the lots included in the mortgage executed by Browne to Barcroft, and which he held under title derived from Browne.

On or about the said fifteenth day of January, 1847, the
210 said plaintiff and the defendant entered into an agreement, as was alleged in the declaration, to the following effect, to wit:—The plaintiff agreed with and promised the defendant that he would make a release to Browne and his assigns of all claims and demands which Barcroft, Trustee as aforesaid, had against said Browne for and on account of the mortgage executed by the latter; and the defendant, for and in consideration of said release to be executed by plaintiff, undertook and promised to pay the plaintiff the sum of six hundred dollars, upon the execution of said release. The plaintiff averred that he did, on the seventeenth day of April, 1847, execute a release to Browne for the purpose mentioned in the agreement, but that defendant had not paid and refused to pay the sum of six hundred dollars, according to his promise and undertaking.

The defendant filed the following pleas:

And the said defendant, by attorney, comes and defends the wrong and injury, &c., and says that the said plaintiff his said action ought not to have and maintain, because he says the plaintiff has not released to said mortgagor all claims which said Barcroft had against said mortgagor in his declaration mentioned, as he hath alleged; and of this he puts himself on the country.

2. And for further plea in this behalf he says the plaintiff his action ought not to have, because he says the plaintiff hath not made and delivered to the said defendant or to any person authorized by him to receive the same, any legal release or relinquishment of all claims said Barcroft had against the said mortgagor in his declaration mentioned; and of this he puts himself on the country.

3. And for further plea in this behalf the said defendant says plaintiff his action ought not to have, &c., because he says the said supposed agreement in said declaration mentioned, was made without consideration, valuable in law; and of this he puts himself on the country.

4. And for a further plea in this behalf the said defendant says that the said plaintiff this action ought not to have 211
because he says that the said plaintiff could not make or execute a legal release of the claims said Barcroft had against said mortgagor in his said declaration mentioned; and of this he puts himself on the country.

5. And for further plea in this behalf the said defendant says that he never undertook or promised to pay six hundred dollars or any other sum of money for a release of all the claims said Barcroft in said declaration mentioned had against said mortgagor, to be made by said plaintiff, or to the said F. A. Browne; and of this he puts himself on the country.

6. And for further plea in this behalf the said defendant saith that he did not write or sign any memorandum in writing of said supposed agreement; and of this he puts himself on the country.

The first, second, fourth and sixth pleas were demurred to. The demurrer to the first and sixth pleas was sustained, and that to the second and fourth overruled. Issue was joined on the third and fifth pleas.

At the trial the plaintiff, to sustain his case, offered in evidence the release, which is fully set out in the opinion delivered by the court. The defendant asked and obtained from the court the following charge to the jury in relation to said release: "That the release given in evidence as the "release of Simonton of all the interest of Barcroft, does "not perfect Gandolfo's title, and does not release all the "claims or demands which Barcroft, mortgagor, had against "Browne, as mortgagee."

The cause was tried at the Spring term, 1850, of the Circuit Court sitting in and for the County of Monroe, the Hon. JOSEPH B. LANCASTER, Judge of the Southern Circuit, presiding. The jury returned a verdict for the defendant, and the plaintiff, having excepted to the rulings and instructions given by the Judge on the trial of the cause, appealed from the judgment of the court below.

Judge HAWKINS sat in the place of THOMPSON, Justice, who 212
had been of counsel in the case.

Papy and *Archer* for appellant.

Hogue for appellee.

ANDERSON, *Chief Justice*, delivered the opinion of the Court.

The plaintiff here in his declaration alleges, among other things, that "the said plaintiff agreed and promised the "said defendant that he (plaintiff) would make a release "to said Brown, &c. of all claims or demands which said "Barcroft, trustee as aforesaid, had against said Brown, "mortgagor as aforesaid, for and on account of said mort-"gage; and the said defendant, for and in consideration of "said release, to be executed by plaintiff to said Brown, "undertook and promised the said plaintiff to pay him the "sum of six hundred dollars, upon the execution of said "release."

On the trial, the plaintiff excepted to the fifth instruction, as asked by defendant and given by the court, and embodies the exception in his bill. The instruction asked for and thus excepted to, is in the following words: That the release given in evidence as the release of Simonton, of all the interest of Barcroft, and bearing date 16th April, 1847, does not perfect Gandolfo's title, and does not release all the claims or demands which Barcroft, mortgagee, had against Brown, as mortgagor, which is as follows:

"Know all men by these presents—Whereas, on the 22d day of August, A. D. one thousand eight hundred and thirty-six, Fielding A. Browne, of Key West, did purchase of John Barcroft, trustee of John W. Simonton and Ann Simonton, certain lots, tracts and parcels of land on the island of Key West; and, whereas, to secure payment for the same unto said John Barcroft, trustee, the said Fielding A. Browne did, on the same day, execute his several promissory notes, together with a mortgage upon all the said

lots, tracts and parcels of land, which said conveyance from 213
John Barcroft to Fielding A. Browne, and said notes and mortgage from Fielding A. Browne to said John Barcroft, and recorded in the office of the county records of Monroe county, Florida, and are herein referred to; and, whereas, the payments stipulated for in the said mortgage have not been made, and there still remains due and payable from said Fielding A. Browne to said John Barcroft upon the same, eleven thousand two hundred and thirty-four dollars and eleven cents; and, whereas, the said Fielding A. Browne has, by an instrument of writing, bearing even date herewith, forever remised, released, conveyed, aliened, confirmed and quit-claimed unto the said John Barcroft, all his right, title, interest, claim, property and demand of every nature whatsoever, either in law or equity, in and to the said lands, which are particularly described and set forth in the said instrument of writing, bearing even date herewith; Now, therefore, this is to declare that I, John W. Simonton, of Key West, Florida, *cestui que trust* of said John Barcroft, in consideration of the execution and delivery of the said instrument of writing and quit-claim, do covenant, stipulate and agree to and with the said Fielding A. Browne, his heirs, executors and administrators, that I, my heirs, executors and administrators, shall and will, within four years from the date hereof, I or they will sell, convey and finally dispose of all the said lots, tracts and parcels of land which are specified in said instrument of writing, and quit-claim, to the best advantage and in such manner, that the proceeds arising or to arise, accruing or to accrue from the same, shall be realized by me within the said four years, and that out of the said proceeds is first to be paid the aforesaid eleven thousand two hundred and thirty-four dollars and eleven cents, which is due and payable from said Fielding A. Browne upon the aforesaid mortgage, whatever that sum justly be, to be computed; and that the balance or surplus which may remain after I shall have paid the said sum

due, shall be, within the said four years, paid over to said 214
Fielding A. Browne, his heirs, executors, or administrators; and I do further hereby and forever release the said Fielding A. Browne, his heirs and assigns, from all claims or demands of every nature whatsoever, which the said Barcroft, trustee as aforesaid, had or may have had against or upon him, for and on account of his said mortgage.

"In testimony whereof, I have hereunto set my hand and stal at Key West, Florida, on this sixteenth day of April A. D., one thousand eight hundred and forty-seven.

"(Signed.) J. W. SIMONTON, [Seal.]

"Signed, sealed and delivered in the presence of—

"JAMES JOHNSON,

"W. R. HACKLEY."

Supposing that the jury upon the issue presented by the plea of the general issue, found that the contract as alleged in the declaration was made, the deed of release, as set forth in this exception, is the evidence by which the plaintiff offered to show that he had complied with his part of the contract, and thereby entitles himself to recover of the defendant.

The second plea of the defendant was doubtless designed to present an issue as to this fact; that is whether the plaintiff had performed his part of the contract; and if it were a good plea, the court would have no difficulty in arriving at their judgment. The plea, though pronounced by the court below upon demurrer to be good, is very equivocal in its terms, and we have hesitated long before consenting to consider it as sufficient to present a proper issue. We stretch the authority of this court to its utmost limit, when we determine to do so, under a conviction that the jury really passed upon the true merits of the controversy, and that the setting aside this verdict for mistakes in pleading would be of no advantage to the plaintiff, while it might involve both him and the defendant in unavailing expense and trouble.

Simonton vs. Gandolfo.—Opinion of Court.

It is very evident that the jury in finding for the defend- 215
ant, found either that there was no contract between the parties, or that the plaintiff had not complied with his part of the contract. If they found the first, we have no right to interfere with their verdict, for it was a pure question of fact properly presented to them by the plea of the general issue—if they found the other alternative, then the legal sufficiency of the evidence upon which they passed is presented to our notice and decision by the fifth instruction asked for by defendant and given by the court, and which we have recited. In other words, we are to inquire and to say, whether the deed of release executed by the plaintiff to Browne, was a compliance with the plaintiff's contract, as set forth by himself in his declaration, to wit, "that said plaintiff agreed and promised the said defendant that he, said plaintiff, would make a release to said Browne, mortgagor as aforesaid, and his assigns, of all claims or demands which said Barcroft, trustee as aforesaid, had against said Browne, mortgagor as aforesaid, for and on account of said mortgage."

It appears from the recital in the deed that Barcroft was trustee of John W. Simonton and Ann Simonton. The deed purports to be executed by John W. Simonton, not as attorney for Barcroft, but in his own person; and describing himself as *cestui que trust*, no reference being made to Ann Simonton; and the consideration mentioned is a certain instrument of writing executed by Browne.

The deed concludes as follows: "I do further hereby and forever release the said F. A. Browne, his heirs and assigns, from all claims or demands of every nature whatsoever, which the said John Barcroft, trustee as aforesaid, had or may have had, against or upon him, for and on account of his said mortgage," and is signed thus: John W. Simonton, [L. S.]

Was Simonton competent to convey the title of Barcroft? Let us see. Barcroft had the legal estate probably in fee-simple; if so, it could only be conveyed by deed under seal, 216
(2 Blackstone's Commentaries, 297,) and "a deed is a writing containing a contract, and signed, sealed and delivered *by the party.*" 4 Comyn's Digest, 270. If it were only an estate for years, the statute 29th Charles II. requires the assignment to be at least in writing to be signed *by the party.* No estate, then, that Barcroft might have had could be conveyed, unless in the case of a freehold the conveyance was sealed, and, in the case of a chattel, interest was signed by Barcroft. In the case before us he does neither, and it does not appear that Simonton had any authority to convey for him, to seal for him or to sign for him. Whatever Simonton conveyed he surely did not convey the interest of Barcroft, and failing or omitting to do so, he did not perform his part of the contract with defendant.

It is alleged by plaintiff's counsel that a *cestui que trust* may sell his interest, and that Simonton, therefore, though not technically conveying Barcroft's interest, conveyed an estate of more value. We do not deny that Simonton might have released his interest, but the proper questions are—did he do it? and, if he did, was it the release Gandolfo bargained for? His own deed and his own declaration furnish replies to both enqueries. In his deed he says, "I release all claims or demands which John Barcroft had or may have had"—there is no release of his own interest.—In his declaration he says that he "agreed that he would make a release of all claims and demands which Barcroft had," but makes no agreement to release his own.

These considerations afford also a response to the positions assumed by counsel, to the effect that a part performance of his contract will entitle him to recover. The deed seems to us a mere nullity—it conveys nothing; and what is supposed by counsel to be conveyed, to wit—the equitable interest of Simonton, forms no part of the agreement.

We think, therefore, the court was right substantially in instructing the jury as asked in the fifth instruction of de-

fendant. We say substantially, because the part that relates to perfecting Gandolfo's title is, at best, unnecessary. But we overlook this and other defects, because we are satisfied that none of these errors misled the jury, and that they arrived at the proper adjustments of the respective rights of the parties. 217

Let the judgment be affirmed.

JAMES GIBSON, APPELLANT, v. DANIEL LOVE, APPELLEE.

By the ancient common law the question of fraud was purely a question of fact.

The statute 13th of Elizabeth, protecting creditors and *others* from fraudulent conveyances, is to be construed liberally in favor of the class of persons designed to be protected from fraud.

A surety is the creditor of a co-obligor and, as such, entitled to all the protection which the statute 13th Elizabeth extends to creditors and others.

The statute 27th Elizabeth, though in its terms it applies only to land, yet being declaratory only of the common law, may be interpreted as defining the nature and effect of fraudulent conveyances generally.

What is termed fraud in law is distinct from fraud in fact, and it is the duty of a judge to instruct the jury that their conclusions from facts must be regulated by the character and imports given to those facts by necessary legal implication. Some acts are proofs of fraudulent intent, and it is the duty of the court so to instruct the jury.

Where a legal effect of a conveyance is to delay, hinder and defraud creditors, no matter what the actual intention may have been, it is a fraud in law, and the courts are bound so to declare it.

Where the seller of a slave retains possession after the sale, fraud is to be inferred, unless there is evidence not of a general character negativing a fraudulent intent, but of a character to explain possession. The presumption of fraud in a case where the vendor remains in possession, is so strong as to outweigh positive testimony of an entire absence of all fraudulent intent, or even to establish a fraud, where the jury are satisfied that there was none actually intended.

218 **This case was brought up by appeal from a judgment of the Circuit Court for the county of Gadsden, given at the Spring Term, 1850. The opinion of the court contains a full statement of the case.**

Dupont, for Appellant.

The record shows the following state of case in the court below: James Gibson had obtained a decree of foreclosure upon a *mortgage of indemnity*, executed by John C. Love, embracing amongst other things a certain slave named Henry. The decree directed the slave to be sold under direction of the master in chancery, and under this order the master took the slave into possession. Daniel Love thereupon interposed a *"claim"* to the slave, and the issue was to try the *title* to the slave.

At the trial below, the claimant Daniel Love, proved that he was in possession of the slave *at the date of the levy*—he also exhibited a *"bill of sale" absolute on its face*, from John C. Love, for the slave Henry, dated December 9th, 1841, and *recorded* January 1st, 1842. He also proved that, at the time of the alleged sale, the vendor, John C. Love, was to retain the *possession* of the slave, paying an annual *hire* for him equivalent to the *interest* of the amount stipulated in the bill of sale as the purchase money.

James Gibson, the plaintiff in execution, to support his title, exhibited a "deed of mortgage," dated on the 13th day of December, A. D., 1841, and *recorded* December 17th, 1841. He also proved that John C. Love, the mortgagor, was in *actual possession* of the slave at the date of the mortgage, and so continued for more than two years.

Upon this state of case, the plaintiff in execution prayed the court to give the jury certain instructions, all of which were refused, and the court proceeded to give certain other instructions, all of which will more fully appear by reference to the "bill of exceptions" contained in the record.

To sustain the title to the plaintiff in execution, we contend as follows:

The court erred in refusing to grant the two first instruc- 219
tions prayed for by the appellant. We contend that these instructions were pertinent to the facts of the case, and were asked in view of the *objects* and *policy* of the "registration laws." It is true that "recording" is not essential to the validity of a conveyance of *personal* property, and neither is it so in regard to *real* property. In reference to the latter class, however, our statute in terms makes *recording* absolutely necessary, to protect it against the claims of creditors and subsequent purchasers "without notice." Vide Thompson's Digest, 180, section 1. They also *permit* and *provide* for, and *make it obligatory* on, the recording officers to record "all transfers of *personal property*, which may be offered for record" Thompson's Digest, 183, sections 4th and 3d. It may be proper to note the distinctions observed in the statute, in regard to the two species of property, and the *reason* for that distinction, in order to lead us to a correct application of the object of those statutes

Now, it will be observed that the only effect of recording conveyances of *real property*, is to protect it against the claim of "creditors and subsequent purchasers *without notice.*" If the creditor or subsequent purchaser had *actual notice* of the conveyance, then he could claim no benefit under the statute. Why was the statute thus framed? Evidently to give notoriety to the transaction, in view of the fact that in the transfer of title to *"real estate," actual possession*, or *"possessio pedis,"* is not essential at law to pass the estate. In the transfer of *"personal* property," however, (as a general rule,) the converse of this doctrine prevails—it being well established that, to make the conveyance good against creditors and subsequent purchasers, *"possession must accompany and follow the deed."* It would seem, however, that our Legislature, being well aware of the many exceptions and modifications to which this doctrine (as a general rule) had been subjected by the conflicting decisions of the courts, determined to place the two species of property upon the same footing, in regard to the 220
"constructive notice," afforded by registration of the conveyance, and hence the provision in the statute for recording of conveyances of personal property. Vide Thompson's Digest, 183, sections 4th and 3d. Upon no other principle, and with no other object, can we rationally account for this provision of the statute. It certainly never could have been intended merely to subserve the *convenience* of individuals, as a means of *perpetuating* the evidence of their "title" to property, the mere *possession* of which, by operation of law, affords sufficient evidence of title, without the aid of any written transfer.

But why, it may be asked, does the statute in the one case declare *in terms* the conveyance *void*, as against "creditors and subsequent purchasers," and omits to do so in the other? The reason is obvious:—In the case of the transfer of *real* property, the well established law is, that a want of *actual possession* raises no presumption of fraud; while in the transfer of *personal* property, the law is equally well established, that, unless *actual possession* (or such as the property is capable of) accompany the deed, the presumption of fraud is always raised. The object of the Legislature, therefore, was to provide a ready mode of *rebutting* this presumption by the *notoriety of recording*, operating in the nature of a "constructive notice."

If this view of the statute law be deemed correct, then it only remains to refer to the evidence in this case, to determine the pertinency of the two instructions under consideration.

The deed of mortgage under which the appellant claims is dated December 13th, A. D., 1841, and was *recorded* on the seventeenth day of the same month. The bill of sale under which the appellee claims title is dated December 9th, A. D., 1841, but was not offered for record until January 1st, 1842; thus showing that, although *by its date* it purported to have been executed four days before the date

221 of the mortgage, yet it was not *offered for record* until the lapse of eighteen days after making, and thirteen days after the recording, of the latter.

The evidence of Samuel B. Love (a witness) further shows that the property never in fact went into the possession of the vendee, Love, until some *two years or more* after the date of the bill of sale, and that, at the time of the execution of the mortgage to Gibson, the property was in the actual possession of the mortgagor, and so continued for two years or more. It also appears by reference to the testimony of Harris, (a witness,) that he, as a party interested in the estate of Colson, had given notice to these parties, who were co-sureties for J. C. Love, the executor, that there would probably be a deficiency on the settlement of the executor's account, and advised them to secure themselves; that upon a subsequent interview with the sureties, (both being present) a proposition was made by him (witness) to take the individual notes of the sureties for their respective portions of the liability incurred by the default of the executor, which had been then ascertained; that Love declined, and in this interview, Gibson charged him to his face with having deceived him, (Gibson,) by taking the bill of sale from his brother, (the executor,) and that he (Gibson) knew nothing of its existence until some time after the execution of the mortgage.

From this reference to the testimony, it is apparent—

1st. That no possession of the property accompanied the bill of sale to the vendee.

2d. That Gibson had no *notice* of the bill of sale at the date of the execution of the mortgage, and that the vendor was then in actual possession of the property.

3d. That the bill of sale was not affirmed for record until after the date of the *recording* of the mortgage.

4th. That Gibson was *deceived* by the *"dealing"* in regard to this property which took place between vendor and vendee.

222 In this state of case, we hold that the first two instructions prayed by appellant ought to have been given to the jury, and that it was error to refuse them. The simple doctrine involved in these instructions is as follows, viz: "that if Gibson was *deceived* and *thereby injured,* by the want of *notice* (either actual or constructive) of the existence of the "bill of sale;" and if this want of notice grew out of the *neglect* of vendee, or his unwarrantable *dealing* with the vendor in regard to this property—then the bill of sale ought not to prevail against the lien of the mortgage."

But should we be in error in the view we have taken as to the "object and policy of the registration laws," and the doctrines flowing therefrom, then does this very *error* present with ten-fold force the propriety of the instruction as embraced in the third prayer. The doctrine embraced in that prayer is the well established doctrine of the highest judicial tribunal of this country—the Supreme Court of the United States, Hamilton v. Russell, 1st Cranch, 309. Chief Justice Marshall, in delivering the opinion of the court, refers to the doctrine as laid down in Edwards v. Harbin, 2d Term Reports, 587, and says, "We are of the same opinion—we think that the intent of the statute is best promoted by that construction, and that fraudulent conveyances, which are made to secure to a debtor a beneficial interest, while his property is protected from creditors, will be most effectually prevented by declaring that an absolute bill of sale is itself a fraud, unless "possession accompany and follow the deed." Such a deed must be considered as made with intent to delay, hinder and defraud creditors."

1st. This doctrine of the Supreme Court is based upon the adjudications of the English courts. 3 Coke, 80—Twine's case. 2 Term Reports, 587—Edwards v. Harben.

I am aware that the doctrine of Edwards v. Harben is said to have been *shaken* by later decisions of the English courts, but by a careful examination of these decisions it will be found, first, that in none of these cases was the doctrine directly involved; and second, that no later case has 223 undertaken to *overrule* the doctrine.

The "possession" necessary to support an absolute bill of sale must be *bona fide, substantial* and *exclusive.* Wordell v. Smith, 1 Campbell, 333.

A sale and immediate *"hiring"* to the vendor does not constitute such a *"change of possession"* as will relieve the transaction from the imputation of *"fraud in law."* Vide 1 Smith's Leading Cases, notes to Twine's case.

An agreement that the vendor should retain possession of real estate and *pay rent* constitutes the transaction fraudulent *per se.* Vide 1 Smith's Leading Cases, 48. Cobern v. Pickering, 3 New Hampshire, 415.

2d. The doctrine, as established by the Supreme Court of the United States, has been recognized and adopted by the adjudications of the following States, viz: Virginia, Kentucky, Illinois, Indiana. Vide 1 Smith's Leading Cases, 42 to 50, where the cases may be found collected.

3d. The doctrine is recognized in the courts of South Carolina, with a distinction as to whether the "consideration" of the sale was founded on a *pre-existing* indebtedness of the vendor to the vendee—making, in such cases, the sale absolutely void by mere operation of law. Vide 1 Smith's Leading Cases, 49 to 50.

The evidence in the case at bar shows that such was the consideration of the alleged sale of the slave Henry.

4th. The doctrine as limited by the Supreme Court to bills of sale *absolute on their face,* is recognized and *extended* to mortgages and conditional sales in the following States, viz: New York, Pennsylvania, Connecticut and Vermont. Vide 1 Smith's Cases, 50 to 56.

III. Having thus demonstrated the propriety of the three instructions prayed by appellant, we next proceed to enquire, first, whether the substance of these instructions is supplied by those which were given by the court, upon the trial of the case below; and, secondly, whether the instructions given by the court were proper in themselves, as a 224 correct exposition of the law applicable to the case.

1st. It is only necessary to advert to the terms of the four instructions given by the court to perceive that they are in direct *conflict* with those prayed by appellant and refused, and consequently adverse to the position assumed under the first and second heads of this argument.

2d. The instructions given by the court were improper in themselves, because the whole question of "fraud or no fraud" was submitted to the determination of the jury; whereas, being a "conclusion of law," it ought to have been decided by the court. Vide Edwards v. Harben, 2 Term Reports, 487. Hamilton v. Russell, 1 Cranch, 309.

Archer, for appellee.

Gibson, at the time of the sale to D. Love, and at the time of the delivery of possession to D. Love, was not a creditor, by judgment, execution or attachment—indeed, was no creditor at all within the statute of Elizabeth or of 21st James I., who could complain of want of possession in vendee or act of bankruptcy in vendor. The fact that he was surety in the executor's bond did not make him a *creditor* of his principal; otherwise he would be a specialty creditor. The bond was not a cause of action then or subsequently, but only the *occasion,* which might give rise to a future liability. Nor did the mortgage make him a creditor; for *non constat* he might never be damnified and never have a right of action.

2. Gibson gave no new credit and extended no old one while the property remained in possession of vendor. He suffered no injury whatever by the vendor remaining in possession. His liability was not increased or his security diminished by that fact. On the contrary, if J. C. Love had delivered the property to Daniel Love on the 9th December, 1841, Mr. Gibson would have been in no better condition that he is at present. This shows that in fact he sustained

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225 no injury, and where this is the case and there is no fraud in fact in the transaction, the party complaining is without remedy. As already shown, the verdict negatives all idea of fraud in fact.

If Gibson claims under the mortgage, he must claim as a *purchaser*. But purchasers are not included within the letter or spirit of either 13th Elizabeth or 21st James. As to them *caveat emptor* applies. The bill of sale from Love to Love is good *inter partes*. By the verdict it is not tinctured with fraud in fact. The older title must prevail. A junior purchaser cannot stand above his senior, except he can cut off the remedy of his adversary by lapse of time, or bar his right by *estoppel* in deed or in *pais*. There is no lapse of time to apply in this case—no *estoppel* by deed and none in *pais*, unless the possession by vendor estops the prior vendee. But the bare fact of possession (to say nothing of the accompanying explanation in this case,) is not enough to prevent the application to Gibson of the rule *caveat emptor*. Indeed the very object of the rule *caveat emptor* is to let buyers be advised that they are not to be governed by *appearances* when they purchase personal property.

I am aware that in some cases the courts have confounded the position of a purchaser of personal property with that of a purchaser of real estate, and have held that a *bona fide* purchaser of personalty without notice of an older title may hold against the true owner. But this I maintain cannot be correct, in the absence of *actual fraud* on the part of the true owner. The statute 27th Elizabeth and our registration laws here provide for the security of innocent purchasers of real estate, and upon very correct principles. As to *loans* of personalty, we have a statute which certainly would seem to negative the positions of the appellant. In reference to personalty which passes by delivery and without writing, and which (particularly in case of slaves in this country) is often-times out of the possession of the owner, upon loan, hire, or otherwise, it would be

226 monstrous to assert that a *bona fide* purchaser from the actual possessor should hold the property against the true owner, because the *appearances* misled the last purchaser. The rule might not be so injurious in its application to ordinary chattels; but to apply it in this country, where we have personal property of such dignity and value as slaves, would make titles to property of this description so insecure as to discourage all efforts towards its acquisiton.

But Gibson is not even entitled to the benefit of the position of an ordinary purchaser for value; for although technically a purchaser by virtue of the mortgage, he could not be injured by the possession remaining in vendor. He gave no credit—paid no new consideration for the mortgage. J C. Love was not liable to him as debtor, and was under no legal obligation to give the mortgage. The act was purely voluntary, and for the *benefit* of Gibson, notwithstanding the mortgage as to "Henry" was inoperative. Gibson *complains* that, as a creditor *prospectively*, he did not get a good title to *all* the debtor's property, to the exclusion of Daniel Love and others, and forgetting the extent of his demands for security, attacks the conduct of Daniel Love, *as a fraud* upon creditors. Under the English policy, the decisions under which he invokes, Gibson's mortgage would be held to be a *fraud against all creditors*, not explainable—while Daniel Love's bill of sale, even against a judgment creditor at the time, would be capable of explanation to a jury.

Hitherto I have endeavored to show that this judgment can be affirmed, without contravening the appellant's *legal* propositions. I now maintain that these propositions are not maintainable upon principle or authority in England or America.

Chancellor Kent made great efforts to retain the stringent rule of reserving the question of fraud for the court, and to exclude explanations to the jury; but without surrendering his prejudices, he admits his failure; and while he compliments the Vermont Judiciary for not as yet yielding 227 to the admitted progress of the milder rule, he adds, with proper misgivings as to the ability of that Court to hold out much longer, and with full knowledge of the unyielding demands of public policy in America, *"How long the Court will be able to stand on that ground is another question."* See note to 2d Kent, 526.

The establishment of the stringent rule involves the ascertainment of innumerable exceptions. The exceptions are so numerous as to *disprove* the rule—for controversies in this Court which would arise under the exception would far exceed all the litigation which could arise under the milder principle, that each case depended upon its special circumstances of explanation.

ANDERSON, *Chief Justice*, delivered the opinion of the Court, as follows:

This is a case of a claim to personal property interposed according to the provisions of our statute of February 17th, 1833.

The facts material to the point presented to this Court are briefly these: James Gibson and Daniel Love, the parties to this suit, on the thirteenth of April, 1839, became sureties on a bond given by one John C. Love, as executor of John Colson, deceased. On the thirteenth of December, 1841, John C. Love having become indebted to the estate of his testator and some fear being entertained that he might become a defaulter, a deed of mortgage was executed by the said Love to Gibson, conveying to him several negroes and, amongst them, one by the name of Henry, the subject of the present controversy. The object of the mortgage was to save harmless the said Gibson, on account of any loss which he might sustain, as surety on the bond before mentioned. Most of the property thus mortgaged was subject to a prior lien of the Union Bank. This mortgage was duly proven by a subscribing witness, and recorded on the seventeenth day of December, 1841 four days subsequent 228 to its date.

On the first day of January, 1842, John C. Love acknowledged before the clerk of the Circuit Court the execution of a paper writing in these words:

"Territory of Florida—Gadsden County:

Received of Daniel Love one thousand dollars in payment for a negro-man, Henry, twenty-four years of age, a slave for life, which negro, Henry, I do warrant to the said Daniel Love, his heirs and assigns, forever, to be good property forever.

Witness my hand and seal this ninth December, 1841.

[Signed,] JOHN C. LOVE, [Seal.]"

On the day of its acknowledgment, (that is, January 1st, 1842,) this paper writing was recorded by the clerk. On the subsequent trial of the right of property Samuel B. Love, a witness, stated "that about the time of making the bill of sale, John C. Love was somewhat embarrassed in his pecuniary affairs, and that he (John C. Love) was indebted to the claimant, Daniel Love, but to what amount he could not say. That about the time of making the bill of sale, he (witness) heard Daniel Love tell John C. Love, that he (John C. Love) might keep possession of the negro-man, Henry, for two or three years if he (John C. Love). would pay him the interest on the price of the negro, Henry. That John C. Love not paying the interest, Daniel Love took possession of the negro, Henry, about January, 1843.

Another witness, Alexander Love, stated that the amount of the indebtedness of John C. Love to Daniel Love was about one thousand dollars. Another witness, Isaac R. Harris, stated that, at some subsequent time, though the date is not mentioned, "when it was ascertained that John C. Love was indebted to the estate of Colson he (witness) and the other legatees of the estate of Colson had a meeting with Daniel Love and James Gibson, as securities of John C. Love, to see whether or not a settlement could not be

229 had between the legatees and the securities; the legatees proposing to take Daniel Love's note for one-half and James Gibson's note for the other half of the amount due from John C. Love to the estate of Colson. That Daniel Love refused to settle, unless James Gibson would let him (Daniel Love) share in the benefit of the mortgage; which Gibson refused, saying that he (Gibson) had frequently applied to him (Daniel Love) to assist him (James Gibson) in obtaining the mortgage security from John C. Love, and that he (Daniel Love) had refused to do so."

Subsequently John C. Love became in arrears to the estate of Colson, and on the 29th of November, 1845, judgment for $2,792 82-100 was recovered against Gibson on account of his suretyship, and that amount was paid by him in full.

On the 13th of November, 1847, a bill previously filed by Gibson, praying a foreclosure of the mortgage, was taken as confessed as to John C. Love, and on the 31st of December, 1849, the decree was made absolute, and it was ordered that the Master in Chancery should take possession of the slave Henry and sell him to satisfy the claim of the complainant, Gibson. Under this decree the master proceeded forthwith to take possession of the slave Henry, who, when levied on by him was in the possession of the claimant, Daniel Love, who thereupon, on the 4th of January, 1850, commenced proceedings for interposing his claim, by filing the affidavit required by law and executing his bond.

The case came on to be tried on the 24th of May, 1850, and after the evidence was heard the plaintiff in execution prayed the following instructions, to wit:

1st. That if the jury believe from the evidence that the property in controversy was in the possession of John C. Love at the date of the execution of the mortgage, and that the mortgage was recorded prior to the time that the property passed into the possession of Daniel Love, the claimant under the bill of sale, then the law is for the plaintiff in execution, and they will find the property subject.

230 2d. That if they believe that the contract between John C. Love and Daniel Love was calculated to deceive the plaintiff in execution, then the jury shall find the property subject to the execution.

3d. That when the bill of sale is absolute on the face, and the possession does not accompany the bill of sale, the contract is fraudulent *per se*.

Which instructions the court refused to give, but gave to the jury the following, as prayed by the claimant, viz:

1st. If the jury believe that the plaintiff purchased the slave Henry, in good faith, for a valuable consideration, and arranged with the vendor that he might retain possession of the slave upon hire and, from the circumstances, that there was no fraud in fact in the transaction, the claimant is entitled to recover.

2d. That, although possession of personal property, if it continues in the possession of the vendor after a sale, is *prima facie* evidence of the transaction being colorable and fictitious, yet that such possession continuing in the vendor may be explained by the circumstances; and if the jury believe that, under the circumstances in this case, there was no fraud in fact, then the bill of sale of the 9th December conveys a title to Daniel Love.

3d. That if the jury believe that the hiring of this slave was real and *bona fide*, and not fictitious and colorable, the possession of John C. Love was consistent with the bill of sale, being in law the possession of Daniel Love.

4th. That if the sale to Daniel Love was not fictitious or fraudulent, the possession continuing in John C. Love under an arrangement for hire cannot be complained of by a creditor, unless a new credit be given or an old one extended, under a mistaken belief that the property remained unsold.

Under these instructions the jury found the property to be in the claimant, Daniel Love, whereupon the plaintiff in execution, having by his counsel filed his bill of exceptions setting out the foregoing facts, refusal and charge, prayed an appeal to this court.

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The assignment of errors is in the following words: 231

1st. The court erred in refusing to instruct the jury as prayed for by the appellant.

2d. The court erred in instructing the jury as prayed for by the appellee.

The two sets of instructions prayed for by the respective parties are somewhat inartificially drawn up, owing, doubtless, to the haste incident to a jury trial at *nisi prius*. No one of the instructions, taken singly, presents very distinctly the difficult questions which grow out of this class of cases; but, taken as a whole, they may be regarded as asserting on the one side that the question of fraud is a question of law, to be decided necessarily and by legal inference from certain facts; and, on the other, that it is a question of fact, to be determined by the jury according as they may or may not believe, from the evidence, that there was an actual design to cheat. As so intended and understood, we shall proceed to consider them.

It may tend to the better understanding of this distinction, if we remark in the outset, that, by the ancient common law, the question of fraud was purely a question of fact, involving an actual fraudulent intention, and the proper inquiry, therefore, will be, whether there is such a thing as statutory fraud, as contra-distinguished from actual fraud.

The first point to be ascertained is, the relation in which Gibson stands to John C. Love—whether he is a creditor or purchaser, or both?

It is maintained by the counsel for the appellee, that "the fact that he was surety on the executor's bond, did not make him a creditor of his principal." Perhaps in the strict technical meaning of the term he cannot be called a creditor. But it will be recollected that the statute of 13th Elizabeth protects creditors and *others* from fraudulent conveyances, and a liberal construction of this statute in favor of the class of persons designed to be protected from fraud, has always been admitted by the courts. "As to rights from 232
"contracts, any one liable upon a contract, express or im-
"plied, though only contingently, is a debtor from the time
"the liability is entered into; accordingly, a surety is a
"creditor of the co-obligor from the time the obligation is en-
"tered into; (Howe v. Ward, 4th Greenleaf, 195;) and those
"interested in an official bond are creditors of the surety
"from the time that the bond is executed by him. 1st American Leading Cases, 55. So "a guarantee is to be deemed a creditor to the guarantor, on a covenant of guaranty, even before it is broken." 8th Cowen, 407. And Gibson having made himself a debtor, on account of his liability for Love, is by the same rule, a creditor of Love.

So, also, in Twyne's case, 3d Coke, 80, it is said, "because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole court, that all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud;" and an instance is given in the case of Pauncefoot v. Blunt, where it was held that the statute embraced the case of a forfeiture incurred to the Queen, and "it was resolved by all the barons that the statute of 13th Elizabeth, chapter 5, extends to it; for thereby it is enacted and declared that all feofments, gifts, grants, &c., to delay, hinder and defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, forfeitures, heriots, mortuaries and reliefs, shall be void,' &c. *So that this act doth not extend only to creditors, but to all others who have cause of action or suit, or any penalty or forfeiture,*" &c.

We must regard, then, Gibson as entitled to all the protection which this statute of 13th Elizabeth designs to extend to creditors and *others*, against fraudulent conveyances contrived to delay, hinder or defraud them of their just and lawful actions, &c. Upon this point, also, the counsel for the appellee says: "I know of no case, where a creditor of a vendor obtaining judgment and execution after the ven-

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233 dee got into possession, has complained of the previous want of possession in the vendee, or previous actual possession of the vendor."

The case of Edwards vs. Harben, 2d Term Reports, 587, to which all the courts both in this country and in England refer, as a leading case, was that of a simple contract creditor, who had obtained neither execution nor judgment before the possession of the vendee commenced; and yet the court held in his behalf, that the sale of chattels made by the indebted vendor, under an agreement to retain possession for fourteen days, was fraudulent and, therefore, void. The counsel for appellee seems to admit that Gibson was a *purchaser,* but adds "that purchasers are not included within the letter or spirit of either 13th Elizabeth or 21st James.

A sufficient reply has been given to this objection by the authorities already quoted; but we think further, that the statute of 27th Elizabeth, though its terms apply only to land, yet being but declaratory of the common law, may be interpreted as defining the nature and effect of fraudulent conveyances generally—in its letter, re-enacting the common law as to fraud relating to land, but in its spirit, sanctioning and sustaining the condemnation passed by the common law upon all frauds. In Hudnall vs. Wilder, 4th McCord, 295, it was held, "that, upon common law principles, a fraudulent conveyance of chattels might be avoided by a subsequent *bona fide* purchaser for a valuable consideration, without notice."

Gibson stands unquestionably in the relation of a purchaser, by virtue of the mortgage of 13th December, 1841. "A mortgagee is a purchaser to the extent of his interest in the premises, within the meaning of the term purchaser, as used in the statute of frauds." Ledyard vs. Butler, 9th Paige, 137, and authorities quoted in the margin.

We must, however, regard him as a subsequent purchaser; for though there is no proof on the record that the bill
234 of sale from John C. Love to Daniel Love was executed before the 1st of January, 1842, which was subsequent to the recording of the mortgage, yet we are concluded by the verdict of the jury to take it to have been in fact made before the date of the mortgage.

For the reasons given, we shall regard Gibson as both creditor and subsequent purchaser, entitled to the protection of the statute of 13th Elizabeth in both these relations, by virtue of the phrase "creditors and others;" and also entitled as purchaser to the benefits of the common law provisions against fraudulent conveyances, as explained and defined in 27th Elizabeth, which was enacted in more direct reference to fraudulent conveyances of land.

In the case before us, the court instructed the jury substantially that, unless satisfied from the facts developed by the evidence, that in the sale of the slave Henry by John C. Love to Daniel Love, there was an actual, positive design to commit a fraud, they must find for the claimant.—This instruction we consider erroneous in this—that it was not qualified, by further instructing the jury that the policy of the law, sanctioned by authority, regarded certain facts as such unerring *indicia* of fraud, that the inferential evidence afforded by them was of as high a character as direct proof. So conclusive, indeed, is the nature of this evidence in some cases, that it not only supplies the omission of direct proof of fraud, but it is so stringent in its character as not to be rebutted by direct proof of the absence of any fraudulent design. For instance, if a man largely indebted makes a voluntary conveyance of all his property, no one doubts that the conveyance is fraudulent in law, and void as to creditors, and yet it is possible that the grantor had no actual design to cheat, and the jury might so believe. It might be the grantor was in the receipt of an income from his trade, or his profession, or his business, which he deemed sufficient to enable him to pay his debts, and that, in the sanguine anticipation of the continuance of this income, he calculated surely and honorably to satisfy all his 235
creditors; but in spite of this honest intent, however fully believed by the jury, there is no court but would instruct the jury that it was their duty to find the conveyance fraudulent. It would be fraudulent in law necessarily and independently of the actual intent of the grantor.

Though the case supposed is an extreme one, it is sufficient to show that what is termed fraud in law is distinct from fraud in fact, and that it is the duty of the judge to instruct the jury that their conclusions from facts must be regulated by the character and import given to those facts by necessary legal implication.

But we do not design to be understood as saying that generally, or even very often, does the law give to certain facts the effect of overruling and contradicting conclusions arising from other facts, as in the case supposed. It more generally gives to those certain facts a legal implication, to aid the jury in detecting the existence of an actual fraud, when its more direct and obvious manifestations may be successfully concealed. Fraud is, in its nature, secret, and the law, in its wise abhorrence of all false dealing, lends its aid to the jury through the court, to enable them to detect and expose the deception. Hence it is that it regards some acts as proofs of fraudulent intent, and it is the duty of the courts so to instruct the jury. It is not a sufficient answer to this to say, that in the case before us the judge instructed the jury, according to the second instruction asked, that the possession of personal property, if it continues in the possession of the vendor after sale, is *prima facie* evidence of the transaction being colorable and fictitious; but that the possession may be explained by circumstances. He should have gone on to characterize those circumstances as sufficient to explain the possession—as for instance, that the sickness of the slave Henry made his delivery impossible, or that there was something else to repel the presumption of fraud arising from the detention of the slave after the sale. Instead of doing this, and maintaining the force and 236
integrity of these legal presumptions, the jury are directed in the further instructions of the Judge to abandon all legal presumptions, and go into an inquiry as to fraud, as proved or not proved directly by facts.

So necessary is it to maintain the distinction between fraud in law and fraud in fact, that even in the State of New York, where the vexed questions growing out of this distinction were attempted to be settled by the enactment of a statute, declaring that "in all cases arising under the statute against fraudulent conveyances as respects creditors, the question of fraudulent intent shall be a question of fact and not of law," the courts have found it necessary still to maintain the distinction.

In the case of Cunningham v. Freeborn, 3d Paige's Reports, 557, the Chancellor said: "As this cause was heard on bill and answer only, the denial of all fraud in the execution of the assignment is conclusive evidence of the fact, in favor of the defendants, unless that allegation is inconsistent with or contradicted by some other statement or admission in the answer. But the Vice Chancellor was correct in supposing that the general denial of fraud was not sufficient, if it appeared upon the face of the assignment that its legal effect would be to delay, hinder and defraud the complainant and other creditors of the assignor. The Revised Statutes *have not made the fraud itself a question of fact in all cases, neither indeed was it possible for the Legislature to do so;* for when a party has intentionally executed an assignment or conveyance of his property, which must hinder and defraud his creditors of their just demands, the question whether the conveyance is fraudulent or not, necessarily becomes a question of law and not of fact." See,, also, 11th Wendell, 241, and 6th Hill, 433.

"So with respect to libels, where the fact of publication is incontestable, if the paper, which is the subject of indictment or information, has upon the face of it a natural and

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obvious tendency to promote sedition, it is no subject of inquiry by evidence whether the party had actually such intention in his mind or not. What passes in the mind of man is not scrutable by a human tribunal—it is only to be found out by his acts. Every man of sufficient understanding is to be responsible for his actions—he is supposed to be cognizant of the law as the rule by which every man is to be governed, and, therefore, it is his business to know it. If, therefore, a man publishes what the law says is treasonable, seditious or libellous, the *intent* with which he does it is mere matter of legal inference from the fact of publication, and is not the subject of proof either one way or the other." Mr. Justice Ashurst's judgment, Rex v. Dean of St. Asaph, 3d Term Reports, 428.

In the case now before us the court should have instructed the jury that, in the absence of positive proof of a fraudulent intent on the part of Love, they should infer it from his having retained possession of the slave after selling him absolutely, unless there was some evidence not of a general character negativing a fraudulent intent, but of a character to explain this possession which the law regards as a badge of fraud—as that the slave was too sick to be removed, or that, for the convenience of the grantee, John C. Love had kept him for a short time. The possession of the slave by the grantor for two years after the absolute sale, and for his own convenience, gives to the mere possession the force of more than mere *prima facie* evidence. So potent is the effect of presumptions of this character that, by the operation of the statute of frauds they must prevail, as we have already intimated, to establish a fraud, even where the jury are satisfied that there was no acutal fraudulent intent—much more when there is a mere absence of proof of actual fraud. In the case of Salmon and Bennett, 1 Connecticut Reports, 505, the Chief Justice says "*though there "be no fraudulent intent,* yet if the grantor was considera- "bly indebted and embarrassed at the time and on the eve
238 "of bankruptcy, then such conveyance will be void as to "creditors." The fraud thus established is sometimes and appropriately called statutory fraud, and this term implies that there may be a species of fraud, sufficient to avoid a conveyance, distinct and different from the moral, actual fraud into which the jury in this case were directed to inquire. It is the absence of all recognition of this species of fraud, in the instructions given in this case, that makes them erroneous.

The cases in the books which illustrate and enforce these views are very numerous and of very high authority, but they are so familiar to the profession that we shall refer only to a few of them. Twyne's case, reported in 3 Coke, 80, is the most celebrated of these, and in the commentaries on that case, in Smith's Leading Cases, by both the English and American editors, we find all the most important authorities arranged and digested, and the principles involved very clearly and learnedly discussed. The weight of the authorities is very decidedly in favor of the general principle that, in the sale of chattels, unless possession follows and accompanies the deed, it is fraudulent and void as to creditors.

In Edwards v. Harben, 2 Term Reports, 587, one Mercer executed a bill of sale to Harben, to whom he was indebted, of all his household furniture and effects, by way of security for his debt, with a parol agreement that if the debt were not paid within fourteen days, Harben might enter upon the effects and sell them at the end of that time.—Mercer, retaining possession, died eleven days thereafter, and on the next day Harben took possession of the effects and sold them. Edwards, another creditor of Mercer, brought suit against Harben, as executor *de son tort* of Mercer, and the question for the court was, whether the defendant be entitled to retain the proceeds of the effects or whether the bill of sale was void as against the creditors of Mercer. It was held that Harben was liable to be sued as executor *de son tort,* for the debts of the deceased; for, says Justice 239
Buller, "Unless possession accompanies and follows the "deed it is fraudulent and void. This case has been ar- "gued by the defendant's counsel as being a case in which "the want of possession is only evidence of fraud, and that "it was not such a circumstance, *per se,* as makes the trans- "action fraudulent in law. That this point which we have "considered, and we are all of opinion that if there is noth- "ing but the absolute conveyance without the possession, "*that* in point of law is fraudulent."

After the English rule on this subject had been thus discussed, declared and settled, it was repeatedly held that an absolute bill of sale of chattels, unaccompanied with possession, was fraudulent at law and void as against creditors. 2 Kent, 518.

In the Supreme Court of the United States the rule laid down in Edwards v. Harben has been approved and adopted, and it is declared that an absolute bill of sale is itself a fraud in law, unless possession accompanies and follows the deed. See Hamilton v. Russell, 1 Cranch, 305. "Modern "decisions," says Chief Justice Marshall in that case, "have "taken this question up upon principle, and have deter- "mined that an unconditional sale, where the possession "does not accompany and follow the deed is, with respect to "creditors, on the sound construction of the statute of Eliz- "abeth, a fraud, and *should be so determined by the court.*" "We think that the intent of the statute is best promoted "by that construction, and that fraudulent conveyances "which are made to secure to a debtor a beneficial interest "while his property is protected from creditors, will be most "effectually prevented by declaring that an absolute bill of "sale is itself a fraud, unless possession accompanies and "follows the deed."

All the Federal Courts have followed the construction here laid down by the Chief Justice. In Virginia the same principle has been directly and repeatedly adjudged to be well settled. Alexander v. Deneale, 2 Munford, 341. Rob- 240
ertson v. Ewell, 3 Munford, 1. Land v. Jeffries, 5 Randolph, 211. In this latter case the real purpose and extent of the explanations allowed to be made to the jury to rebut the presumptive evidence arising from possession after an absolute sale, and the proper understanding of which will reconcile many apparently contradictory authorities on this point, are well defined. It was held "that when the grantor "of personal property remains in possession after an abso- "lute conveyance, the conveyance is *prima facie* fraudulent; "but such possession is not conclusive evidence of fraud, "barring every explanation. It will lay with the purchaser "to explain and rebut the presumption of fraud—as if the "the slave be purchased and not taken away for seven "months it may be shown that he was too sick to be re- "moved." The explanation must relate to the possession. If that is unexplained, it is conclusive evidence of a fraudulent intent.

The States of New York, (before the revised statutes,) Kentucky, Illinois, Indiana, South Carolina, New Hampshire, Pennsylvania, Connecticut and Vermont recognize the rule as laid down in Hamilton v. Russell, as to absolute bills of sale, though differing among themselves on the subject of mortgages.

In New-Hampshire the distinction to which we have referred as made in the case of Land v. Jeffries is fully adopted. "When conveyances by one in debt are impeached, "the question is, was there a secret trust? and in absolute "sales possession is *prima facie* evidence of it, and if unex- "plained, conclusive." Parker v. Pattee, 4 New-Hampshire Reports, 176.

The South Carolina cases make a distinction where the purchaser is a creditor of the grantor, as is the relation of the parties in the case before us. Adopting the rule just referred to as prevailing in New-Hampshire, in the case of an absolute sale for a price paid, it was held that "where

241 "a pre-existing debt is the consideration, or a part of it, re-
"tention of possession and use is conclusive and intraversa-
"ble evidence of fraud." 1 Smith's Leading Cases, 49, and authorities referred to.

In Connecticut the true rule, as understood by this court, is well laid down in the case of Osborne v. Fuller, 14 Connecticut Reports, 530. There all the cases were reveiwed, the old principle is maintained, and the result of these decisions appears to be, "that the rule is one of policy, but not "of intention; that it is not enough that the jury find that "the sale was *bona fide* and for a good consideration, though "evidence of that is proper to be submitted to the jury to "repel actual fraud; there must be some reason for the re-
"tention, *legally sufficient and satisfactory.* The presump-
"tion of fraud is a presumption of law, and the law judges "of the cases in which it does not arise, and *the jury are to "be instructed by the court* as to the sufficiency and reasons "alleged to justify the retention."

In Maryland an early statute has relieved the courts of all difficulty upon this vexed question; but in Massachusetts and Maine and Ohio and Tennessee, North Carolina and Alabama, the courts have, to a greater or less extent, broken down the rule established in England and in the Federal courts, to which we have referred. But this court can see nothing in the reasonings by which the relaxation of the rule is attempted to be justified in the reports of those States, to shake their conviction that the other rule is more consonant with the objects of the statute and with the reason and policy of the law.

We conclude, then, by saying that we think the court below, on the trial of this case, erred in instructing the jury that the question of fraud upon which they were to pass was a question of mere intention. The retention of personal chattels, after a sale, is *prima facie* evidence of fraud, and the appropriate evidence to rebut the presumption is not the proof of the general good faith of the grantor, but
242 an explanation of the retention, to show either that it is consistent with the deed or is unavoidable, as in the case of a ship at sea, or is temporary, for the reasonable convenience of the grantee.

In reviewing the decisions of the other States we have not adverted to the diversity of opinion which exists in reference to delivery of possession of chattels which are mortgaged. We have a statute which requires all such mortgages to be recorded, and the notice thus given to the world is a negation of the fraudulent intent which the law infers from retention of possession after an absolute sale.

This case must be sent back for a new trial, and the Judge of the Circuit Court will instruct the jury according to the rule set forth in this opinion.

EDWARD C. BELLAMY, ET. AL., APPELLANTS, v. SAMUEL C. BELLAMY, APPELLEES.

The 28th section of the act of November 7th, 1828, in relation to proceedings in Chancery, was passed solely to provide for the enrollment of final decrees, and to invest them with the lien in that section mentioned, as well as to entitle a party to process thereon—appeals and petitions for rehearing being only incidentally mentioned, as prohibiting the enrollment, the lien and final process, where either of those steps are taken.

The 32d section of the same act, which provides for rules of practice in Chancery, does not give to parties the same right of appeal, and in the same cases, in which appeals were allowed from the High Court of Chancery in England to the House of Lords.

The act entitled "An act regulating the mode of suing out writs of error and prosecuting appeals in the Court of Appeals of the Territory of Florida," approved February 10th, 1832, is still in force, and by that act, as well as by the act of November 12th, 1828, an appeal is allowed only from a final judgment, sentence, or decree. An appeal does not lie, under any law in force in this state, from an interlocutory decree.

Where money is directed to be paid into court, or property to be delivered to 243
a receiver, as to a new trustee, or where anything is to be done which may be the subject of exception or appeal, the decree is not final, but interlocutory only.

Appeal from a decree of the Circuit Court of Jackson County, at the Fall Term, 1850, made by the Hon. GEORGE S. HAWKINS, Judge of the Western Circuit.

The decree appealed from was made in a cause wherein Samuel C. Bellamy was complainant, and Edward C. Bellamy and others defendants, and was as follows, viz:

This cause came on to be heard at the Spring Term, 1850, of this court, before the Honorable GEORGE S. HAWKINS, Judge of the Western Circuit, upon bill, answer of defendant, Edward C. Bellamy, replication, exhibits and proofs taken in this cause, and the same having been fully argued by counsel for both parties, and the matters in dispute duly considered, and the judgment and decree to be given in the premises fully advised of, his Honor doth think fit, and so orders, adjudges and decrees:—

First.—That the deed of conveyance of the said complainant to the said defendant, Edward C. Bellamy, bearing date the thirteenth day of December, in the year of our Lord, one thousand eight hundred and forty-five, (1845,) mentioned in and exhibited with said complainant's bill of complaint, for the reasons at large set forth in the opinion delivered in this cause, was and is wholly inoperative and void; and that the said Edward C. Bellamy should and ought to account for the trust property and funds conveyed by and possessed under the trust deed from the said complainant to the said Edward C. Bellamy, bearing date the nineteenth day of November, in the year of our Lord one thousand eight hundred and forty-four, also mentioned in and exhibited with complainant's said bill of complaint.

Second.—It is further adjudged and decreed that the said defendant, Edward C. Bellamy, holds that portion of the trust property, and profits and issues thereof, purchased by him at the sales under execution by the sheriff of Jackson 244
County, on the first Mondays of January and February, 1846, subject to the uses and trusts limited and appointed in the aforesaid deed of the nineteenth of November, in the year one thousand eight hundred and forty-four, and is liable to account therefor.

Third.—It is further ordered and decreed that the defendant, Edward C. Bellamy, account before George F. Baltzell, Esq., one of the Masters in Chancery of this court, upon and at such time as shall be appointed by said master, of and concerning the aforesaid trust and the execution thereof, rendering a full, true and perfect account in detail of all and singular the trust property and funds committed to his charge, and the rents, issues, profits, crops and proceeds issuing out of the same, or accruing therefrom which he, or any other person for him, or by his consent or procurement, received therefrom, or which he might, could and ought, by the exercise of reasonable diligence, to have received. Said accounting to be upon due notice to the complainant or his solicitor, and according to the usual mode of proceedings in the office of the master; and that said master make report of said accounting, and the evidence taken before him thereon, with all convenient speed.

Fourth.—It is further ordered and decreed that the said Edward C. Bellamy be removed from his said trust, and ousted of his said trust estate; and that he deliver over to the receiver hereinafter appointed all of the said trust property and funds, and the rents, issues and profits, and crops arising from or issuing out of the said trust property, now in his hands, power, possession or control, and thereafter stand and remain restrained and enjoined from any interference with, control over, or management of, the said trust property, until the further order of this court in the premises.

Fifth.—It is further ordered and decreed that Frederick R. Pittman, of the county of Jackson be appointed Recei-

ver of this court in this cause, upon his entering into bond 245
in the penalty of ten thousand dollars, (10,000,) with good and sufficient security, to be approved of by the master aforesaid and conditioned for the due and faithful performance of his duties; and that, said Receiver shall, after qualification, with all convenient speed, demand and receive from the said Edward C. Bellamy the trust property hereinbefore mentioned, and shall rent out the plantation, and hire out the slaves at public auction by the year, until the further order of the court in the premises, and shall render and file in the office of the clerk of this court annual accounts and returns of his actings and doings in the premises, and of the amounts of funds and securities in hand.

Sixth.—It is further ordered and decreed that the said George F. Baltzell, master as aforesaid, do also proceed to ascertain and report to this court, the names of the creditors of the said Samuel C. Bellamy, who are entitled to the benefits of the trust estate heretofore conveyed by the said Samuel C. Bellamy to the said Edward C. Bellamy as aforesaid, with the amounts due to each respectively, and the respective order of priorities; and for this purpose, the said master shall make advertisement for the presentation of such claims, within such times as he shall deem reasonable and proper in the premises; and that all further directions are reserved until the coming in of said reports.

Archer, for Appellee, moved—

To dismiss the appeal, on the ground that the decree was not final but interlocutory only, and that, by the law of this State, an appeal does not lie from an interlocutory decree. The argument of the solicitor for appellee, and the authorities referred to and relied on in support of the motion, are stated in the opinion delivered by the court.

Long (with whom was *Finley,*) for Appellant, resisted—

The motion to dismiss upon the two grounds stated in the opinion of the court.

Upon the first ground, he cited the Chancery act of 1828, 246
as quoted in the opinion, and showed by authorities not questioned, that, by the practice of the High Court of Chancery in England, interlocutory decrees might be appealed from.

Upon the second point, he relied upon the principle of the case cited on the other side, from 6th Howard's Reports, the substance of which is stated in the opinion of this court. He also cited and relied upon a case in one of the Alabama Reports, as in all respects similar to this, in which the appeal was allowed. He also cited 2d Daniel's Chancery Practice, 1199, and notes and authorities there cited, to prove that a decree is final to the extent that it is ordered to be executed, and contended that, upon principle and sound reason, as well as upon authority, a decree is final as to such part of the case as does not remain open for further proof or argument in the court rendering it, or where the court does not design again to adjudicate the point. Such a decree, though there may remain other questions in the cause to be adjudicated for other purposes, is final, if execution is to follow. An appeal alone supersedes the execution of a decree, and to dismiss such an appeal, is equivalent to a denial of the right of appeal. In this cause, it is plain that the decree takes from E. Bellamy the property, without any indemnity to him, by bond or otherwise, to pay such damages as he may thereby incur, and contemplates no future action upon that question. The property is only given to a Receiver, in order to determine how much of the same complainant's creditors shall have, and how much will remain for him. Defendant is turned out of possession by the terms of the decree, and that to be followed by instant execution, if the *supersedeas* produced by this appeal is dissolved by dismissing the appeal. The execution of this decree may ruin defendant, and he is wholly without remedy or redress, even although years hence this court may decide that he was wrongfully dispossessed.

Mr. Long also contended that if this decree was thus 247
made final prematurely, and ordered to be executed too soon, because before an appeal would lie on the whole cause, still this court ought to allow this appeal, to enable it to reform the decree in this respect, and thus prevent the deprivation of a constitutional right, and the ruin of a citizen.

LANCASTER, *Justice,* delivered the opinion of the court as follows:

This case comes by appeal from Jackson Circuit Court, and a motion made to dismiss the appeal because the decree rendered in the case below is not final.

The appellants, by counsel, contend that this court has jurisdiction to entertain appeals in chancery cases from interlocutory decrees, and if not, that the decree rendered in this case is final and the appeal is well taken.

Let us first consider the right of a party to appeal to this court from an interlocutory decree. It is contended by counsel for appellant that the right to appeal may be inferred from the provisions of the 28th section of the chancery act of November 7th, 1828, (Duval's Compilation, 135, Thompson's Digest, 451) and that the 6th (properly 32d) section in the same act, (Duval's Compilation, 137 and Thompson's Digest, 459,) which provides for rules of practice in chancery, gives to parties the same right of appeal, and in the same cases, in which appeals were allowed from the High Court of Chancery, in England, to the House of Lords.

It may be here remarked that the 28th section of the chancery act referred to, was passed solely to provide for enrolments of final decrees in chancery and to invest them with the powers of lien in that section mentioned and to entitle a party to process or other proceedings thereon; and appeals and petitions for rehearing were but incidentally mentioned in the section—not to provide or invest parties with rights which these proceedings might respectively se- 248
cure, but simply where a party had taken either of these steps according to law, to prohibit the enrollment and its consequent lien, and the final process which the other party might issue thereon.

The view taken of the section 32, in relation to the rules of practice is not more satisfactory; for, conceding that the House of Lords entertained appeals from the High Court of Chancery, in England, upon interlocutory decrees, that was done on petition to the Lords, setting forth all the proceedings desired to be appealed from, which petition and its statements the Lord Chancellor was required by the Lords to admit or deny. Being admitted, the Lords had the case before them, and might, in the plentitude of unlimited power, proceed as they thought fit. No such power is known to have been at any time vested in the late Court of Appeals or in this court. That section, in terms, provides "that the "rules of practice in the courts of equity of the United "States as prescribed by the Supreme Court thereof under "the act of Congress of the 8th May, 1792, where pro- "vision is not made by this act shall be rules for the prac- "tice of the courts of this Territory when exercising equity "jurisdiction. And when the rules of practice so directed "by the Supreme Court and the provisions of this act do "not apply, the practice of the courts shall be regulated by "the practice of the High Court of Chancery, in England."

Now, if it be said that the right of appeal to the Supreme Court of the United States is not a right established by a rue of that court, but a right given by act of Congress, and therefore not one of the rules adopted into practice here by the passage of the above recited section, so also, with equal force and truth, it may be said the right of appeal from the High Court of Chancery, in England, is not a rule of practice of said court, but a rule of right imposed on the Court by the arrogated omnipotent power of Parliament.

Rules of practice are prescribed by the Courts, for the more safe and convenient transaction of business; but rules

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of right are prescribed by the Legislature, the better to ascertain what rights are reserved or secured to the person. We must, therefore, look elsewhere for the right of appeal.

The fifth section of the act of Congress, entitled "an act to amend the several acts for the establishment of the Territorial government of Florida," approved May 15th, 1826, after providing for writs of error and appeal to the Court of Appeals, of the Territory on all final decisions of the Superior Courts arising under the Constitution and laws of the United States, where the matter is of the value of one hundred dollars exclusive of costs, goes on further to provide, "and in all other cases writs of error and appeal may be "taken and prosecuted from said Superior Courts to the "Court of Appeals in such manner as the Legislative Coun-"cil have directed or shall direct." By an act of the Legislative Council, entitled "an act regulating the mode of suing out writs of error and prosecuting appeals in the Court of Appeals of the Territory of Florida," approved November 12th, 1828, just five days after the chancery act before noticed was approved, the manner of taking appeals was provided for. As much of the first section of that act as is here deemed necessary is in these words, viz: "That "if a party in either of the Superior Courts of this Terri-"tory shall feel aggrieved by a final judgment, sentence or "decree, made or pronounced by any or either of said courts, "it shall and may be lawful for such party, at the time "when such judgment, sentence or decree is rendered or "pronounced, to obtain in Court, &c., his appeal." See pamphlet Laws of the year 1828, page 44-5. This section of this act, as far as after diligent examination we have been enabled to discover, was only repealed by an act of the same title, approved February 10th, 1832, and which is now in force. By both laws an appeal is allowed only from a final judgment, sentence or decree.

But it is contended the phrases were used loosely by the Legislature, and only meant to provide for appeals at com-
250 mon law and not in chancery. The jurisdiction of the courts from whose decision these laws meant to provide an appeal, extended as well to equity as law, and when the phrase is used, "shall feel aggrieved by a final judgment, sentence or decree, made or pronounced by any or either of said courts," it is difficult to imagine the Legislature meant to restrict the right of appeal to less than the extent of the jurisdiction appealed from. But the second section of the act of February 10th, 1832, uses the terms judgment given, decree rendered or sentence pronounced, showing familiarity with these terms and using them in their legal acceptation. Moreover, there is no other act on the statute book providing for appeals in chancery cases, except the act of 11th February, 1832, Thompson's Digest, 462. Can it be presumed that a Legislature that so carefully provided for appeals on judgments at common law should have totally failed to provide a similar remedy from decrees in chancery?

The act of 11th February, 1832, provides that appeals may be taken from final decrees in two years; but it also provides that, if not taken in the time fixed by law in other cases, they shall not operate as a *supersedeas*, except on an order of a Judge of the Supreme Court. Now, will any one contend that an appeal taken from a final decree of the Circuit Court, conformably to the act of 10th February, 1832, will not operate as a *supersedaes*, and that a party below may still proceed as if no such appeal had been taken, or that such appeal ought to be dismissed as not authorized by law? We are clearly of opinion that the right to bring appeals into this court is declared and provided in the act of 10th February, 1832, as well in chancery cases as in those at law, and, in relation to final decrees in chancery is somewhat extended and modified by the act of the 11th of the same month; and that the right under the former act is by its terms limited to final judgments, sentences or decrees, while by the latter it is limited to final decrees. We are equally clear that no appeal lies to this court from an interlocutory decree.

It remains yet to be considered whether the decree in this 251
case appealed from is, in its character, interlocutory or final.

The acts of Congress providing for appeals from the Circuit to the Supreme Courts of the United States, give the right only on final judgments or decrees. The question, therefore, as to what are interlocutory and what final decrees, has received considerable attention from that court. In the case of Perkins v. Fourniquet et al., 6 Howard, 206-8, that appellees, children of the deceased wife of appellant, alleged that during her life there existed, in the State of Louisiana, between her and the appellant, her husband, a community of *acquets* and *gains*. The appellant, by his answer, denied any such community. Upon the hearing, the court decreed that the community did exist and that the appellees, a part of the heirs, had a right to recover their proportion of all their deceased mother's rights of community which accrued during her coverture with appellant, and referred the matter to a master in chancery to take and report an account of the *acquets* and *gains*, prescribing fully the manner in which the lands acquired were to be divided and the accounts taken. All other matters in controversy between the parties were reserved until the coming in of the report of the master. The court thereon said: "This clearly is "not a final decree in any respect. It is the common interloc-"utory order or decree passed by courts of chancery in cases "of this kind, and it is absolutely necessary to prepare the "case for a final hearing and final decree, wherever the "complainant is entitled to partition of property or on ac-"count."

In the case of Pulliam et al. v. Christian, 6 Howard, 212, where the bill was filed to annul and vacate a deed of trust for the benefit of creditors and a decree was passed to set aside said deed, the court said: "This decree is final only "as to the trust deed. All the matters arising under the "trust are referred to a commissioner for a statement of the "account, to enable the court to enter a final decree. There "is no sale or change of the property ordered, which can 252
"operate injuriously to the parties;" and the decree, not being final as to the whole matter in controversy, the appeal was dismissed.

In the case of Young et al. v. Smith et al., 15 Peters, 287, the bill was filed by residuary legatees against the executors of an estate. The matter was referred to a master to take an account. He made his report—it was referred back—he again reported, and exceptions filed were disallowed. The Circuit Court decreed that the report should be accepted and that the complainants should have execution for the sum reported in the hands of the executors, and, as to the residue of the debts due to the estate, as soon as they or part of them should be collected, the amount should be paid into court, for distribution to be made under the direction of the court. The Supreme Court held, (Mr. Justice Story delivering the opinion,) that this decree is an interlocutory and not a final decree, in the sense of the act of Congress. It does not dispose of the whole matter in controversy between the parties.

In the case of Brown v. Swann, 9 Peters, 1, the complainant filed her bill for injunction against a judgment at law of defendant, alleging usury and part payment, and the injunction was granted, which was afterwards in part dissolved; and afterwards, upon a hearing of the bill, answer, demurrer of the defendant, exhibits and depositions, the court decreed that the demurrer be overruled—that the complainant has sustained her allegations of usury—that payments of a part of the judgment at law had been made—that there remains a specified sum yet due—and that a claim for a further credit of fifty dollars on that sum, of which the court is not sufficiently advised, is demanded by complainant. Thereupon, the court adjudged and decreed that the injunction awarded the complainant be made perpetual for all except the specified sum—that the defendant be at liberty to proceed under her judgment at law for the

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253 specified sum, except the fifty dollars claimed as a credit by the complainant; and this cause was continued for further consideration as to the said sum of fifty dollars. In this state of the case an appeal was had, and Mr. Chief Justice Marshall delivered the opinion of the court, dismissing the appeal with costs, because the appeal was granted before there was a final decree in the case.

In the case of Bernard et al. v. Gibson, 7 Peters, 650 to 658, Mr. Justice McLean delivered the opinion of the Supreme Court. The decree appealed from awarded against the defendants a perpetual injunction, restraining them from constructing or using in any manner, or from selling or disposing of certain planing machines which the complainant alleged he had the exclusive right to, under letters patent; and it was referred to a master to report what damages the complainant had sustained by the infringement of his patent by the defendants—the report to be made in term-time to the court, or in vacation to one of the Judges; and the question of costs, and all other questions in the cause, were reserved until the coming in of the master's report. The court say the decree in this case is not final within the decisions of this court. The injunction prayed for was made perpetual, but there was a reference to a master to ascertain the damages by reason of the infringement; the bill was not dismissed, nor was there a decree for costs.

The case of Forgay et al. v. Conrad, 6 Howard, 201, seems to recognize other principles than those laid down in the foregoing cases. In that case all the questions between the parties are finally adjudicated and disposed of—execution awarded against one of the defendants, and certain lands and negroes decreed to be delivered by them to complainant, as assignee in bankruptcy—the bill being retained to have an account of the rent of the lands and hire of the slaves, stated by a master. The decree concludes as follows: "So much of said bill as contains or relates to matters "hereby referred to the master for report, is hereby retained
254 "for further decree in the premises; and so much of said "bill as is not now, nor has been heretofore adjudged and "decreed upon, and which is not above retained for the "purposes aforesaid, be dismissed without prejudice, and "that the said defendants do pay the costs." This decree, (Mr. Chief Justice Taney delivered the opinion of the court,) is held to be final, so as to authorize an appeal. He says, according to the last paragraph in the decree, the bill is merely retained for the purpose of adjusting the accounts referred to the master; in all other respects the whole of the matters brought into controversy are finally disposed of, as to all of the defendants, and the bill as to them is no longer pending. "If these appellants, therefore, must wait until "the accounts are reported by the master and confirmed by the court, they will be subjected to an irreparable injury; for the lands and slaves which they claim will be taken out of their possession and sold, and the proceeds distributed among the creditors of the bankrupt, before they can have an opportunity of being heard in this court in defence of their rights." The Chief Justice says, "When the decree "decides the right to the property in contest and directs it "to be delivered up by the defendant to the complainant, "or directs it to be sold, or directs the defendant to pay a "certain sum of money to the complainant, and the com- "plainant is entitled to have such decree carried immedi- "ately into execution, the decree must be regarded as a final "one to that extent, and authorizes an appeal to this court, "although the bill is retained for the purpose of adjusting, "by a further decree, the accounts between the parties."— "This rule, of course," he says, "does not extend to cases "where money is directed to be paid into court, or property "to be delivered to a receiver, or property held in trust to "be delivered to a new trustee appointed by the court, or "to cases of a like description. Orders of that kind are "frequently and necessarily made in the progress of a cause, "but they are interlocutory only, and intended to preserve "the subject matter in dispute from dilapidation or waste 255 "and to keep it within the control of the court, until the "rights of the parties can be adjudicated by a final decree."

The laws of Florida providing for appeals, is similar in its terms to that of the United States, and allows appeals from such final decisions as they are allowable from in the Supreme Court of the United States. We now have seen the construction given to the act of Congress by the Supreme Court; and considering the great learning, ability and virtue which have ever characterized the members of that bench, we do not feel at liberty to give a different construction from that they have given upon the same identical legal terms—more especially when that construction, corresponds with our own best judgment of the proper import of the terms used in the law. And we think, moreover, if it had been the object of the Legislature to guard against a multiplicity of appeals in the same case, no form of words could have been well devised better calculated to promote that end. We do not, therefore, concur with the court in Alabama, in distinguishing between the final judgment and the last judgment, so as to make that a final judgment or decree, which must needs be followed by another judgment or decree, which last may itself be the subject of appeal.

We will now look into the decree appealed from in this case. That decree adjudges the deed of conveyance of the complainant to the defendant, bearing date the 13th day of December, 1845, exhibited with the bill, to be wholly inoperative and void; that the defendant, Edward C. Bellamy, should and ought to account for the trust property and funds, conveyed by and possessed under the trust deed, bearing date the 19th day of November, 1844; that the defendant, E. C. Ballamy, holds that portion of the trust property, and profits and issues thereof, purchased by him at sales under execution, by the sheriff of Jackson county, on the first Mondays of January and February, 1846, subject to the uses and trusts limited and appointed in the deed of the 256 19th day of November, 1844. It is further decreed that the defendant, E. C. Bellamy, account before George F. Baltzell, a Master in Chancery, of and concerning the said trust, rendering a full, true and perfect account in detail of all and singular the trust property and funds committed to his charge, and the rents, issues, profits, crops and proceeds, issuing out of the same, or accruing therefrom; that he be removed from his said trust, and ousted of his said trust estate, and that he deliver over to the Receiver hereinafter appointed, all of the said trust property and funds, and the rents, issues and profits, and crops, arising from, or issuing out of, the said trust property, and that he stand and remain restrained and enjoined from any interference with, control over, or management of, the said trust property, until the further order of the court in the premises. It is further ordered that Frederick C. Pittman be appointed Receiver of the court in this cause, upon his entering into bond in the penalty of ten thousand dollars, with good and sufficient security to be approved by the master, conditioned for the due and faithful performance of his duties. It is then ordered that the Receiver shall take possession of said trust property, and rent out the plantation, and hire out the slaves at public auction by the year, until the further order of the court, and shall render and file in the clerk's office of the court, annual accounts of his actings and doings in the premises, and of the amount of funds and securities in hand. It was further decreed that the master proceed to ascertain and report to the court, the names of the creditors entitled to the benefits of the said trust estate, with the amount due to each respectively, and their respective order of priorities, and to advertise, in a reasonable and proper manner, for the presentation of such claims; and all further directions are reserved until the coming in of said reports.

It is very plain that this decree is not more, or so nearly

257 a final decree, as any of those we have before mentioned as having been decided by the Supreme Court to be not final, nor is there any precise similitude between it and the case of Forgay, et al., v. Conrad, which will authorize us to entertain this appeal on the authority of that case. There the property was decreed to be delivered to the complainant—here to a Receiver of the court. There the property, if received by the complainant, who was assignee of a bankrupt, would have gone into distribution among the creditors of that bankrupt—here it is retained in the custody, and under the control of the court. There if the appellants waited to appeal, until the accounts were reported by the master, and confirmed by the court, they were subject to an irreparable injury—here no such injury can ensue. It was, moreover, laid down in that case, that where money is directed to be paid into court, or property to be delivered to a receiver, or property held in trust to be delivered to a new trustee appointed by the court, or in cases of a like description, such orders or decrees are interlocutory only, and are frequently and necessarily made in the progress of a cause. We think, also, the Supreme Court went as far in assuming jurisdiction of the appeal, in the case of Forgay v. Conrad, as they would willingly go, and were rather surprised into an assumption of jurisdiction, by the perception of irreparable injury to the appellants, if they refused to entertain the appeal, than by any strong opinion that the decree was final; because they say, "undoubtedly it is not final in the strict technical sense of that term," and because they admonish chancellors in the Circuit Courts not to shape their interlocutory decrees so as to give them a final effect. The opinion delivered in the case of Forgay v. Conrad is an able and lucid one, and deserves well the serious consideration of every chancellor, when engaged in making an interlocutory decree.

There are many things required by the decree given in this cause to be done, which, when done, may be the sub-
258 ject of exception, and, consequently, of appeal. If an appeal should be taken at every step, where a party may feel dissatisfied or aggrieved, there is no foreseeing when a cause would end, and the delays of chancery would become as justly a blot and reproach on the jurisprudence of this country, as they now are, and long have been, to that of England.

We consider the decree appealed from in this case as an interlocutory, and not a final judgment, sentence or decree. The appeal must, therefore, be dismissed, and Samuel C. Bellamy, the appellee, must recover his costs.

DANIEL FRY, APPELLANT, v. NELSON HAWLEY, APPELLEE.

H. and A. having obtained a contract to carry the United States mail from the port of Apalachicola to Chattahoochee, on the Apalachicola river, for four years, at a yearly stipend of about $2,600; and H. having informed one F. that he was desirous of purchasing a steamboat for the service, and that it would require about $6,000 to purchase one suitable in all respects, and that he, H., was to furnish one-half of said sum, and A. the other half, and that each was to own a moiety in the said contract and boat; and F. agreeing with H. to furnish, and actually paying into the hands of H. one-half of the sum which he, H., had agreed to furnish or $1,500—H. binding himself to give to F. an interest with himself to the extent of the amount placed in his hands, and that he, F., should share in the profits accruing from said contract, in proportion to that amount, "all losses to be borne equally;" and the said boat having been built under the superintendence of A., and at an expense of $14,900, $6,000 of which sum was paid, and the balance secured by a mortgage upon the boat, which A. was authorized by H. to execute:—Held, that F. acquired only an interest in said boat in proportion to the amount furnished by him—that is, about one tenth, instead of one-fourth, which was the amount of interest claimed by F.—Held, also that, although the balance of the purchase money was paid by the profits of the steamboat, the extent of the interest of F. therein was only one-tenth, he not

being liable upon the contract of purchase, the boat having been built under the direction and superintendence of A., and purchased by A., acting for himself and H. 259

The Hon. THOMAS DOUGLAS, Judge of the Eastern Circuit, and the Hon. J. WAYLES BAKER, Judge of the Middle Circuit, sat at the hearing of this case, in the place of Justices THOMPSON and SEMMES, who had been of counsel in this cause.

The following statement of the case was made by DOUGLAS, Justice, who delivered the opinion of the court:—

This suit was instituted by Daniel Fry, the complainant, against Nelson Hawley, Benjamin Allen and Benjamin S. Hawley, defendants, to obtain the specific execution of a contract. The facts are as follows: viz: one Henry Allen and the defendant, Nelson Hawley, had entered into a contract with the United States, to carry a mail between Apalachicola and Chattahoochee, in Florida, for four years, at a yearly stipend or sum of about $2,600; and for the purpose of performing the said contract, as well as the business of carrying merchandize and conveying passengers, entered into an agreement on the 8th day of May, 1847, which agreement, under the hands and seals of the parties, is as follows, viz:

STATE OF FLORIDA—FRANKLIN COUNTY.

This agreement made and entered into between Henry Allen, of the State and county aforesaid, and Nelson Hawley, of the aforesaid State, and county of Gadsden, witnesseth—That the said Henry Allen and Nelson Hawley, being jointly interested in a contract with the United States, for carrying the mail for four years, commencing on the first day of July next, on the Apalachicola river, between the city of Apalachicola and Chattahoochee, on said river, known as route No. 2523, all in the State aforesaid, and in order to carry out said contract, to agree that the said Henry Allen, on his part, is to furnish in cash the sum of three thousand dollars, and the said Nelson Hawley, on his part, is to furnish the like sum of three thousand dollars. And it is further understood and agreed that the said money, say 260 six thousand dollars, is to be paid in the hands of the said Henry Allen, and he is to proceed at once to New Orleans, and if necessary up the Mississippi and Ohio rivers, for the purpose of purchasing a suitable steamboat to carry out the conditions of the said mail contract—using his judgment and means to the best advantage in making a selection and purchase of said boat; and if found upon examination to be for the advantage of the parties interested to pay more than $6,000 for said boat, he, the said Allen, shall be authorized to give a joint note for the balance required, or secure the parties by lien upon the boat, as may be deemed most expedient, all necessary expenses accruing in purchasing said boat to be shared equally by both the above named parties. And it is understood and agreed that said Allen is to have command as master of said boat, or boats, at a reasonable salary, say one hundred dollars per month, and to give his undivided attention to the interest of the contractors. And it is further agreed that Daniel Fry is to be employed in the capacity of engineer, to furnish his second, at a salary of one hundred and thirty-five dollars per month, so long as he faithfully discharges his duties in the above capacity, to the satisfaction of the master of said boat. And on the same day, (8th day of May, 1847,) after said agreement had been executed, an arrangement was made by the said Nelson Hawley and the complainant, as evidenced by a receipt given by the said Hawley, which is in the following words, viz: "Received of Daniel Fry fifteen hundred dollars, to be invested in a steamboat by Captain Allen, for the purpose of carrying the mail between Apalachicola and Chattahoochee, for the term of four years, commencing July 1, 1847; Nelson Hawley being jointly interested with Captain Henry Allen in the above mentioned contract, binds himself to give to the said Fry an interest with himself, to the extent of the amount placed in his hands, and in proportion to that amount, he is to share in the profits accruing

261 from said contract. Said Nelson Hawley further binds himself to consult and advise with said Fry in all matters of importance in regard to the said joint interest—all losses to be equally borne. (Signed) Nelson Hawley."

This receipt contains the agreement, the specific execution of which is sought to be enforced by this suit; the complainant claiming that he is entitled to a conveyance of one *equal* moiety, or *one-half* of the interest of Nelson Hawley in the said steamboat, and to one-fourth of the nett profits of the whole contract, in virtue of said contract or receipt. Nelson Hawley, on the other hand, contends that the complainant is only entitled to one-tenth interest in the said steamboat, and one-tenth of the nett profits of the said contract. Nelson Hawley placed the sum of $3,000 in the hands of the said Henry Allen, and he proceeded to Cincinnati, for the purpose of purchasing the desired steamboat, but not being able to purchase one which, in his judgment, would suit the business, he contracted for the building of one, to be called the Quincy, for the sum of $14,900, three or four thousand dollars of which (the exact sum is not stated) was paid in cash, and $6,000 in drafts or bills representing cash, and the balance of the cost was secured by a mortgage executed by said Allen on the boat, he having contracted for and taken a title to her in his own name *alone*. The boat was completed and brought to Apalachicola river about the month of October, 1847, the said Henry Allen acting as master, and the complainant as engineer; and it appears by the proof in this cause that he has continued in that service ever since, with his brother as his assistant, at a salary of $135 per month. The said steamboat commenced running and carrying the mail as contemplated after her arrival in the Apalachicola river, under the command of the said Henry Allen, who, some short time after her said arrival, conveyed one-half interest in her to the said Nelson Hawley. It appears by a *balance sheet* of the said steamer, annexed to the answer of the said Hawley, that, on the 22d day of July, 1848, the boat had made a sufficient amount of profits to pay off the balance then due 262 of her purchase money, amounting to $8,900, and leave a sum to her credit of $988.91; and the report of a special master, to whom the matter had been referred by a decretal order of the Circuit Court on the 27th of December, 1849, shows that, on the first day of January of that year, (when a receiver had been appointed,) "the profits of the steamer Quincy from her arrival upon the said river had been $12,-930.51." The special master also reported (under the said decretal order) that the costs of the said steamer, on her arrival at Apalachicola, was $15,000; that the sum advanced by the complainant, Daniel Fry, was $1,500; that this amount bears a proportion to the whole cost of the boat of one-tenth, and that the complainant having contributed one-tenth of the original cost, is entitled to one-tenth of the profits, say $1,293.65. The report of the master was confirmed, and the court "decreed that Nelson Hawley, defendant in this suit, by good and sufficient deed, to be prepared by the master in chancery, do convey to complainant, Daniel Fry, one-tenth interest in and to the steamboat Quincy, her tackle, apparel and furniture; and further, that the receiver theretofore appointed in this case, pay over to the said Daniel Fry one-tenth portion of the nett proceeds of said steamboat up to the present time—deducting whatever sums may have been paid or received by the said Fry out of said proceeds, and that the balance of said funds in the hands of said receiver be paid over to said defendant, Nelson Hawley. And it was further ordered that the injunction in this case be dissolved, and that defendant do pay the costs of this suit, except the cost of said receiver, which is taxed at fifty dollars, and twenty dollars to be paid to Samuel W. Spencer, special master, and which it was ordered that complainant do pay. From this decree, the complainant appealed to this court.

Maxwell, for the complainant and appellant.

For the complainant it is contended that, by virtue of this

agreement between Hawley and himself, he is entitled to 263 an equal share in the boat with Hawley and to an equal participation in the profits or earnings, and that the agreement is susceptible of no other fair interpretation.

The agreement between complainant and Hawley is founded upon the agreement or contract between Allen and Hawley, to which it refers. The latter constituted a joint undertaking between the two parties to carry the United States mail, passengers and merchandise, of which the capital or joint stock is $6,000 in money, in equal moities of $3,000 each. Although it may have been intended that they were to be tenants in common of the boat when purchased or built, yet it is so blended with the employment that the contract may be termed a *quasi* partnership.

The usual relation of part owners of a vessel is that of tenants in common, but they may become partners. When a person is to be considered as part owner or as partner in a ship depends upon circumstances. 3 Kent's Commentaries, 154, 155. Holderness vs. Sheckels, 8 Barnewall & Creswell, 612. Lamb vs. Durant, 12 Massachusetts, 54. Harding v. Foxcroft, 6 Greenleaf, 77. Seabrook v. Rose, 2 Hill's Chancery, 555.

But whether the parties are to be considered as partners or part owners is not material to this controversy—the distinction between the two characters will not affect the claim of complainant. So far as his rights are involved herein, there is no difference between the two positions. Hawley receives from Fry $1,500 in cash, and, in consideration of the sum so paid, binds himself to give Fry an interest with himself in the contract he had entered into with Allen to the extent of the amount so placed in his hands, and in proportion to that amount he (Fry) is to share in the profits accruing from said contract, and stipulates that all losses shall be equally borne; and this contract the complainant seeks to enforce.

It is admitted that every contract, deriving its force from the mutual assent of the parties, is to be interpreted accord- 264 ing to the intention of the parties, so far as it is legal and mutually understood, (Story on Contracts, second edition, §634;) and that the exposition is to be upon the whole contract, and not upon disjointed parts taken separately. Ibid, §657, and authorities cited.

Yet it is equally true that, where the language of the instrument is neither uncertain nor ambiguous, it is to be expounded according to its apparent import, and is not to be warped from the ordinary meaning of its terms, in order to harmonize it with uncertain suppositions, in regard either to the probable intention of the parties contracting, or to the *probable changes which they would have made* in their contract, had they foreseen certain contingencies. Whenever the words are *clear* and *definite*, they must be understood according to their grammatical construction, and in their ordinary meaning. Story on Contracts, second edition § 639 2 Evan's Pothier on Obligations, 37.

The rule that "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument," is said to admit of an exception when, in equity, a party seeks a specific performance of an agreement, the defendant may show fraud, accident or mistake—that such a decree would be against *equity* and *justice*, by parol evidence of the circumstances, even though they contradict the writing. 1 Greenleaf on Evidence, § 296, a.

In this case there is no fraud, accident or mistake in reducing the contract to writing alleged in the answer of defendant; and I am willing that the language employed may be "read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties;" and shall confidently contend that the decree which the complainant seeks for is neither inequitable nor unjust.

Hawley's agreement with Fry is made with special reference to the agreement or contract he had made with

Allen; and to understand the meaning of the terms, "an interest with himself" in it, "to the extent of the amount placed in his hands," it is only necessary to ascertain what was the interest of Hawley in the joint concern of Allen and Hawley, and what proportion the contribution of Fry bears to it; and in this examination I invoke the whole of the two instruments, and not disjointed and separate parts of either.

The evidence discloses, and it is also conceded, that Hawley was entitled to a moiety of the boat, by reason of the contribution of one-half the stipulated capital, say $3,000, as between himself and Allen. Now, Fry's contribution being $1,500, or one-half thereof, does it not make the extent of his interest with Hawley just one-half—in other words equal with Hawley ? And is not this confirmed by the subsequent stipulation that all losses are to be *equally* borne? Hawley's interpretation that it is the proportion which $1,500 bears to the whole cost of the boat is a strained one—if indeed, that can be called an interpretation which is not sustained by the language of the agreement, *per se*, nor with "the aid of the light of the surrounding circumstances."

It was conceded in argument below, and so considered by the court, that if the boat had cost but $6,000, the amount of the capital, the complainant would have been entitled to one-fourth of the whole, and an equal share with defendant, Hawley. The fact that the boat cost $15,000, does not at all vary the result of our interpretation; for it is not pretended that Hawley, or Allen, or any one else contributed any additional money to the capital to be invested in the enterprize, but the residue of the cost of the boat, over the amount of the capital, was provided for by a hypothecation of the whole boat, which included as well Fry's interest, or contribution, as that of Allen and Hawley; and from the *nett profits*, this debt was paid off on the 28th July, 1848.

The learned Judge below seemed to consider that the cost
266 of the boat exceeding the capital produced an ambiguity, which could only be cleared away by parol evidence, and that it must be considered as latent. With all due respect, I think this is erroneous. This circumstance produced no change in the contract—could not render it obscure, or affect the mutual rights of the parties. At the time of the contract, it was not definitely ascertained what would be the cost of the boat, although it seemed to be within the idea of the parties that the capital contributed might be sufficient. The agreement between Allen and Hawley, executed the same day, and we may presume immediately prior to the agreement in controversy, and referred to in the latter, provides that the capital is to be paid into the hands of Allen in cash, and he is to proceed to New Orleans, up the Mississippi and Ohio rivers, for the purpose of purchasing a *suitable* steamboat; and if found upon examination to be for the advantage of the parties interested *to pay more than* $6,000 *for said boat*, he, the said Allen, shall be authorized to give a joint note for the balance required, or secure the parties by *lien on the boat*, as may be deemed most expedient." It thus appears that the agreement is a continuing one—it was for the purchase of a *suitable* boat, and would, of necessity, embrace any boat that might be purchased, regardless of the cost. The price was unknown, and the investment was confined to the skill and discretion of Allen. If the capital had been increased by additional contributions from Hawley and Allen, then Hawley might have some foundation for his pretensions, if Fry, upon application, had declined to increase his contribution in similar proportion; but this is not the case—there was no change in the original contract.

Hawley never ventured any more money in the enterprize; but if he had advanced more money, otherwise than as a contribution to the capital, he would have been a creditor of the company only, to the amount so advanced and interest. Conwell v. Sandige, 5 Dana, 212.

Fry vs. Hawley.—Argument of Counsel.

A Court of Equity will not give a strained construction 267
to a contract to create a *societas leonina*. Upon what principle of equity, can Hawley's interest, under his agreement with Fry of May 8, 1847, be greater than that of Fry ? The learned judge below says, "the evidence shows that Fry only put into the original venture fifteen hundred dollars, and to that interest and rateable profits, he is entitled." Is it not also true, that the evidence shows Hawley only put into the original venture fifteen hundred dollars ? and it is respectfully asked, upon what principle of equity, justice, reason, or common sense it is, that Hawley's $1,500 is entitled to four-tenths of the boat and profits, and that Fry's $1,500 is only entitled to one-tenth of the boat and profits ? and this, too, in face of Hawley's stipulation in the agreement, that Fry is to have "an interest with himself, to the extent of the amount ($1,500) placed in his hands, and in proportion to that amount he is to share in the profits accruing from said contract," and "all losses to be equally borne ?" In the absence of all stipulation, equity would divide the profits, or nett gains, according to the contributions to the capital, or equally. It is only by express agreement and stipulation, that one partner can claim a larger share of profits than his co-partner. 3 Kent's Commentaries, 28,29.

Why fix Fry's interest at one-tenth of the boat, except upon the hypothesis that the capital invested was $15,000, which is contradicted by the testimony ? The capital of the company was settled at $6,000—to this extent only did the parties contribute. The additional $9,000 of the cost of the boat was a debt of the company, which Hawley might or might not have been liable for; and whether he was so liable or not, the learned judge below in his opinion considers immaterial. He says: "Fry certainly did advance as much money as Hawley, but that Hawley in his contract with Allen incurs a responsibility not shared by Fry, and gives Allen a *carte blanche* to use his name upon any notes which might be necessary to complete the purchase; and whether this were done or not, matters little, 268
further than it goes to show what was the real state of affairs at the time the contract was made, and what, at least, was Hawley's intention." And he asks, "if Fry was aware of this contract, why did he not, in his with Hawley, have a provision inserted covering the purchase of a boat which might cost more than $6,000?" Of course, Fry was aware of this contract—he could not have been ignorant of it—the contract of Allen and Hawley is referred to in his agreement with Hawley; but the answer is obvious. Fry, although the partner of Hawley, was not the partner of Allen in the purchase of the boat, and in purchasing of Hawley a moiety of his interest in said contract, he incurred also a moiety of Hawley's responsibilities. This was the condition. It is asked, if the boat had been lost coming to Apalachicola—or if Hawley had paid up the purchase money due upon the boat, and she had been then lost—could he have any claim upon complainant ? The answer is, yes; for it is stipulated between Hawley and complainant, that "all losses shall be equally borne."

It is said that Fry could have pointed to the agreement, and shown that his responsibility was limited to the $1,500 paid by him, and that he could lose no more. Not so. Fry had agreed with reference to the agreement between Allen and Hawley—he knew from this, that a *suitable boat* was to be procured, even if the cash capital was insufficient, and that a credit was to be obtained for the remainder of the purchase money, to be secured by the joint note of Allen and Hawley, or by lien on the boat. It is further in evidence, that he accompanied Allen in his search for a suitable boat, and that the steamer Quincy was built, and he served on board of her as engineer from Cincinnati, the place of building, to Apalachicola, and as he uttered no dissent, by his acts and conduct he would have been estopped to deny his acquiescence in the purchase of the boat, and his liability to Hawley for a moiety of the debt thus

Fry vs. Hawley.—Argument of Counsel.

269 incurred. Pickard v. Sears, 33 English Common Law Reports, 117. Gregg v. Wells, 37 English Common Law Reports, 58. Camp v. Parkhill, 2 Florida Reports, 197.

But the debt of $9,000 to the builders was secured by hypothecation of and lien upon the boat, and, therefore, the position that the credit should extend to the increase of Hawley's interest and profits alone, cannot be supported in equity, or justice. Fry had as much at stake as Hawley had—he had advanced to the enterprise as much money, and that which he had contributed was charged with, and liable for, the debt equally with Hawley's. If the boat had been lost, or had been unable to make sufficient gains or profits to pay the debt, and it had been seized or sold, Fry would have lost as much as Hawley would. According to the agreement and the evidence, Hawley was not under any greater degree of liability or responsibility than Fry was; for if Hawley had incurred any loss, or had been compelled to pay any money, Fry was bound to contribute.

In building the boat and fitting it out for service, Allen, it is to be inferred from the evidence, was the only person known to the builders—they made a bill of sale of the boat, when finished, to him alone, received from him the payment of $6,000, and the hypothecation of the boat for the balance due, $9,000; and Allen retained the title until the debt was paid in July, 1848, from the profits, when he conveyed one moiety to Hawley. Upon the principle which Hawley contends for, Allen could have claimed eight-tenths of the boat, and it seems with more show of propriety than Hawley's case exhibits as against Fry.

The learned Judge below says, "the moment the boat was purchased. Hawley became liable to Allen, if he, Allen, paid more than his portion, by way of contribution; and being regarded in the eye of the law as joint owner with Allen, was subject to all and any loss with him." And why is this rule not applicable to the relation which subsisted between the complainant, Fry, and the defendant, Hawley?

270 When Hawley became liable to Allen, as joint owner of the boat with him, for additional contributions and all losses, is it not equally true that complainant, Fry, became liable to Hawley, for his moiety of any additional contributions, he, (Hawley,) should make, or for his moiety of the losses, because he, (Fry,) was joint owner with Hawley of the one moiety of the boat? Are not these the terms upon which Hawley admitted Fry to a participation with him in his share of the enterprise? This is conclusively proved by a reference to the agreements and the evidence?

Suppose A and B enter into any joint undertaking for the transaction of business, but in which B is a silent or secret partner, unknown to the community, although he contributed one-half of the capital. A enters upon the business, invests the cash capital, and obtains credit for other property, goods, &c., used in the business, beyond the capital.—Will equity permit A, upon a dissolution or settlement, to say to his partner, you are entitled to the profits only upon the amount of cash actually contributed by you—the profits upon the credits obtained are mine exclusively, for you were not known as a partner with me? Clearly not; and wherein does the case at bar differ from it?

If the position assumed for Hawley be correct, then it must be admitted that Fry made a most silly bargain—his capital was at risk of loss, without compensation, or at most, a very remote and small benefit. 1. His share of the boat was implicated for Hawley's benefit, as the security of a portion of the debt of $9,000. 2. While thus implicated, it was making for Hawley four dollars for one dollar for Fry. 3. The fifth which it was thus making for Fry, was also implicated for the debt upon the boat, and only receivable when the debt was discharged; for he was not the partner of Allen, but of Hawley—his claim to the profits is through Hawley; and it is not to be presumed that Allen would permit a dollar of the profits to be withdrawn until the debt was paid; and if any accident had happened prior to that event, Fry's capital as well as profits would be involved in 271
the catastrophe; while Fry was liable for an equal portion of Hawley's losses, if any, beyond the $1,500 in cash invested. Truly, this is a perfect illustration of the *societas leonina* of the civilians. To escape from this injustice, the learned judge below interprets *"equality"* to mean *"proportionably;* but they are not synonymous or convertible terms, nor is there any necessity to a fair and perfect understanding of the contract, that the language should be changed to harmonize. Besides, it would only meet a part of the objections to such a construction.

The language is neither uncertain nor ambiguous, and is not to be warped from the ordinary meaning of its terms—the words being clear and definite, they must be understood according to their grammatical construction, and in their ordinary meaning. Story on Contracts, (2d edition,) § 639.

The principle asserted by the learned judge below, that a party seeking a specific performance must show that the agreement is certain and fair, and the remedy mutual, is admitted. Goldsmith's Equity, 79. Story's Equity Jurisprudence, § 723. 1 Johnson's Chancery Reports, 282, 370.

It is contended here that the agreement on its face, and by equitable interpretation, is both certain and fair; that nothing is asked for by complainant which is either inequitable, or unjust; that, so far as the principle of mutuality is involved, the agreement on the part of complainant was *executed*—he paid the amount of his contribution at the time of entering into the contract. It is not proper to resort to conjecture, or to possible cases which might occur, in order to show that a state of case might arise in which there would be a want of mutuality, although in this case such a line of argument might be successfully treated.

An agreement must depend on the circumstances at the time, and cannot be made better or worse by subsequent facts. Morris v. Burroughs, 1 Atkyns, 404.

In cases where, when the specific performance would be attended with great loss and hardship to the defendants, the 272
court has not decreed a specific performance, but has directed an issue to try what damages the party has sustained by non-performance of the agreement. See City of London v. Nash, 3 Atkyns, 516.

Such, however, is not the case at bar—it will be attended with no real loss or hardship to the defendant, Hawley, to yield up to complainant the just and full share of the profits of his capital—to give him a share in the contract to the extent of the amount contributed, and a participation in the profits in proportion to that amount. A court of law could not, by way of damages, give to the complainant full and adequate relief.

The case of Brashier v. Gratz cited below is wholly inapplicable. There the complainant was in default—a considerable length of time had elapsed, and there had been a great change in the title and value of the land, and the court held very justly there was a want of reciprocity, and declined to interfere. 5th Peters' Condensed Supreme Court Reports, 161.

So, also, in Benedict v. Lynch, cited in opinion of the court below, the contract stipulated that if the vendee did not comply with the covenant to pay as stipulated, the contract should be *void;* the vendor made default, some two or three years elapsed, and the vendee sold the land to another—the court, under the circumstances, refused the prayer for a specific performance. 1st Johnson's Chancery Reports, 370

Now, the facts of these cases bear no analogy to the case at bar, and the principles held therein are entirely inapplicable. Here there was no default on the part of Fry—his portion of the contract was executed—he had contributed in money his share of the capital—as joint owner with Hawley, he was responsible for a moiety of his share of liability or loss, and by his acts and conduct, he was estopped to deny his acquiescence in the debt of $9,000 incurred in building and fitting out the boat.

273 He has not so conducted himself as to be obnoxious to the principle of equity quoted by the learned Judge below, from Story's Equity Jurisprudence, §750—he has not led to the defeat of any legitimate object of Hawley, nor has the character and condition of the property been so altered, that the terms of the original contract will not apply to it. A reference to the authority cited by Justice Story, will show that it can have no application to the case here. See Duke of Bedford v. British Museum, 8th Condensed English Chancery Reports, 128.

It is admitted that the question of specific performance is one addressed to the discretion of the court—not of arbitrary and capricious discretion, but of that sound and reasonable discretion, which governs itself, so far as it may, by general rules and principles; but, at the same time, which withholds or grants relief, according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties. Story's Equity Jurisprudence, § 693, 742, 769.

To this discretion, as expounded by the learned jurist, we appeal with confidence for a judgment of reversal, and for a decree granting the prayer of complainant's bill.

Davis, for respondent and appellee.

1. The right of Fry to any share in the boat must depend on the written agreement.

2. Subsequent acts cannot be given in evidence to explain any ambiguity in the written contract. Chitty on Contracts, 106. Comyn on Contracts.

3. To entitle Fry to a specific performance of the agreement which he insists on, it must appear that Hawley had a remedy against him to compel performance of his (Fry's) part of the contract. The remedy must have been mutual. Benedict v. Lynch, 1 Johnson's Chancery Reports, 370. Ibid, 282. 2d Story's Equity, section 723.

4. The words "joint interest" do not warrant the conclusion that an equal interest was intended. Collier on Part. 13.

274 5. To interpret the contract the whole must be taken together. The words "all losses to be equally borne," when taken in connection with the rest of the agreement, must be construed to mean that the losses are to be borne by each in proportion to his share.

6. The debt contracted by Allen in building the boat was in nowise a liability of Fry. Hawley and Allen alone were bound. Fry was not liable, even to Hawley.

7. The fact that the share of Fry was left undetermined is evidence that he did not contract for any specific part.

8. If Fry did not contract for a fourth, the fact that he did not demand his portion of his earnings or his wages gives him no claim to any greater share than that which he was entitled to under the contract. There is no proof that he demanded his profits or wages, or that he was requested to let them remain in the hands of Allen and Hawley.

9. The mortgage of the boat was a necessary consequence of the agreement between Allen and Hawley. Fry had no legal interest until Hawley made him a title. If Hawley failed to do so, Fry had his action to recover the sum deposited with Hawley.

10. The nature of the contract between Fry and Hawley was not a sale of an interest, because the thing was not in *esse.* It was in the nature of a trust. Hawley was bound by the contract to constitute Fry an owner in a steamboat, and an owner in a mail contract "to the extent" of the cash paid by Fry. Fry was to have $1,500 in value of the property.

11. The answer of Hawley and the admissions of Fry all disprove the allegations of the bill. If the case rests on the contract, Fry cannot claim more than the ratable interest, which $1,500 bears to the whole sum. If it is put on the answer and the testimony, he can only be entitled to the same one-tenth. Upon the whole, the decree was correct, and nothing has been adduced to change it.

DOUGLAS, *Justice,* delivered the opinion of the court.

This case has been fully argued by the counsel for the

respective parties, and the questions presented for our con- 275
sideration are, what interest the complainant is entitled to in the said steamboat, and what share of the nett profits he ought to receive.

It is admitted that every contract, deriving its force from the mutual assent of the parties, is to be interpreted according to the intention of the parties, so far as it is legal, and mutually understood. Chitty on Contracts, pages 148, 149, 1st edition, sections 228, 231, and that exposition is to be upon the whole contract, and not upon disjointed parts taken separately. Page 157, section 252.

For the complainant, it is contended that, by virtue of this agreement between Hawley and himself, he is entitled to an equal share in the boat with Hawley, and to an equal participation in the profits or earnings, and that the agreement is susceptible of no other interpretation.

That Hawley's agrement with Fry was made with special reference to the agreement or contract he had made with Allen, and to understand the meaning of the terms, "an interest with himself," it is only necessary to ascertain what was the interest of Hawley in the joint concern of Allen and Hawley, and what proportion the contribution of Fry bears to it.

That the evidence discloses, and that it is also conceded, that Hawley was entitled to a moiety of the boat, by reason of the contribution of one-half the stipulated capital, say $3,000, as between himself and Allen; and Fry's contribution being $1,500, or one half thereof, makes the extent of his interest under Hawley just one-half—in other words, equal with Hawley's, and that this is confirmed by the subsequent stipulation, that "all loses are to be equally borne."

That Hawley's interpretation, that it is in the proportion which the $1,500 bears to the whole cost of the boat, is a strained one, and that a Court of Equity will not give a strained construction to create a *societas leonina.* The last proposition we deem a sound one. But we understood the position of the defendant's counsel to be, that Hawley was 276
entitled to a moiety of the boat, on account of his contribution of $3,000, and of his having given to said Henry Allen authority to use his name, to procure a credit to any amount beyond the sum of $6,000, that might be necessary to procure a steamboat suited to the accomplishment of the objects they had in view, viz: the carrying of the mail, and the transportation of merchandise, conveyance of passengers, &c.; he (Hawley) thus making himself equally liable with said Allen for any debt which the latter might contract in effecting that object. And this we consider a correct view of the matter, and we are unable to perceive why Hawley's interpretation of his contract with Fry is a strained one. To interpret the contract, the whole must be taken together. "Faithful interpretation implies that words, or assemblages of words, be taken in that sense which we honestly believe that their utterer attached to them." Lieber's Hermeneutics, 99. "Since our object is to discover the sense of the words before us, we must endeavor to arrive at it as much as possible from the words themselves." Ibid, 113. The whole of the agreement is to be considered—the construction is upon the *entire* deed or agreement, not merely upon disjointed and particular parts of it. The whole context shall be considered in endeavors to collect the intention of the parties, although the immediate object of inquiry be the meaning of an isolated clause.—Chitty on Contracts, 6th American edition, 83. Now, what are the words we are called upon to interpret?—"All losses to be equally borne. What is the instrument we are called upon to construe?—The receipt of Hawley to Fry, viz:

"Received of Daniel Fry fifteen hundred dollars, to be invested in a steamboat, for the purpose of carrying the mail between Apalachicola and Chattahoochee, for the term of four years, commencing July 1, 1847; Nelson Hawley being jointly interested with Captain Henry Allen in the above named contract, *binds himself* to give to said Fry *an*

interest with himself to the extent of the amount placed in his hands, and *in proportion to that amount,* he is to share in the profits accruing from said contract. He further binds himself to consult and advise with said Fry in all matters of importance in regard to said joint interest." What joint interest?—the joint interest of Hawley and Allen. Now, the contract here spoken of, is the contract for carrying the mail, and the joint interest mentioned, is the interest of Hawley and Allen in that contract. No reference is here made to the agreement between Allen and Hawley about the purchase of the steamboat. The object in view, viz: the carrying out of that contract to convey the mail, appears from the fact that the $1,500 advanced by the complainant, was to be invested in a steamboat by Captain Henry Allen for that purpose; and Nelson Hawley being jointly interested with Captain Henry Allen in that contract, binds himself to give the said Fry *an interest with himself to the extent of the amount placed in his hands,* and in *proportion to that amount,* he is to share in the profits accruing from said contract. Why all this circumlocution, if it were intended that Fry should have an equal interest both in the steamboat and in the profits accruing from said contract? Why did not Hawley say, being jointly interested with Captain Henry Allen in the above mentioned contract, I bind myself to give the said Fry an *equal interest* with myself in said contract and an *equal share* of the profits accruing therefrom? It would have taken fewer words and been clear of all doubt—no room would have been left for construction, and in the agreement which he had on that very day executed with Captain Allen, he had a precedent for so drawing it. If the instrument had stopped here, no question, we think, would have been raised about its construction—the whole difficulty then rests upon the words, *"all losses* to be equally borne." But the construction must be reasonable—it must also be as near the minds and apparent intents of the parties as the rules of law will admit. 2d Blackstone's Commentaries, 379; and it is essential to consider the subject matter of the agreement, in affixing a meaning to the terms used therein. Chitty on Contracts, 6th edition, 74. The subject matter here was a portion of this steamboat and of the contract mentioned, and the question is, the extent of those interests intended to be conveyed. If these words must be understood to mean that Fry must bear the same amount of any loss as Hawley, and that, consequently, he (Fry) shall have the same interest in the steamboat and in the profits of the contract as Hawley, then it results that Fry, for the sum of $1,500, is to have as large a share of both as Hawley, who has paid $6,000. We do not lose sight of the fact, that some five or six thousand dollars balance due on the boat, was paid out of the profits accruing on the contract, or that the boat was mortgaged to secure that debt; but it was the debt of Allen and Hawley; and if they had suffered it to be sold to pay their debt, Hawley would have been liable to Fry for his $1,500, unless, indeed, they had procured another boat, and Hawley had given him an interest in it according to his contract, which he would have had a right to do; for the agreement between Hawley and Fry did not specify that the $1,500 should be invested in any particular boat—such a result would certainly be a very onerous and unequal one, and comes pretty well up to the idea of a *societas leonina.* But we see no good reason for so interpreting this contract. From the phraseology of the whole instrument, and the reason and justice of the case, it seems to us quite clear, that the *intent* of the parties was that the words, *"all losses to be equally borne,"* was that each should bear any loss that might occur, in proportion to his interest. Equality is said to be equity, which judges according to what is good and equal, and we do not perceive that construing the words, "all losses shall be equally borne," to mean that they shall be borne in proportion equal to their respective interests, does any violence to the English language. By reference to the word equal in Webster's Dictionary, folio edition, pages 471 and 475, we find it, amongst many other definitions, stated "Equal," "being in just proportion," "to make equivalent to," "to recompense fully," "to answer in full proportion." We are satisfied, therefore, that the words ought to be interpreted and construed to mean that Fry shall answer to Hawley in full proportion to his interest. From a just and proper reading of the receipt itself, therefore, without any "resort to the aid of the light of surrounding circumstances." it seems to us that the construction placed upon this instrument by the court below is the correct one.

But let us take a view of those circumstances and see whether they are calculated to sustain or change this view of the subject. One fact deemed of some moment is, that the complainant is an engineer, and it was a matter of considerable importance to him to obtain constant employment as *such,* at good wages. This seems to have been one object which it appears he accomplished by it; for, although no reference is made in the receipt given by Hawley to Fry, for this $1,500, to the agreement between Hawley and Allen respecting the purchase of the steamboat, yet it clearly appears by reference to the bill of complaint in this case that the complainant was fully aware of it, for he commences with the charge that "Nelson Hawley informed him that, in connection with Henry Allen, he had obtained a contract to carry the United States mail from the port of Apalachicola to a point on the Apalachicola river, known as Chattahoochee; that said contract was to continue four years, at a yearly stipend of $2,600; that said Hawley also informed him (Fry) that he was desirous of purchasing a boat to carry said mail and perform said contract, and that it would require about $6,000 to purchase a suitable boat for the purpose aforesaid; that he was to furnish $3,000 and said Allen to furnish the remaining $3,000, and each was to own one moiety in the said contract and the said boat." And on looking into this contract we find one of its stipulations to be that "Daniel Fry is to be employed in the capacity of engineer, (to furnish his second,) at a salary of $135 per month, so long as he faithfully discharges his duties in that capacity, to the satisfaction of the master of the boat;" and the fact which the evidence discloses that he has been thus employed, with his brother as his second, ever since the boat has been running on the Apalachicola river, at the wages mentioned, leads to the irresistible conclusion that this stipulation was inserted by the parties, after an understanding with him on the subject. Now, it is very extraordinary that the complainant, with the intimate knowledge he possessed of the agreement between Allen and Hawley, in making his agreement with Hawley, did not also take care to have an express stipulation inserted by Hawley in the receipts given by him to complainant, that he should have one *moiety* or *half* of Hawley's half or moiety of said boat and the profits accruing from said contract, if such were the *intention* of the parties. Indeed, if the transaction was to have been, as is contended, of such a nature as to make it *quasi partnership* between the three, Allen, Hawley and Fry, so as to make Fry liable beyond the sum of $1,500 advanced by him, it is not easy to account for the fact that he did not at once enter into the agreement with Allen and Hawley, or why they did not require him to do so, and thus make him equally liable with Hawley for any outlay beyond the $6,000. There is no evidence that Fry ever set up a claim against Hawley for one-fourth of the boat and profits, &c., until the commencement of this suit, and such a claim is inconsistent with the acts of the complainant himself, who, as appears by the answer of the defendant, Hawley, responsive to the bill, and by the testimony in the case, offered to take one-sixth interest in the said boat—an offer quite inconsistent with the claim of a right to one-fourth. The court assents to the proposition of the counsel for Mr. Hawley that "to entitle the complainant

Fry vs. Hawley.—Opinion of Court.

281 Fry to a specific performance of the agreement which he insists on, it must appear that the defendant, Hawley, had a remedy against him to compel performance of his (Fry's) part of such contract." It seems to be very generally and very properly laid down in the books that a court of equity will never decree a specific performance where the remedy is not mutual, or one party only is bound by the agreement. Parkhurst v. Van Courtlandt, 1 Johnson's Chancery Reports, 282, and authorities there cited. 2 Story's Equity, section 723. Fry had advanced $1,500; the boat has cost $15,000; one-fourth of the cost is $3,750—where was Hawley's remedy to compel Fry to pay the difference, $2,250?

It is contended on behalf of the complainant that the agreement on the face of it and by equitable interpretation is both certain and fair; that nothing is asked for by him which is either inequitable or unjust; that so far as the principle of mutuality is involved, the agreement on the part of the complainant is *executed;* that he paid the amount of his contribution at the time of entering into the contract. If this be so, if the contract on the complainant's part was *executed* by the payment of the sum of $1,500 at the time he entered into the contract, and we think it was, then surely there is *no* mutuality.

An agreement must depend on the circumstances at the time, and cannot be made better or worse by subsequent facts. Morris v. Burroughs, 1 Atkyns, 404. Subsequent acts cannot be given in evidence to explain any ambiguity in a written contract. Chitty on Contracts, 106. 1 Atkyns, 404, 605. The debt contracted by Allen in building the boat was in nowise a liability of Fry. Hawley and Allen *alone* were bound for that debt. Fry was not liable for it. So far as we are able to discover, from anything which the record discloses, he was not liable over to Hawley. Fry, by the payment of his $1,500 into Hawley's hands, obtained a permanent situation as engineer, at $135 per month, and an interest in the steamboat and the profits, &c., in proportion to the amount he advanced. These were strong and, no 282 doubt, the controlling inducements to make this advance, [and in construing a contract the court will look to the motives that led to it, and the object intended to be effected by it, Davis et al. v. Barney, 2 Gill & Johnson, 382,] and we do not deem a contract very onerous, by which a man gets $1,273 in a little more than one year on an investment of $1,500, and a permanent situation besides, as engineer, at $135 per month.

Upon the whole, therefore, we see no reason to disturb the decree of the court below, and it is consequently in all things affirmed.

Per totam Curiam.

DECISIONS
OF THE
Supreme Court of Florida,
AT
January Term, 1852,
Held at Tallahassee

FARISH CARTER, APPELLANT, *vs.* ARCHIBALD T. BENNETT, APPELLEE.

The Superior Courts of the Territory of Florida, though not Constitutional Courts, were nevertheless Courts of the United States, since they derived their existence from the legislation of Congress, under the powers conferred by the Constitution.

The Circuit Courts of the State of Florida had no right, as such, to succeed to the records and jurisdiction of the Superior Courts, though the former were held in the same places, became possessed of the records, and had jurisdiction of the same matters as those which were cognizable by the former. The validity of the transfer of causes from the one Court to the other, depends upon the concurring legislation of the two powers by which the Courts were established.

The Act of July 22, 1845, transfers all causes, civil and criminal, pending in the Superior Courts, and all common law cases pending in the County Courts, to the Circuit Courts of the State, there to be proceeded in without delay. The eighth section of said act except such causes as are cognizable by the Federal Courts to be organized in this State, which it directs, shall be transferred to said Court.

All the Courts of the United States derive their authority from express grant, and can, therefore, exercise jurisdiction only in those cases where it is conferred upon them by Act of Congress. The Judiciary Act of 1789, provides for the removal of a cause of Federal cognizance from a State Court to the Circuit Court of the United States, by requiring the defendant, if he wishes to do so, to file his petition for such removal, at the time of entering his appearance in the State Court.

The Act of Congress of February 22, 1847, was designed to transfer to the United 284 States Courts organized in Florida, all such records of the Territorial Courts as belonged appropriately to that Court. From the precise enumeration of the classes of cases directed by the Act to be transferred, the inference is irresistible that Congress acquiesced in and sanctioned the retention by the State Courts of all the papers and records relating to other cases of which they had possession.

It is the duty of a court to decide upon the relevancy of a particular fact when offered in evidence. If the isolated fact offered to be proved is irrelevant, it is not error in the Court to reject it, although in connection with other facts which may be subsequently proved, it may become relevant.

Where testimony, oral or written, is offered and objected to, the grounds of the objection should be stated; and if the defect is not pointed out, it is not error in the Court to admit it.

The admission of immaterial testimony cannot be assigned for error by a party where no injury could by possibility result to him from its introduction.

It is not error if a Judge omits to charge the jury upon any points of law arising in a cause, unless the point upon which the charge is desired, is called to the attention of the court, and an opinion thereon is refused. The Act of 1848, which requires that the Judge shall charge in writing, seems to be chiefly designed to restrain Judges from intermeddling with the facts.

The admission of a party to a suit, either express or implied from his conduct, are strong evidence against him, but not conclusive. He is at liberty to explain them, or show that he was mistaken; and this though the admissions were under oath.

The assignment of a mortgage to a party, will not make the assignee a creditor of the mortgagor, unless it is accompanied with an assignment of the debt secured by the mortgage.

A creditor must establish his debt by judgment before he can raise the question of the validity of a conveyance made by his debtor.

Judgments may be fraudulent as well as deeds, and it is competent to the grantee in a fraudulent conveyance, to show fraud or irregularity in a judgment at law or a decree in equity, if he can.

In *trover*, possession, whether rightfully or wrongfully obtained, is a sufficient title against a mere stranger.

The question of the propriety of granting or refusing new trials, is one that must be left entirely to the discretion of the Judge who tries the cause and has heard the evidence. The practice of reviewing decisions of a Court upon motions for new trial, is wholly unknown to the judicial system of this country.

This case was brought up by appeal from a judgment of the Circuit Court of the county of Franklin, at a term of

Carter vs. Bennett.—Statement of Case.

285 the court in said county held by the Hon. THOMAS DOUGLAS, Judge, in the fall of 1848. The cause was argued and submitted at the adjourned term of the Supreme Court held in the city of Tallahassee in July last, Judge BAKER of the Middle Circuit, and Judge LANCASTER of the Southern Circuit, sitting with the Chief Justice in the places of Justices THOMPSON and SEMMES, who had been of counsel in the cause both in the court below and in this court.

The most material facts in the case were these—Bennett, the appellee, brought an action of trover against Carter in 1842, while Florida was a Territory, in the Superior Court of Franklin county. The cause was continued from term to term from the time of its commencement until after Florida was admitted into the Union, and until the Fall Term of the Circuit Court in the year 1848, when a trial was had, which resulted in a verdict and judgment for plaintiff for the sum of $19,999 66-100.

The suit was brought for the alleged conversion by the defendant to his own use of a number of slaves claimed to be the property of plaintiff.

On the trial, the plaintiff read in evidence the following bill of sale, viz:

For value received I do hereby assign, set over, transfer and convey unto A. T. Bennett the following negroes, to wit: Rica, Tom, Charles, Elias, Jeff, Isaac, Allen, Cato, John, Joe, Amy, Albert, Andrew, Pink, Charles and Henry, children of Pink, Dinah, Amarilla, Emeline, Fanny, Antoinette, Clarissa, Nancy, Ellen, Sam, Patsey, Henry, Sally, Irene, Jane and Henry, and their increase, to him, his heirs and assigns forever, without any recourse upon me or my heirs, either in law or equity.

RO. J. FLOYD, [SEAL.]

He then proved by R. J. Floyd, a competent witness, that he (the witness) and plaintiff purchased a number of
286 negro slaves in 1842 from one Reuben Thornton, of the State of Georgia—that after the purchase, the negroes were divided, in the schooner Magnet, at sea, between witness, plaintiff, and one Farrior, who had become interested in the bargain—that he, the witness, sold out his right in the property, executed a bill of sale, and gave possession to plaintiff—that the negroes mentioned in the bill of sale are a part of those purchased from Thornton—that the whole number purchased was seventy-six, of which Bennett had one-half, and witness and Farrior a fourth each—that the slaves mentioned in the bill of sale were in the possession of the plaintiff in 1842—that they were taken from him under and by virtue of an execution upon a judgment in favor of Carter, assignee of a mortgage to the Georgia Railroad and Banking Company, executed by one Warren Jordan, and were sold by the Marshal of the Apalachicola District, Richard H. Long, Esq., of Jackson county, becoming the principal purchaser.

The plaintiff then read in evidence the following agreement of counsel, dated December, 1846, made in reference to the cases of Bennett vs. Carter, Farrior vs. Carter, Roberts, Allen & Co. vs. Carter, and cases in which any of the parties are defendants, and Farish Carter, plaintiff, viz:

We, the counsel for plaintiff and defendant, agree to admit the depositions, if properly taken, in either of the above cases to be read as evidence in all the cases, so far as the same are applicable, and so far as the same may be decided by the court to be legal. Plaintiffs are to admit on the trial that the copy of the mortgage now on file in said court in the case of the Georgia Railroad and Banking Company, shall be considered in lieu of the original mortgage, that said mortgage was duly executed by Warren Jordan, attested by the witnesses regularly, and that the said mortgage was duly and legally assigned by the said company to said defendant. In other words, plaintiff is to 287
admit the legal execution of said mortgage, and assignment, provided that the court determines that the original mortgage and assignment presented would be legal and proper testimony in the said cases. All questions as to the legality of this testimony are reserved. Plaintiff is willing to admit further that the mortgage was recorded as stated in said copy of mortgage. It is further agreed that the following advertisement may be introduced in evidence by the plaintiff as proof of its contents:

Will be sold for cash, on the thirty-first day of December, 1842, in front of the Exchange in the city of Apalachicola, to satisfy a judgment and decree of foreclosure in favor of Farish Carter, assignee of the Georgia Railroad and Banking Company, for $16,783 and costs, and an order of sale and an execution in said case, the following negro slaves to wit: Rica, a black boy, 17 years old; Tom, a black boy, 18 years old; Charles, a man, 35 to 40 years old; Elias, a yellow boy, 20 years old; Pink or Gincy, a yellow woman, 22 years old; Pink's two children, Charles and Henry; Dinah, black woman, 35 years old; Amarilla, a yellow girl, 5 or 6 years old; Fanny, a yellow girl, 3 or 4 years old; Emeline, a yellow girl, 2 years old; Tom, a black man; Sarah, a black woman; Antoinette, a yellow girl, 7 or 8 years old; Clarissa, a black girl, 14 years old; Camilla, a black girl, 12 years old; Nancy and child, a woman, 35 years old; Ellen, a girl, 10 or 11 years old; Sam, a black man, 30 years old.

And also, at the same place, on the 9th January, 1843, the following slaves, to wit: Jeff, a black man, 35 to 40 years old; Isaac, a black man, 20 years old; Allen, a black man, 29 years old; Cato, a black man, 35 or 40 years old; John, a yellow man, 40 years old; Joe, a black man, 20 years old; Amos, a yellow man, 28 or 30 years old; Patsey and child, a dark woman, 28 years old; Sally, a 288
black woman, 40 years old; Andrew, black boy, 11 years old; Albert, yellow man, 20 years old; Irene, yellow girl, 13 years old; Jane and child, yellow woman, 18 years old:

In satisfaction of said order and execution.

N. HAWLEY,
Marshal District of Apalachicola.

December 17th, 1842.

It is admitted by counsel for Carter that the levy therein referred to was made and directed by Farish Carter, that the negroes were sold according to the advertisement, and that the said Carter received the proceeds of the sale. It is further admitted on the part of Carter's counsel, that such of the negroes named in the declaration of Bennett, as are described or named in said advertisement, were in the possession of Bennett when the levy was made. That such of the negroes named in the declaration of Farrior as are described or named in said advertisement, were in the possession of Farrior when the levy was made. That such of the negroes named in the declaration of Roberts, Allen & Co. as are described or named in said advertisement, were in the possession of Roberts, Allen & Co., when the levy was made. It is further admitted by counsel for Carter that said negroes were levied on by Hawley, the Marshal, by the direction and order of the said defendant, and that in pursuance of said orders and direction of said Carter said negro slaves were taken from the possession of plaintiff, and that said levy and seizure by said Marshal was previous to the commencement of said suits, and that said negro slaves were sold by said Marshal under the direction and at the instance of said Carter, and for his use and benefit. Defendant further agrees to admit, if required by plaintiff on the trial, that defendant, Carter, has recovered

289 a judgment in the State of Georgia against plaintiff, Bennett, for the following named negroes, to wit: Cato, Elias, Sam, John, Charles, Henry, Dinah, Antoinette, Fanny, Emeline, Amarilla, Nancy and Enoch, that said last mentioned sixteen negroes are a portion of those sued for by plaintiff, and contended by defendant as having been taken from Richard H. Long by plaintiff, Bennett, subsequent to these suits. It is understood that neither party admits identity of any negroes in declarations or mortgage. No understanding or agreement, not signed by the parties, is to be considered as binding. Depositions of Brown may be withdrawn, and his testimony and Milligan's to be taken if deemed fit, by plaintiff, provided Brown's depositions now taken are returned to the court, and which either party may use if they think fit, if legal testimony. Felton's testimony to be retaken by defendant, if he deems it necessary, provided the first depositions are returned to the court on trial. Plaintiff is willing to waive any objections as to any formalities on the envelope of Felton's depositions now on file.

December, 1846.

December 14th, 1848.

It is further agreed that the paper of 16th day of March, 1842, signed and sealed by A. T. Bennett and R. J. Floyd, and witnessed by J. C. Harris and J. M. Teague, decd., shall be read without proof of hand writings of witnesses or parties in all cases in Franklin county in which Farish Carter is a party.

The defendant, to sustain his case, relied upon the foregoing agreement of counsel, which had been adduced as a part of the plaintiff's evidence, and read to the jury the following original mortgage of Warren Jordan to the Georgia Railroad and Banking Company, viz:

Whereas, an arrangement was entered into on the 28th
290 day of December in the year eighteen hundred and thirty-eight, by and between Warren Jordan of said county, and the Georgia Railroad and Banking Company, whereby a loan of twenty-five thousand dollars was extended by said company to the said Warren, on his note for that amount, dated the date and year aforesaid, payable one hundred and eighty-four days after date, to the order of, and endorsed by Reuben Thornton, of said county, and secured by a mortgage of even date on the property hereinafter described, (with the exception of lot No. 285 in the second District of Baker county in this State, containing 250 acres of land,) which said note it was agreed should be renewable every six months after the first day of January, 1839, so as to be made to fall due on the first days of July and January in each year for five successive years, from and after the said first days of July and January, or on the first discount days of said Bank succeeding the said first days of July and January, 1839, subject to a reduction of 10 per cent. at each renewal, or 20 per cent. annually, as the said Bank might thereafter require the whole amount of the twenty-five thousand dollars to be paid by the expiration or within the limits of five years as aforesaid from the said first day of January, 1839, together with all interest and expenses that might be required by said Bank, at each renewal, in accordance with its rules and regulations, not to exceed the rate of 8 per cent. per annum. And whereas, in accord ance with the said arrangement, the said Warren renewed his said note so given as aforesaid for $25,000, by giving a new one, with the same endorser, to the said Georgia Railroad and Banking Company, on the first day of July, 1839, payable six months after date for $22,500, and paying the reduction and interest required by the Bank. And whereas, it being now discovered that there has been an omission to record the said mortgage, and that the time allowed by the statute of the State for that purpose has elap- 291
sed, the parties have agreed to remedy the omission by the execution of a new mortgage of the same property, with the addition aforesaid, and the due record thereof, for the security of the said note of $22,500 now remaining in said bank, and of all other notes that may be given in renewal thereof, or of each other, and of the interests and costs that may accrue on the same. To these ends, therefore:— This indenture made and entered into this 30th day of October in the year of our Lord, 1839, by and between the said Warren Jordan, of the first part, and the said Georgia Railroad and Banking Company, of the second part, witnesseth, that the said Warren Jordan, for and in consideration of the premises, and the sum of ten dollars to him in hand paid by the said Georgia Railroad and Banking Company, at the sealing and delivering of these presents, the receipt whereof is hereby acknowledged, hath given, granted, bargained and sold, and by these presents doth give, grant, bargain and sell to the said Georgia Railroad and Banking Company, the following land, town lots and negroes, to wit:— fifteen hundred acres of land immediately adjoining the town of Gainesville in the said county of Hall and State aforesaid, comprising lots Nos. 149, 150, 152, 153, 167, 168, and parts of lots 154 and 136, forming one body, lying on both sides of Flat Creek, adjoining lands of Cooper, Daniel Mitchell and others; together with all the various buildings thereon, comprising six dwelling houses, and a great variety of other houses necessary for the different lots and settlements thereon; which said tract of land is the one whereon the said Warren now resides. Also the following improved lots in the town of Gainesville, to wit: Part of 11 and 12, with store house and improvements thereon, fronting on the public square, adjoining property belonging to Rivers on the North, and Brown on the South; lot
No. 28, with the buildings and improvements thereon; also 292
300 acres of land in the second and third Districts of originally Early (now Baker) county, in said State, comprising six lots on the Colewake Creek, known as Nos. 271, 272, 273, 274, 275 and 286, adjoining Dennard, John Taylor and others. Also on Chickasalratchie Creek, No. 180, 179, 219, 220, 224, all in the second District, and 181 in the Third District aforesaid; which said lots or tracts of land were conveyed by Jerry Cowles to the said Warren Jordan. Also lot No. 285 in the second District of said county of Baker, containing 250 acres. Also the following negroes, to wit: Davy, carriage driver; Albert, house servant; Richard, shoemaker; Cato, Ben, Coon, Charles, Billy, Tom, Abram, Allen, Henry, Ivey, waggoner; Jeffrey and Horace, Jack, Toin, superior house carpenter; Amos and Moses, good house carpenters, and Lane, making twenty-four fellows. Also Isaac, Americus, Elias, Starling, Tom, and Rica, six lads nearly grown. Susan and her eight children, as follows: Mariah, grown, Amelia, nearly grown, Rica, plough boy, Edenboro, Charlotte, Pompey, Sarah and William, Narcissa and her four children, Washington, Olive, Darby and Clement, Rachel and her two children Ally and Grandison, Martha, a grown woman, Dafney and Nancy, two women, Jainey and her child Caroline, Dinah and her four children, Irene, Antoinette, Marcus and Amarilla, Penny, a woman, Patty and her child, Rose and her seven children, Clarissa, Joe, Emeline, Camilla, Ellen, Araminta and Angeline; two Sarahs, women, Patsey, a valuable cook, Mary, house servant and seamstress, Sarah, cook and washer, Fada and Rhoda, two women, Harriet and her two children, Frances and Monroe; Siller and her child Major; Gilbert, Ferrel and Andrew, three lads:— Together with all and singular the rights, members and appurtenances to the said lands belonging or in any wise

293 appertaining, to have and to hold all the above bargained property, to the only proper use, benefit and behoof of the said Georgia Railroad and Banking Company, their successors and assigns forever, in fee simple. And the said Warren for himself, his heirs, executors, administrators, the above bargained property unto the said Georgia Railroad and Banking Company, will forever warrant and defend against the claims of all persons whomsoever: Provided nevertheless, that if the said Warren Jordan, his heirs, executors and administrators, shall well and truly attend to the renewal of the said note for $22,500, now remaining in the said Georgia Railroad and Banking Company, at their office or banking house in Athens, and of all notes that may be given in renewal thereof and of each other, and punctually pay all reductions and discounts which shall become due thereon according to the true intent and meaning of these presents, so as to complete the payment of the whole $25,000 originally borrowed by the said Warren from the said company within the five years as above specified, from the first day of January, 1839, together with all interests, costs and charges of any kind that may arise from any defalcation, and so to or cause the same to be done, then and from thenceforth, as well this indenture and the right of property thereby conveyed, as the said note now renewed as aforesaid, and all others given in renewal thereof or of each other, shall cease, determine and be void to all intents and purposes; but in default thereof, according to the plain tenor and meaning of these presents, the said Georgia Railroad and Banking Company shall have the right, and is hereby vested with the power, of foreclosing this mortgage according to law, and to sell so much of the property hereby conveyed, as will satisfy all legal demands of the said Georgia Railroad and Banking Company against the said Warren Jordan growing out
294 of his defalcation or failure to comply with the conditions and requirements of this mortgage, and after paying all the principal, interests, cost, and charges on the same, that he, the said Warren, may by law be held liable and responsible for—the balance, if any, shall be paid over to the said Warren or to his legal representatives, and the balance of the property not sold, shall likewise be immediately [turned over] to the said Warren or to his legal representatives, re-conveyed by the said Georgia Railroad and Banking Company.

In witness whereof, the said Warren Jordan hath hereunto set his hand and seal, this 30th day of October, 1839.

WARREN JORDAN, [Seal.]

Signed, sealed and delivered in presence
of REUBEN THORNTON,
GEORGE MERCH, J. P.

He next offered the following original notes, purporting to be drawn by W. Jordan, and endorsed by Reuben Thornton, both dated July 1st, 1841. The one for fifteen thousand dollars, payable six months after the date thereof, and the other for six hundred and twenty-seven dollars, payable also six months after the date thereof, which notes and endorsements thereon are in the following words and figures, to wit:

$15,000.

Six months after date, I promise to pay to the order of Reuben Thornton, at the Bank of the Georgia Railroad and Banking Company, in Athens, fifteen thousand dollars. Value received.

WARREN JORDAN.

July 1, 1841.

January 4, 1842.—Endorsed, REUBEN THORNTON.

$627 00.

Six months after date, I promise to pay to the order of Reuben Thornton, at the Bank of the Georgia Railroad 295
and Banking Company, at Athens, six hundred and twenty-seven dolars. Value received.

WARREN JORDAN.

July 1, 1841.

Endorsed, REUBEN THORNTON.

Which said notes, upon motion of plaintiff's counsel, were ruled out by the court, upon the ground that they did not appear to be the debt of the mortgage, (before the necessity of proving hand writing,) and not allowed to be read in evidence—to which ruling, defendant by his counsel excepted.

The defendant then read the following assignment of said mortgage above recited, from said Georgia Railroad and Banking Company to Farish Carter:

Georgia:

Know all men by these presents that the Georgia Railroad and Banking Company, for and in consideration of the sum of sixteen thousand one hundred and thirty-six dollars and thirty nine cents, to them paid by Farish Carter, Esquire, of Scotsboro, in said State, at or before the delivery of these presents; the receipt whereof is hereby acknowledged, have bargained, sold, assigned, set over, and by these presents do bargain, sell, grant, assign, and set over unto the said Farish Carter, his heirs and assigns, a certain mortgage deed entered into on the thirtieth day of October, in the year of our Lord, one thousand, eight hundred and thirty nine, between Warren Jordan, of Hall county in said State, as mortgagor, and the said Georgia Railroad and Banking Company as mortgagees, which said mortgage deed was recorded on the day and year aforesaid in the clerk's office of the Superior Court of said county, in book E, folios 261 to 253, and on the sixteenth day of December, in said year, in the county of Baker in said
State, in the clerk's office of the Superior Court of the said 296
last mentioned county, in book 7, pages 181, 182, 183, 184, 185, and 186, as by reference thereto will appear, together with the lands and negroes, houses and buildings therein mentioned and described, with the rights, members and appurtenances thereunto belonging, and all the estate, right, title and interest of the said Georgia Railroad and Banking Company therein, to have and to hold, all and singular, the premises hereby granted and assigned unto the said Farish Carter, his heirs and assigns forever, without recourse in any event to the said Georgia Railroad and Banking Company, subject nevertheless to the rights and equity of redemption of the within named Warren Jordan, his heirs and assigns in the same.

In witness whereof, John P. King, hath signed these presents as President, and James Camak hath countersigned the same as cashier of the said Georgia Railroad and Banking Company, and affixed the seal of the said corporation hereto, this thirty-first day of May, in the year of our Lord one thousand eight hundred and forty-two.

JOHN P. KING, [Seal.]
Pres't Ga. R. R. & B. Co.

On the part of the defendant the deposition of Reuben Thornton was next read to the Jury. This witness deposed to the following circumstances, under which he received a bill of sale of a large number of slaves from Warren Jordan, and also to the circumstances under which he alleged he sold said slaves to Floyd and Bennett, viz:

About the first of March, 1842, Warren Jordan employed Jeptha C. Harris, Esq., of Albany, Geo., to take charge of about eighty negroes, for the purpose of carrying them to Texas and settling a plantation for him, giving to Harris a power of attorney to control, protect and manage said property. Harris proceeded with the negroes to Apalach-

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297 icola, on the steamboat Louisa, which was the property of A. T. Bennett, for which passage he paid to James Y. Smith, (who then commanded the boat,) a likely young fellow, that would now command from six to seven hundred dollars. After landing with the negroes at Apalachicola, Harris went into the custom-house, for the purpose of procuring a certificate of clearance, which appeared to be a pre-requisite to their being shipped, and while there the negroes were arrested by the deputy marshal, N. Baker, under a false attachment sued out by one John H. Watson, as agent for the Central Bank of Georgia vs. one J. L. Hodges, and were taken from the possession of Harris, by the Marshal, and placed in jail. Harris being unable to replevy the negroes, determined to return to Georgia and inform their owner of their situation, when Bennett tendered his services to accompany him, and did go with him to the plantation of Warren Jordan, in Baker county, where Jordan was then staying. About half an hour previous to their arrival at Jordan's plantation, witness had also arrived there, and Harris and Bennett both represented to witness and Jordan the facts above detailed; they also represented Bennett as being a respectable citizen of Apalachicola with thirty thousand dollars, for the truth of which Bennett frequently appealed to Harris' knowledge of him, &c., and stated that he was so kindly disposed to aid Col. Jordan in the liberation of his property that he had come all the way to tender him the use of his name or his services in any way that would effect that object; they further stated that Bennett and his friends had further offered to afford Harris security to replevy the negroes, which could not be done under the power of attorney he then had; they had, therefore, come to the conclusion that it would be best to obtain a bill of sale to the negroes from Warren Jordan to Harris, for the purpose of enabling Harris to

298 claim the negroes, which being done, there would be no further difficulty in replevying them, as Bennett and his friends could and would give any security that the marshal would require. As witness was there, Harris proposed to Col. Jordan to intercede with witness to go with them to Apalachicola, and to make to him a bill of sale to the negroes, for the purpose of replevying them. This arrangement Bennett strongly backed, and urged both to Col. Jordan and witness that the bill of sale should be executed to him. Witness objected, and replied to his proposition that he had a power of attorney from Warren Jordan, regularly executed and recorded, constituting him his agent in any State or Territory in the Union, which was amply sufficient to enable him to replevy the negroes—to which Bennett replied that his friends at Apalachicola were respectable and wealthy merchants, but they knew but little about legal matters, and they had been advised by counsel that the negroes could not be replevied unless the person had a bill of sale to them, and that unless he took one, it would be out of his power to afford him the aid he desired to do. It was finally settled and agreed that witness should take the bill of sale, upon a pledge of honor from Bennett, made both to Jordan and witness, and over and over repeated, that himself and his friends would afford ample security to enable him to replevy the negroes. Under these promises, and for the satisfaction and gratification of Bennett, witness received the bill of sale from Jordan to the negroes, to which Bennett and Harris were subscribing witnesses, and for the sole and only purpose of enabling him to replevy them for the benefit of Warren Jordan, who was the true and bona fide owner of them. In the event of witness having to claim the negroes personally, he thought it best to execute his note to Jordan for something like the value of the negroes, and some money was laid on the table at the time the bill of sale was signed, and which 299 was taken up again by witness in the presence of the witnesses to the bill of sale, and put in his pocket, they knowing that not one cent was actually paid, or even intended or expected to be paid, and that the note which was executed by witness to Jordan was not accepted, or intended by either of them ever to be paid, which facts were as well known and understood by Bennett as by themselves, the whole being done to place matters in a form to please Bennett, and thereby secure his promised aid in procuring the security necessary to replevy the property.

—That on the arrival of witness at Apalachicola, he found it impossible, in consequence of the character and amount of the bond required, to replevy the negroes—that Bennett could not render him the assistance which he had promised, and that he then determined to make it the interest of some person to aid him in his object and purposes, by making an offer of a portion of the negroes as an inducement. This he accordingly did, but was not successful—that he finally sold the negroes to Bennett and Floyd, as they were, in the jail of Franklin county, stating to the purchasers at the time that he had no valid title to them, and that he did not mean the sale to interfere with the rights of Warren Jordan or his creditors.

He moreover required from Bennett, as a condition of sale, a written acknowledgment under the hands and seals of himself and Floyd, that they bought the negroes without delivery, as they stood in the possession of the Marshal, "subject to all the liabilities that were against them in the way of debt, either by note, judgment or mortgage, in the State of Georgia, either as the property of" Jordan or himself, which paper, bearing the same date as the bill of sale made by witness, is in these words, viz:

TERRITORY OE FLORIDA—FRANKLIN COUNTY. 300

Whereas, Reuben Thornton, of the County of Hall and State of Georgia, has this day sold to R. J. Floyd and A. T. Bennett, the following negroes which are now in the hands and possession of the Marshal under an attachment sued out against one J. L. Hodges, to-wit: old Tom, Dick, Allen, Cato, Charles, Gilbert, Amos, Merida, Elias, Jack, Abram, Major, Ben, Sam, Jeffrey, Rica, Moses, Americus, Albert, Billy, Isaac, John, Coon, Joe, making twenty-four fellows; Grandison, Fayett, Andrew, Virgil, Washington, Tom, Marcus, Clem, William, Monroe, Wylie, Charles, Simeon, making thirteen boys; Sarah, Martha, Patsey, Jane, Susan, Narcissa, Jinsey, Dinah, Harriet, Fada. Mariah, Milley, Rachel, Penny, Sally and Nancy, making sixteen negro women; Charlotte, Caroline, Antoinette, Camilla, Frances, Lucinda, Ellen, Sarah, Amanda, Fanny, Avarilla, Mary, Crissa, Abby, Clarissa and Jenny, making seventeen girls; Jenny, William, Henry, Albert, Cornelius, Randle, Henry and Emeline, making eight infants, which said negroes are sold by the said Thornton to us, the said R. S. Floyd and A. T. Bennett, subject to all the liabilities that are against them in the way of debt, either by note, judgment or mortgage, in the State of Georgia, either as the property of Warren Jordan or the said Reuben Thornton, the said Reuben only warranting the same against himself and his heirs. This is therefore given by us to show that if any of said property should be lost by suit in consequence of any claims as aforesaid, that it is to be no offset or plea against the payment of the note of seven thousand dollars, bearing even date with these presents, given by said Bennett and Floyd in payment for said negroes, as witness our hands and seals, this 16th day of March, 1842.

R. J. FLOYD, [Seal.]
A. T. BENNETT, [Seal.]

Which acknowledgment, under the hands and seals of Floyd and Bennett, was signed, sealed and delivered in the presence of J. C. Harris and J. M. Teague. 301

The defendant then exhibited to the jury the record of the proceedings, and decree and judgment of foreclosure in the case of Farish Carter, Assignee of the Georgia Railroad and Banking Company—the execution issued thereon, together with the necessary evidence of levy and sale by the Marshal.

There was a vast amount of other testimony introduced and read on the trial of the cause, not however deemed material to be herein set out or stated.

The following instructions were asked by defendant's counsel, viz:

1st. That a party cannot be admitted to gainsay or deny his own solemn oath of record made in this court, setting up the facts sworn to as a defence in the action, and when such oath is introduced to the jury, it is conclusive against the party making such oath, and the highest possible evidence—which first instruction was refused by the court, and instead thereof, the court gave the following:

Instruction first given. Instead of the first, I state to the jury, that a party cannot be admitted to gainsay or deny his own solemn oath of record made in a court, setting up the facts sworn to as a defence to the action; but he may be permitted to explain it, and to show that it was made in ignorance of his rights, or under a misapprehension in regard to them.

2d. Second instruction asked. That a party cannot claim title to property in any court in this State, when such claim comes through such facts as are sworn to in the plaintiff's affidavit introduced in this trial, dated 24th July, 1844, and filed in the suit of Charles T. Thornton, to foreclose a mortgage against Bennett and Floyd, a copy of 302 which is herewith filed, marked A. Such affidavit is conclusive against Bennett, as proof of the facts there sworn. The following is the affidavit referred to:

FRANKLIN SUPERIOR COURT, ON PETITION TO FORECLOSE MORTGAGE.

A. T. Bennett, impleaded with R. J. Floyd,
ads.
Charles T. Thornton.

The defendant, in pursuance of law, files herewith the following objections to the decree of foreclosure, herein protesting in the first place that the plaintiff is not entitled to the same, for objections apparent in the said proceedings, for which the same should be dismissed. The defendant sets forth that the note of $7,000 which said mortgage was given to secure, was made and executed in consideration and payment of certain negro slaves sold to defendant on the 16th day of March, in the year 1842, the same being specially set forth in a bill of sale executed by one Reuben Thornton to defendants; that said slaves, being the property of one Warren Jordan in the State of Georgia, were fraudulently, clandestinely, covinously, collusively, wickedly, illegally, and improperly, against the laws of said State run off, removed and carried away from said State by said Jordan and said Reuben Thornton, said removal being made, executed, contrived and devised of fraud, covin, collusion and guile, to convey them from said State out of and beyond the United States, to Texas, to the end, purpose, and intent to convert them to their own use and profit, and to delay, hinder and defraud the Georgia Railroad and Banking Company and others to whom said slaves had been mortgaged, and other creditors in said State of Georgia, contrary to the laws of said State; that the sale to said defendants by the said Thornton and the giving and taking of the said note of $7,000 and its assign-

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ment to plaintiff, was in pursuance and consummation of 303
the same wicked, fraudulent, corrupt, illegal, covinous and improper design, contrivance and purpose, and the assignment of said note to said plaintiff was under suspicious circumstances not in the usual course of trade, without consideration and fraudulent; that said negroes being over the age of twelve years were imported into this Territory by said Jordan on the — day of March, 1842, from said State of Georgia, without any design of making a settlement in this Territory, and without having obtained a certificate signed by a Judge of the County Court or two Justices of the Peace of the County from which they were brought, containing a particular description of the stature and complexion of said slaves together with their names, ages, and sex; and furthermore, that they have not been guilty of or committed murder, burglary, arson, or other felony within such State, as required by the laws of the Territory, and in defiance thereof, and further, that said slaves having been brought into this Territory as merchandize, were sold to defendants by said Thornton on the — day of March, 1842, at Apalachicola, in the Territory of Florida, where they were first sold in this Territory without coming to be registered with the clerk of the County Court of Franklin County, the certificate required by law as aforesaid, containing a particular description of said slaves as aforesaid, and that they were not guilty of and had not committed murder, and the other crimes aforesaid, in said State, and that said slaves were sold to defendants by said Thornton and said Jordan, without having obtained the certificate of description required by said statute, and without complying with the law of this territory entitled an act relating to crimes and misdemeanors committed by slaves, free negroes, and mulattoes. And defendant saith that on account of the defences and causes herein set forth, as well as in the action at law on the said note to which he 304
refers, and makes a part of his objections herein, he ought not to be compelled to pay said note and mortgage, the same being on account thereof, and the reasons and causes herein set forth, null and void.

THOMAS BALTZELL,
For Defendant, BENNETT.

TERRITORY OF FLORIDA, JACKSON COUNTY.

Before me personally appeared A. T. Bennett, defendant in the above suit, who being duly sworn, saith that the matters above stated, so far as they are inserted from his own knowledge and belief, are true, and so far as made from the knowledge of others, he believes to be true.

A. T. BENNETT.

Sworn and subscribed before me, 24th July, 1844.

R. BALLARD, J. P.

Which was written across by the court and refused in these words: "Refused because the law is so mixed with fact in the instruction asked, that one cannot be given without the other."

3d. Defendant next asked his third instruction in these words: that no man can claim title to property sworn by himself to have been acquired by a direct violation of the statute of frauds, as against the parties intended to be defrauded, (which the court altered by adding thereto the words, "unless he shews that he made such oath under a misapprehension as to the law or the facts of the evil,") which instruction, so altered, the court gave.

4th. The defendant then asked his fourth instruction, viz: That running off mortgaged negroes is felony by the law of Georgia, punishable by confinement in the penitentiary, and no man can claim property acquired through a felony, with notice of the facts, and his own affidavit of the facts is conclusive upon him. And defendant's counsel offered

305 to read to the court said Georgia statutes from a printed statute published and printed under and by authority of the State of Georgia. (This offer to read the laws of Georgia was not made, however, by defendant's counsel until the argument of counsel on both sides had closed, and after instructions had been prayed for and given up to instruction 4th.) Which the court refused to hear read, and refused to give the instruction, and wrote thereon these words: "What the law of Georgia is must be proven."

5th. The defendant's fifth instruction then asked—the court then gave, after including therein the words here written in brackets, that a voluntary bill of sale, in which no money is paid, [or other valuable consideration given,] carries no title against prior creditors, especially mortgage creditors; and even if another person should buy for money, with notice of the person holding under such bill of sale, such new party can claim no title against prior creditors or mortgagees.

Defendant's sixth instruction was then given by the court in these words, without alteration viz: that a mortgagee has an absolute title, subject to be defeated by payment at the day, and after the day passed, the mortgagor has no title whatever at law, and an action of trover cannot be maintained by him or his assignee.

7th. The court next gave, without alteration, defendant's seventh instruction, viz: After mortgage is past due, the title in personal property is fixed in the mortgagee, and he cannot be guilty of conversion, because the property is in the mortgagee, and trover cannot be maintained against him.

8th. The court then gave, without alteration, defendant's eighth instruction, viz: The equity of redemption is only a title in equity—can only be set up in equity, and even there the party must come with clean hands and the
306 utmost purity; the least fraud would put him out of court.

9th. Defendant's ninth instruction [is] in these words: That the title to the sixteen [thirteen] negroes mentioned in the action of trover in Georgia, was decided in that case to be in Farish Carter, and the jury cannot reverse or review that decision, and must throw that number of negroes from their consideration—which the court refused, writing thereon "refused," because involving facts upon which the court is prohibited from instructing the jury.

10th. The tenth was waived and erased.

11th. The eleventh was given, without alteration, by the court thus: That a claim bond without securities is no claim bond, and an attachment which contains no description of personal property, and an affidavit which gives no description of the property, amounts to no claim under the statute, and would be disregarded by the court.

12th. The defendant's twelfth instruction was then given by the court, without alteration, viz: When a party claims under another whose rights have been regularly adjudicated, such adjudication bars the party so claiming.

13th. Defendant's thirteenth instruction was in these words: The record in the case of Peninah W. Thomas vs. Farish Carter being in evidence before the jury, and commented on by plaintiff, is conclusive as to any subject matter decreed upon in said record; and if the record shows that a foreclosure has been had in Georgia on the personal property by said mortgage conveyed on the fifth July, 1842, the titles to the personal property became absolute in the mortgagee—an action of trover for said personal property, subsequently commenced by the mortgagor, or any person claiming by, through or under him, cannot be maintained—which the court refused, writing on the same "refused," because it is not conclusive against 307 any but those who are parties or privies to the record.

14th. Defendant's fourteenth instruction was then given, without alteration, except the addition in brackets at the end, viz: A party whose title is tainted with fraud, cannot rely upon such title to object to the regularity of a decree rendered in favor of the creditor against the debtor, who did so fraudulently part with his title; and this will apply in the case of a foreclosure of mortgage by a mortgagee, against mortgagor, where the decree is attacked by any one claiming title under a mortgagor who has fraudulently conveyed his equity of redemption to hinder and delay the mortgage, [such person being cognizant of the fraud at the time of his purchase.]

15th. Defendant's fifteenth instruction was then given by the court, without alteration, to-wit: If a common law judgment is rendered against a party who could not there defend his rights, a Court of Equity will interfere by injunction, upon proper showing, to stay the proceedings at law.

16th. The defendant then asked his sixteenth instruction, in the words following, which the court refused as written, but gave with the additional words in brackets below, viz: In case of foreclosure at common law under our statute, any person claiming by, through or under a mortgagor, can come in and state his objections, under oath, showing cause against foreclosure of the mortgage property—to which the court added, ["provided, he is served with legal notice, either personally or by advertisement."]

17th. The court gave defendant's seventeenth instruction, without alteration, viz: The doctrine of notice applies only to bona fide purchasers.

18th. Defendant then asked an instruction that plain- 308 tiff, to maintain trover, must prove as follows:

1st. That he had a right to the property claimed and was entitled to the immediate possession of the same at the time the action was commenced. Which was given.

2d. That plaintiff must prove a conversion by the defendant at or before the commencement of the action. Which was given.

2d. That no such property or possession can be maintained against a prior creditor of the vendor, Thornton or Jordan, unless such property or possession was obtained bona fide. Which was refused by the court, and written upon "Mixed with fact."

4th. That a possession obtained by fraud cannot be set up as a possession in which to sustain trover. Which was given by the court.

To all of which several rulings and opinions of said court against defendant upon the questions of evidence, and refusals to charge and instruct, and alterations of instructions, defendant, by his counsel, excepted and prayed that his bill of exceptions might be signed and sealed by the court, which was accordingly done; and this constituted the defendant's first bill of exceptions.

After the rendition of the verdict in this cause, the defendant's counsel moved for a new trial, on the following grounds, to-wit:

1st. The verdict is against the law, and against the instructions of the court.

2d. Against the evidence.

3d. Against the weight of evidence.

4th. Excessive damages.

5th. Verdict gives interest as well as hire and excessive valuations.

6th. Verdict exceeds the whole amount claimed and the

309 amount of all the slaves, as valued in the declaration mentioned, when plaintiff, at the trial, admitted, and the same was proved, the re-capture of sixteen of said negro slaves, and abandoned his suit for the same.

7th. The verdict is indefinite, in finding costs as part of the damages.

8th. The jury gave a verdict beyond the value of property proved by any evidence.

9th. Surprise in ruling out testimony by the court.

10th. Because plaintiff claims title through an act which it appears by his own oath, unexplained, was a felony in Georgia.

11th. Because no conversion was proved, and said verdict is in other respects unlawful and informal.

Which said motion was overruled by the court, and a new trial refused, to which refusal and opinion defendant, by his counsel, excepted; and this constituted defendant's second bill of exceptions.

And said motion for a new trial having been overruled as aforesaid, the said court adjourned until Tuesday, the 26th, at nine o'clock, the 24th being the Sabbath, and the 25th Christmas day, and on the opening of the court on Tuesday, the defendant, by counsel, moved the court in arrest of judgment, and that said cause be dismissed from this court, with the order to the clerk to transfer the papers to the District Court of the United States for the Northern District of Florida, or hold said papers and proceedings subject to any order of transfer or demand from said District Court, and upon said motion defendant's counsel showed to the court that this cause was instituted by a writ of which the following was admitted by counsel of plaintiff to be a true copy, as well as of the endorsements thereon, the original having been lost or mislaid:

310 In the Name of the Territory of Florida.

To the Marshal of the Apalachicola District—Greeting.

We command you that you summon Farish Carter to be and appear before the Judge of the Superior Court of Franklin County, at a court to be held in the city of Apalachicola on the fourth Monday of March next, to answer Archibald T. Bennett of a plea of trespass on the case, damages twenty thousand dollars, and have then and there this writ.

Witness, George F. Baltzell, Clerk of our said Court at Apalachicola, this 17th day of December, 1842, and of the Independence of the United States the sixty-seventh year.

(Signed,) GEORGE F. BALTZELL, *Clerk.*

On which writ were the following endorsements:

Archibald T. Bennett vs. Carter. Summons issued 17th December, 1842.

Served by handing a copy to Farish Carter, December 17th, 1842.

RICHARD J. YOUNG,
Deputy Marshal, for
H. Hawley, *Marshal.*

The declaration and plea were then exhibited to the court, and the various entries made on the record of the Superior Court of Franklin County, prior to the third of March, 1845, as well as those made subsequent to the admission of Florida into the Union.

Defendant then offered to prove that Farish Carter was, at the commencement of said action, and has been at all times since, a citizen and resident of the State of Georgia, which fact was admitted by counsel for plaintiff.

Plaintiff then showed, by the evidence of William Valeau, clerk of this court, that after his election as such clerk, at the first state election, holden in 1845, he received from George F. Baltzell, the late Clerk of the Su- 311
perior Court of Franklin county for the Apalachicola District, the records of said court, and all the papers in the said cause, which are now in court, and that said papers were by him filed, and so have since remained in this court.

And the following order hereto appealed from the District Court of the United States, was served upon him, but he did not give up or surrender the papers, records and proceedings in these cases, or any of them:

In District Court of the United States, for the Northern District of Florida.

At Judge's Chambers,
St. Augustine, 29th March, 1847.

Whereas, in and by an act of Congress, approved 22d February, 1847, entitled an "Act to regulate the exercise of the appellate jurisdiction of the Supreme Court of the United States in certain cases, and for other purposes," it is enacted that all and singular the records of the proceedings in the several cases which were pending in the Superior Court of the late Territory of Florida, under and by virtue of the act of Congress of the 23d May, 1828, entitled an act supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida, approved 26th May, 1830, and in the several cases which are pending in the Court of Appeals of the same Territory on the third day of March, 1845, and all and singular the records of the proceedings in the several cases in which judgments or decrees have been rendered in said courts, on or before that day, and from which writs of error could have been sued out, or appeals could have been taken, or from which writs of error had been sued out, or appeals had been taken and prosecuted to the Supreme Court of the United States, according to the laws of the United States which were in force on the said third day 312
of March in the year of our Lord one thousand eight hundred and forty-five, shall, from and after the passage of the first above recited act of Congress, of the 22d February, 1847, be transferred to and deposited in the District Court of the United States for the District of Florida;

And whereas, it is further enacted in and by the second section of the said act of Congress, approved 22d February, 1847, that it shall be the duty of the Judge of the District Court of the United States for the District of Florida, immediately after the passage of said act to cause the same to be notified to the several Clerks of the Superior Courts, or to other officers or persons having in their possession or custody the records of the proceedings herein above referred to and described, and to demand the delivery of the same, to be deposited as above specified and required, and on the refusal of such clerk, or other officer or person, to comply with such demand, the said Judge is authorized and required to compel the delivery of said records, by attachment, or otherwise, according to law:

And whereas, in and by a subsequent act of Congress, approved 23d February, 1847, entitled an act to establish a court at Key West, in the State of Florida, and for other purposes, it is enacted that the title and name of the said District Court of the United States for the District of Florida shall hereafter be "the District Court of the United States for the Northern District of Florida."

Now, therefore, in pursuance of the provisions of said act of Congress herein first above recited, approved 22d February, 1847, it is hereby ordered by the Judge of said District Court of the United States for the Northern District of Florida, that the Marshal of said District, either by himself or by any one of his deputies, be and he is hereby authorized and required to make known the afore-

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said act of Congress of the 22d February, 1847, to the late Clerk of the Superior Court of the Apalachicola District in the County of Franklin, and to the present Clerk of the Circuit Court of Franklin County, or to any other persons within the late Apalachicola District of the Territory of Florida, who may have the possession and custody of any of the aforesaid records of the proceedings in the cases above mentioned. And it is further ordered, that the said Marshal or his deputy shall cause a copy of this order, duly certified under the hand and seal of the clerk of this court, to be served personally on each and every of the officers or persons above mentioned, and at the same time shall demand from the person on whom the same shall be served, a delivery (in pursuance of the act of Congress last mentioned) of the aforesaid records herein before mentioned, or of such or so many of such records as may be in the possession and custody of such person, and the said Marshal or his deputy is hereby authorized and empowered to receive from each or any of the persons or officers aforesaid so notified by him any of the aforesaid records, which such persons or officer may deliver to him, and to deposit the same with the clerk of this court at Apalachicola, or such records may be delivered by the persons or officers having possession and custody of them directly to or deposited with the said clerk of this court at Apalachicola.

And it is further ordered, that the Marshal who shall serve this order and make demand of said records as aforesaid, shall respectfully request of each of said officers or persons on whom the same may be served, a written reply or answer to said demand, and also a written schedule of any records or papers, which may be delivered by such officer or person either to him or the clerk of this court in pursuance of the foregoing act of Congress or this order. And it is further ordered, that the said Marshal or his dep-

314 uty shall, without delay, make full and particular return in regard to the execution of this order, and of his doings herein, to the Judge of the District Court of the United States for the Northern District of Florida. And it is further ordered, that this order be entered of record by the Clerk of said Court at Apalachicola, and copies furnished without delay to the Marshal or his deputy for service.

(Signed,) I. H. BRONSON,
Judge U. S. District Court for the Northern District of Florida.

I, Joseph S. May Clerk of the District Court of the United States for the Northern District of Florida, in the Apalachicola District, do hereby certify that the foregoing is a true copy of the original order now on file in my office of said court.

In testimony whereof, I hereunto set my hand and [SEAL.] affix the seal of said court, this the 28th day of December, 1848.

JOSEPH S. MAY,
Clerk U. S. District Court.

Defendant having made these facts apparent to the court, contended and stated, in support of his motion aforesaid, that it was manifest to the court that this cause was commenced and came to issue in the District Court of the United States for the District of Apalachicola, sitting as the Superior Court of Franklin County, in the then Territory of Florida, a court established by the Congress of the United States, and under its juruisdiction and control; and because it does not appear how the said cause, and the records and papers of the same, were ever legally transferred to this court, or that the same have ever been so transferred, or that the same are not yet legally remaining in the said Territorial Court's office, or that the same have not been removed, and said cause been tried or dismissed, or yet remains pending in the District Court of the United 315
States; and because the courts established by the Government of the United States have the exclusive right to hear and determine all causes legally commenced in the courts established by said Government, unless the same be prevented by act of Congress, or the consent of the parties; and because, by the act of Congress of 22d February, 1847, entitled an act to regulate the exercise of the appellate jurisdiction of the Supreme Court of the United States in certain cases, and for other purposes, all the judgments, papers and records of said Superior Courts of the Territory of Florida, were transferred to the District Court of the United States, and all cases pending in any of the Superior Courts of said Territory of Florida, on the third day of March, A. D. 1845, and not legally transferred to the said courts of Florida, and which are claimed to have been pending in said courts after said day, were, by said act, transferred to the District Court of the United States for the District of Florida, afterwards called the Northern District of Florida.

And defendant insisted that said act of Congress *proprio vigore,* transferred said cause to said court, the same having been pending in said court at said time, and never legally transferred to any State Court, and that this court had not then, and never had, jurisdiction to hear and determine said cause so commenced and pending as aforesaid.

And defendant further referred to the law of Florida of the twenty-second day of July, 1845, by which only such causes are attempted or pretended to be transferred from the Territorial Superior Courts to the Circuit Courts of the State, as are not cognizable by the Federal Courts, and contended that this cause was commenced in a "Federal Court by personal service upon him, and is and hath been at all times since cognizable in a Federal Court, and never 316
was transferred legally, or cognizable in this court."

And defendant further showed that, since said act of Congress of 1847 was passed there had been no Judge presiding in this court, who could (as he contended) take any action in this case under the laws of this State, until the present term. The only Judges who had, since the passage of said act of Congress of 1847, presided in this court, having been the Honorable Thomas Baltzell and the Honorable George S. Hawkins, as was proved by inspection of the record, and both of whom it appeared by the record have been attorneys and counsellors in this case, and the same was admitted, and defendant therefore only had power to continue said causes; and defendant contended that the continuances before recited as entered in this cause in this court, were null and void, and of no effect, this court never having had possession or jurisdiction of the same at any time.

But said court having heard argument of counsel on said motion, overruled the same, and gave judgment for the plaintiff—to which opinion and overruling defendant by his counsel excepted, and prayed that his bill of exceptions might be signed and sealed by the court, which was accordingly done; and this constituted defendant's third bill of exceptions.

The defendant then moved in arrest of judgment, on the following grounds, to wit:

1st. That this court has no jurisdiction to try the said cause, because the record and proceedings therein of right belong to the District court of the United States for the Northern District of Florida, holden in the city of Apalachicola, the same being a part of the unfinished business —it being a case pending in the Superior court of the Territory of Florida at and after the third day of March,

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317 1845, viz: the Superior Court of the Apalachicola District of Florida, being a Territorial Court, created and continued by act of Congress, up to the admission of Florida as a State, from which time the said court became defunct, and the proceedings therein abated, until the same were transferred by act of Congress, passed in 1837, to the District Court of the United States for the Northern District of Florida.

2d. Because Hon. GEORGE S. HAWKINS, Judge of the Western Circuit of Florida, was of counsel in this cause —which fact defendant offering to prove, was admitted by plaintiff's counsel—and because the Legislature of Florida, at its session holden in January, 1848, made special provision for the time and manner in which the said case should be tried, and also prescribed how the Judge should be selected who should try the same; that this case is included in the class of cases about which special legislation has been had, and the trial of said cause at this term, by the Hon. THOMAS DOUGLAS, as presiding Judge, who is commissioned only as Judge of the Eastern Circuit, and not of the Western Circuit, is in direct opposition to the Act of January, 1848, in this—that the right to appoint a judge to try causes in which the resident judge is interested, or was of counsel or attorney, is given to the Supreme Court of the State, and not to the resident judge so interested.

3d. That it does not appear that the requisitions of the law have been complied with by the resident Judge, GEO. S. HAWKINS, Judge of the Western Circuit, he not having made a report of the cases in which he was interested as counsel, of which this is one, to the Supreme Court to be holden after passage of said act.

4th. That the cases in which the resident judge is interested as counsel, of which this is one, are postponed for
318 trial until after the session of the Supreme Court, which does not occur until the first Monday in January next, and then they are to be tried at a subsequent term, to be designated by the Supreme Court.

5th. That such time has not arrived, such judge has not been appointed, and the said case, which is one of those provided for by the act of the Legislature approved by the Governor of the State of Florida January 4th, 1848, has not been reported by the resident judge to the Supreme Court of the State, as by said act required. Which motion the court overruled, and to which overruling defendant, by his counsel, excepted, and prayed that his bill of exceptions might be signed and sealed by the court, which was accordingly done; and this constituted the defendant's fourth bill of exceptions.

The errors assigned are twenty-eight in number, and are as follows, to wit:

I. The court erred in giving judgment for plaintiff below, because the action was brought in December, 1842, in the Superior Court of Franklin county, Territory of Florida, and in said court continued until the 17th of February, 1845, when it was ordered that this cause be continued, by consent of counsel, until the *next term*, whereby it appears that this cause is yet pending in the District Court of the United States for the District of Apalachicola, (a Court of Federal cognizance and jurisdiction,) unless removed by act of Congress to some other court, and the Circuit Court had no jurisdiction to give judgment in this cause.

II. Because it nowhere appears by what rule, law, authority or order said Circuit Court obtained jurisdiction to hear and determine said cause so commenced and continued in the said Superior Court of Franklin county, Territory of Florida, and the record showing that the cause was so commenced in another court and another jurisdiction, it must appear, to give validity to the decision of the Circuit 319
Court, that such cause came into said Circuit Court lawfully and regularly for decision, and not so appearing, said decision must be reversed.

III. Because the court erred in ruling out the notes offered in evidence by defendant.

IV. And in admitting the plaintiff's depositions of Ephriam W. Johnson and Minor W. Brown.

V. Because the court erred in admitting plaintiff's deposition of Benjamin F. Griffin.

VI. And the deposition of George W. Collier for plaintiff.

VII. And the bonds and affidavit introduced by plaintiff as his rebutting testimony, marked No. 10.

VIII. Because the court erred in excluding defendant's testimony of the clearance of the slaves at the custom-house for New Orleans, and the certificate of Nathan Baker appended thereto, referred to in the testimony of said Baker.

IX. The court erred in refusing to instruct the jury generally upon the points of law arising in the case when called upon by counsel, and in its construction of the statute of 1848 upon that subject.

X. The court erred in refusing the first special instruction asked by defendant's counsel.

XI. And in giving the modified instruction in lieu thereof, there being no facts of ignorance or misapprehension of rights whatever proved to justify this modification.

XII. And in refusing the second special instruction asked by defendant.

XIII. And in the addition or qualification made to defendant's third special instruction asked, there being no evidence to justify said addition.

XIV. And in adding the qualification ("or other consideration given,") to defendant's fifth instruction, there being no evidence to authorize it, and the bills of sale pur- 320
porting to be for money.

XV. The court erred in refusing defendant's ninth instruction.

XVI. And his thirteenth instruction.

XVII. And in adding the quualification in brackets to defendant's fourteenth instruction, to wit: "Such person being cognizant of the fraud at the time of his purchase," and in refusing to give such instruction as asked, without qualification.

XVIII. And in refusing the sixteenth instruction of defendant as asked, and adding the qualification, "provided he is served with legal notice, either personally or by advertisement,"—the same being unnecessary under the statute, and the qualification calculated to mislead.

XIX. The court erred in refusing to give the third clause of defendant's eighteenth instruction.

XX. And in refusing his motion for a new trial.

XXI. The court erred in refusing to arrest the judgment and dismiss the cause, and order the clerk to transfer the papers to the District Court of the United States.

XXII. And in not arresting the judgment for reasons assigned in defendant's fourth bill of exceptions.

XXIII. That Thomas Douglas, who rendered the judgment, committed error in so doing in this—that he was elected and commissioned as Judge of the Eastern Circuit, and George S. Hawkins was elected and commissioned as Judge of the Western Circuit, and Franklin county is in said Western Circuit, and said Hawkins had been of counsel in this cause, and in such case said Hawkins had no power to preside himself, or to select the judge who should preside in his place at the trial of this cause; but it was provided by the act of January 4th, 1848, that the selection of the judge who should try such causes should be

321 rested in the Supreme Court of the State, whose duty it is made in such case to assign one of the Judges thereof, not interested, or otherwise disqualified to try such cause, and said Thomas [Douglas] had not been selected or assigned, but only claimed to sit as by request of said Hawkins.

XXIV. That said Douglas erred in entering judgment upon said verdict—the same being illegal, having been rendered by twelve men not authorized by law, and without the presence of the Judge of said court, George S. Hawkins, during the trial of said cause.

XXV. That the court erred in rendering judgment, because the verdict is general for the plaintiff on the issue for more than the whole amount of damages claimed, when plaintiff in open court admitted the capture of certain of the slaves, to wit: sixteen in number, amounting to the aggregate value of $————, and abandoned his action as to them—and yet the verdict finds for plaintiff for all, and makes no distinction.

XXVI. The court erred in rendering judgment upon the verdict, which is for more than the aggregate of all the values in the declaration alleged, for all the slaves not recaptured and abandoned in this action—and there is no count or claim in the declaration for any further amount that such value—no claim for interest or hire, and as to that, no issue no litigation, no suit.

XXVII. The judgment should be reversed, because it appears by the record that the court had no jurisdiction of the cause—the Judge no commission to try the cause, if the court had had jurisdiction—and the judgment is for an amount and for property not in litigation between the parties.

XXVIII. The court erred in not dismissing the action, when it was shown by plaintiff's affidavit in a court of re-
322 cord, and corroborated by other testimony, that the action was based upon and intended to sustain a fraud and felony.

Archer, McDonald and *Colquitt,* for Appellant.

Davis, for Appellee.

ANDERSON, *Chief Justice,* delivered the opinion of the court.

This was an action of trover brought by the appellee against the appellant in the county of Franklin, to recover damages for the alleged conversion of a number of negro slaves.

On the trial in that court, at the Fall term of 1848, there was a verdict and judgment in favor of plaintiff for the amount of $19,999 66-100.

The case was brought by appeal to this court. The errors assigned, being twenty-eight in number, we propose to consider in the order presnted by the record, and to make such reference to the facts of the case as may be necessary to the proper understanding of the points upon which we are called to decide.

The first and second errors assigned—which we shall consider together as presenting substantially the same question—are in the following words:

"1st. The court erred in giving judgment for the plaintiff below, because the action was brought in December, 1842, in the Superior court of Franklin county, Territory of Florida, and in said court continued until the 17th of February, 1845, when it was ordered that this cause be continued, by consent of counsel until the *next term,* whereby it appears that this cause is yet pending in the District court of the United States for the District of Appalachicola, (a court of Federal cognizance and jurisdiction,) unless removed by act of Congress to some other court.

and the Circuit Court has no jurisdiction to give jugdment 323
in this case.

"2. Because it nowhere appears by what rule, law, authority or order said Circuit Court obtained jurisdiction to hear and determine said cause so commenced and continued in the said Superior Court of Franklin county, Territory of Florida, and the record showing that the cause was so commenced in another court and another jurisdiction, it must appear, to give validity to the decision of the Circuit Court, that said cause came into said Circuit Court lawfully and regularly for decision, and not so appearing, said decision must be reversed."

The facts upon which this denial of the jurisdiction of the Circuit Court is founded, are briefly as follows:

The action was commenced in December, 1842, in the Superior Court of Franklin county, while Florida was a Territory of the United States.

It was continued from term to term till the 17th of February, 1845, on which day the following order was made, viz: "Ordered that this cause be continued, by consent of counsel, until the next term." On the 3d of March of the same year Florida was admitted into the Union as a State, and the new State Legislature having proceeded with as little delay as possible to organize a State Judiciary, the State Courts were held in the respective counties at the Fall Terms.

In December, 1845, the order of the State Court sitting in Franklin county, in relation to the case before us, was as follows, viz: "Ordered that this cause be continued."

At the Spring Term, 1846, we find a similar order. At the Fall Term, 1846, the parties appeared, by their attorneys, and argued a motion made by the plaintiff to rule out certain depositions, and the cause was again continued.

There was no Spring Term held in 1847, and at the Fall Term of that year, and the Spring Term of 1848, the same 324
orders of continuance were made. At the Fall Term, 1848, the parties came, by their attorneys, and a jury being called, they went to trial, which resulted in the verdict and judgment already mentioned.

Upon this statement the enquiry naturally arises as to the mode in which the State Court became possessed of the papers and proceedings appertaining to a cause which had originated in a court of another power, and of the right of the State Court after obtaining such possession to carry on and complete, without new process and pleadings, a judicial controversy left incomplete by the Territorial or United States Court when it passed out of existence.

The fact is incontestible that the Superior Court of the Territory, though not a constitutional but a legislative court, according to the distinction made by the Supreme Court of the United States, in the case of the American Insurance Company vs. Canter, (1 Peters' R., 546,) was a Court of the United States, since it derived its existence from the legislation of the United States, acting under the powers conferred by the Constitution.

The Circuit Court being a State Court, had no right as such to succeed to the records and jurisdiction of the Superior Courts, although the State Courts were held in the same places, and were found to be in possession of the records and exercised in fact jurisdiction, though somewhat restricted, over the same matters.

One court was not the successor of the other in any sense not provided for by competent legislation, and the possession of the papers without the sanction of such legislation was wholly impotent to carry with it into a distinct tribunal jurisdiction over the varied controversies of which those papers were only the records.

Another consequence may be deduced from the fact that

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these two courts derived their existence and their powers from distinct sources, and that is, that the legislation which we have said is necessary to create any relation between the courts, must have the sanction, express or implied, of both the sovereignties to which they belong, before such legislation can be binding upon the courts, either as to their officers or as to the suitors.

As no legislation of the Congress of the United States could interfere with the records and limited jurisdiction of the State Courts, (except in certain cases where the States have antecedently ceded the right,) without the acquiescence of the State, so can no State legislation, without the acquiescence of Congress, make the records of a Territorial or United States court the records of the State courts, or authorize any proceedings on them.

These propositions as thus stated, seem to require no argument, and were clearly recognized by this court at its last session, in the case of Inerarity vs. Curtis & Griswold.

The case before us was commenced in the Territorial court in 1842, and was continued from term to term until the last session of that court, February, 1845; and in the Fall of that year, we find it, without new process, on the docket of the State court at its first session, and it was considered and continued by that court from term to term until final trial. As we have alleged in the general propositions already stated, that the validity of this transfer of the cause from one court to another depends upon the concurring legislation of the State and Congress, we are brought to an enquiry into the character and extent of such legislation.

The constitution of the State of Florida gives to the circuit courts the most extensive jurisdiction. The sixth Section of the fifth Article provides that "The circuit
326 "courts shall have original jurisdiction in all matters, "civil or criminal, within this State, not otherwise ex- "cepted in this constitution."

The subject matter of the suit between Bennett and Carter is no where excepted in the constitution, and was therefore legitimately before the circuit court for Franklin county, if properly brought there.

The act of July 22, 1845, in section 5th, enacts that "all "causes, civil and criminal, pending in the Superior Courts, "and all common law cases pending in the county courts, "shall be transferred to the circuit courts, to be held in "the several counties in which such cases may be so pend- "ing as aforesaid, *together with all the papers* connected "therewith or relating thereto, and the said causes shall be "proceeded in without delay in said circuit courts."

The same act, in its 8th section, makes substantially the same provision for the transfer of papers and the jurisdiction of causes pending in the Superior courts, with the following exception: "Except all cases cognizable by the "Federal courts which may be organized in this State "which cases shall be transferred to said court."

These provisions of the constitution and the Laws seem ample to give to the circuit court (so far as the State is competent to give it) jurisdiction over the cause before us, and a right to the possession of the papers connected therewith or relating thereto, unless it comes within the exception just recited.

If it was a case cognizable by the Federal courts which might be organized in the State, it would seem by the terms of the 8th section of the act referred to, to be excepted from the operation of this provision for transferring, even though the jurisdiction of the two courts might be concurrent.

It could scarcely have been within the contemplation of the Legislature to give to the exception this extensive im- 327
port; but as the purpose of the law was a transfer of cases from a distinct and independent tribunal, and there was no inherent virtue in the State Court considered in its relation to the Territorial Court to draw to it, from the latter, its jurisdiction independently of legislative enactment, we feel constrained to interpret the extent of this exception according to the plain and literal meaning of its terms, and if this case was cognizable by the Federal Courts, to sustain the error here assigned.

Was it then cognizable by the Federal Court? Could the Federal Court, which was organized in this State, have taken cognizance of it? Let us see.

All the courts of the United States derive their authority from express grant, and "can exercise jurisdiction in "those cases only where it is conferred upon them by act "of Congress." 1 Wash. C. C. R. 231.

The acts of Congress conferring authority upon the Federal Court organized in Florida, (so far as they relate to the subject of our present enquiry,) are the general judiciary act of 1789, and the act of February 22, 1847, which has more direct reference to the court in this State.

The former act, after providing for the jurisdiction of the Circuit Court in certain cases, in its 12th section provides, "That if a suit be *commenced* in any State Court against "an alien, or by a citizen of the State in which the suit is "brought against the citizen of another State, the matter "in dispute exceeding five hundred dollars, and the de- "fendant shall, at the time of entering his appearance in "such State Court, file his petition for the removal of the "cause for trial into the next Circuit Court, on giving bail, "&c., the cause shall then proceed as if brought by origi- "nal process."

This provision of the act is the only one under which it 328
is claimed that the case before us was cognizable by the Federal Court, and the claim rests upon the alleged fact that Carter was a citizen of the State of Georgia. This fact no where appears during the process of the trial, either in the pleadings or the evidence; but after verdict, upon a motion in arrest of judgment, the defendant offered to prove that, at the commencement of the action, and at all times since, he was a citizen and resident of the State of Georgia, and the fact was admitted by counsel for plaintiff.

The Federal Court deriving its authority solely from express grant, Carter must bring his right to be sued in that court, within the provisions of such grant; the court cannot take jurisdiction by mere analogy.

This suit was not commenced in a State Court, nor did the defendant at the appearance term, nor at any term, file his petition for the removal of the cause. Where, then, is the authority of the court to take cognizance? The judiciary act gives no authority for the removal of a cause commenced in a Territorial Court, and especially where no motion is made until after verdict; and the authority not being given, it must be denied under the decision already quoted from the Circuit Court Reports, that the courts of the United States "can exercise jurisdiction in "those cases only where it is conferred upon them by act "of Congress."

It is no sufficient answer to this position to say that, from the peculiar circumstances attending the changes which occurred in the year 1845 in the judicial system of Florida, the defendant was never in a situation to avail himself of the privileges secured by the judiciary act to a non-resident defendant, according to the literal provisions of the act, and that he ought not to suffer from this involuntary disability.

It may be a hardship, but the court cannot make law;

329 and we have seen that the United States Court cannot take jurisdiction, however meritorious the claim, without express grant. The very statement of the hardship negatives the right.

The laws of Florida, with unwonted and perhaps unguarded liberality, surrendered to the Federal Courts all the pending cases where there was concurrent jurisdiction, wherever the latter could or would take cognizance. but the judiciary act of 1789 does not bring this case within its cognizance.

Let us now enquire if the act of Congress of February 22, 1847, passed in more direct reference to the court of Florida, supplies the omission.

The object of this act was place under the control and jurisdiction of the District court organized in Florida, certain records and proceedings in the old Territorial courts.

The act is too long to be here recited, but a careful examination of it will show that it makes no provision for the transfer of the case in question. There are several classes of cases enumerated in the act, and transferred to the District court, and we will briefly describe them.

1st. Pending suits in relation to private land claims under certain acts of Congress.

2d. Causes pending in the court of Appeals on the 3d of March, 1845.

3d. Causes determined prior to that period, on which writs of error could have been sued out or appeals taken to the Supreme court under existing laws.

4th. Causes determined wherein writs of error had been sued out or appeals taken.

5th. All cases pending in any of the Superior courts of Florida or in the court of Appeals on the 3d March, 1845, and not legally transferred to the State courts of the State of Florida, and which said Territorial courts continued to
330 hold cognizance of, and proceeded to determine after that day, or which are claimed to have been since pending therein as courts of the United States.

6th. All cases of Federal character and jurisdiction commenced in said Territorial courts after said day, &c.

The case of Bennett *vs.* Carter was not founded upon any private land claim, and is not therefore embraced in the first class.

It was not pending in the court of Appeals, and is not therefore embraced in the second class.

It had not been determined prior to the 3d March, 1845. and is not therefore embraced in the third or fourth class.

The Territorial courts did not continue to hold cognizance of it, and proceed to determine it after that day; neither was it claimed at the date of the passage of the act to have been pending in the Territorial courts as courts of the United States, and it is not therefore embraced in the fifth class.

The case was not commenced after the 3d of March, 1845, and is not therefore embraced in the sixth class.

It thus appears that this case is no where made cognizable by the Federal court, and not being cognizable by that court, it does not fall within the exception of the Florida law, so that, so far as the Legislature of the State of Florida could accomplish its transfer to the State courts, the provision for its transfer is abundantly adequate.

We have yet to show the concurrent assent of Congress to this transfer, but before proceeding to do so, we will advert for a moment to the nature of Carter's claim to any relaxation in his favor of the strict construction we have felt ourselves constrained to give to the legislative delegation of jurisdiction to the court.

During the interval between the Spring and Fall Terms in 1845, the case is transferred from the Territorial to the

State Court. At the Fall term it is continued without any 331
objection on the part of defendant to the jurisdiction of the court. At the ensuing Spring term it is again continued, without any objection on his part. At the next term he appears and argues a motion made in reference to the testimony. And thus he continues to appear from term to term till three years from his first appearance in the State Court had elapsed. At the end of that time he goes to trial, and after a verdict has been rendered against him, we hear for the first time his objection to the court, or even that he was a citizen of another State.

If he had any privilege at all, it was purely personal. There is no pretence that the subject matter was not cognizable by the State Court; and a privilege purely personal may be waived, and if it ever existed was in this instance waived by repeated acquiescence in the jurisdiction assumed.

But to return to the argument:—We have shown that so far as State legislation was competent to give it, the Circuit Court had full authority to hear and determine this case. Had it the sanction of Congress, which we have admitted was necessary to the legal transfer of the records and proceedings therein?

The act of Congress of February 22d, 1847, was designed to transfer to the United States District Court organized in Florida all such records of the late Territorial Courts as belonged appropriately to that court. A careful specific enumeration was made of all the clases of cases so to be transferred as we have already mentioned. It was made the duty of the District Judge to take the necessary steps to get possession of these specified records from the Clerks of the old Courts, or other officers or persons having them in their possession, these expressions, other officers or persons, pointing obviously to the clerks of the State 332
Courts, who had in fact succeeded to the custody of the papers. This precise enumeration of cases to be transferred from the State Courts leads irresistibly to the inference that Congress acquiesced in the retention by the State Courts of all the other cases and the papers belonging to them. The act of the Legislature providing for the transfer of all these cases not thus enumerated had been passed more than a year and a half, and the State Courts, under the authority of that law, had possessed themselves of them, and had been adjudicating them for nearly the same period. It is impossible to avoid the conclusion that this act of the Legislature and the action of the courts under it received the sanction of Congress in the act of 1847, so far as they were not in conflict with that act.

Besides this, Florida has followed many an elder sister into the Union, and the same provisions had been repeatedly made for the transfer of Federal causes to the District Courts, accompanied by long acquiescence in the assumption by the courts of the new States of jurisdiction over causes not Federal.

The clearness and force of this inferential sanction of Congress is fully recognized both by the Supreme Court of the United States and by the Supreme Court of this State.

In the case of Benner vs. Porter, 9 Howard R., 235, the Supreme Court say:—"The acts of Congress that have "been passed in various instances on the admission of a "State, providing for the transfer of federal causes to the "District Courts, as in the case of the admission of Flori-"da, already referred to, and saying nothing at the time "in respect to those belonging to State authority, *may "very well imply an assent to the transfer of them to the "appropriate tribunal.*

333 "Even the omission on the part of Congress to interfere "at all in the matter may be subject to a like implication, "and a subsequent assent would doubtless operate upon "past acts of transfer by the State authority."

Our own Supreme Court, in the case of Inerarity vs. Curtis & Griswold, (4 Fla. R., 175,) say:—"Where, as in "the case of Florida, the act of 22d February, 1847, pro- "vides for the transfer of the records and proceedings of "certain classes of cases, saying nothing about other class- "es, of which the State courts should take jurisdiction, the "inference is irresistible that Congress intended that the "State authorities should assume jurisdiction over the lat- "ter, or if they had already assumed it, the omission may "well be considered as a tacit acquiescence in and a ratifi- "cation of the authority thus claimed and exercised." "So far as Congress, by the act of February 22, 1847, "claimed to exercise jurisdiction over certain classes of "records and pending causes, it is in our opinion the ex- "excise of a rightful power, and so far as Congress has not "claimed those records, it may be considered as the sanc- "tion of the General Government, to the exercise of the "jurisdiction by the State authorities over the subject."

We have thus shown that the transfer of the case of Bennett vs. Carter from the Territorial to the Circuit Court in which it was tried was made by the Florida Legislature, with the concurrence and sanction of Congress, and the co-operation of these two authorities was sufficient to give legality to the transfer, and jurisdiction to the Circuit Court.

We conclude, therefore, that the first and second errors are not well assigned.

III. The third error assigned is, that the court ruled out the notes offered in evidence by defendant.

The defendant was endeavoring to show a title to the negroes under a mortgage executed by one Warren Jordan

334 in favor of the Georgia Railroad and Banking Company, and after having given the mortgage in evidence, he tendered certain notes, which were ruled out by the court, upon the ground that they did not appear to be the debt of the mortgage.

It is the duty of the court to decide upon the relevancy of a particular fact when offered in evidence. The court in endeavoring to ascertain this, will not always confine its notice to other facts already proven, which, in connection with the fact proposed, will render the latter pertinent to the issue; but it has a right and ought to require the assertion at least of counsel that it will be shown, by evidence yet to be offered, to be material.

Such is the approved practice of the courts, (4 Starkie's Ev., 381,) and without such statement, it is not error to reject an isolated fact, apparently immaterial, though it may afterwards appear not to be so.

"If the evidence be irrelevant at the time it is offered, "it is not error to reject it because other evidence may af- "terwards be given in connection with which it would be- "come relevant."

"If it would be relevant in conjunction with other facts, "it should be proposed in connection with those facts, and "an offer to follow the evidence proposed with proofs of "those facts at a proper time."—2 Phil. Ev., 428, referring to 11 S. and R., 134.

"A deed to the lessor of the plaintiff may be rejected as irrelevant unless the title first be shown in the grantor, or at least an offer made to follow it up with proof of his title." 4 Litt., 272.

In action on a covenant to save from all judgments in favor of P. & B. against the owners of the steamboat H., recovered for the price of the boat, a record of a judgment on notes against the covenants in favor of P. & B., was held not relevant thus nakedly presented. It should have 335 been accompanied with proof *aliunde* that the notes were given for the price of the boat by the owners. Wilson's admr. vs. Bowen 5 Monroe, 33.

Though a matter may possibly be relevant, yet the party must show how, otherwise it cannot be received. 2 Philips on Evidence, 434.

It is evident from these authorities that if the evidence before the court at the time the notes were offered did not, in connection with the notes themselves and statement of counsel, show them to be relevant to the issue, they were rightly ruled out, whatever evidence might be subsequently offered.

How then did the case stand when the notes were offered, as developed on the record before us?

The defendant produced an indenture of mortgage from Warren Jordan of certain property in favor of the Georgia Railroad and Banking Company, to secure the payment of his note for $22,500, dated July 1st, 1839, payable six months after date, and endorsed by Reuben Thornton, and of all other notes that might be given in renewal thereof, or of each other, with interest and costs.

The original debt had been $25,000, and it was recited in the mortgage that the note given for that amount was to be renewed every six months from the first of January, 1839, with a reduction of ten per cent. at each renewal, or twenty per cent. annually, as the Bank might require.

The notes offered were one for $15,000, payable six months after July 1st, 1841, to the order of Reuben Thornton, at the Bank, and another of same date for $627.

There was no proof that these notes were the notes secured in the mortgage, and though it was alleged that they were the representatives of the debt, of which the mortgage was only an incident, it was not proper to supply the lack of proof by conjecture. Many things would have had 336 to be proved to connect them with the mortgage, and the lack of antecedent and accompanying proof of these things was not supplied by any statement of counsel that the identifying evidence would be forthcoming.

But even had it appeared that the notes were those intended to be secured by the mortgage, there was no proof offered to establish the fact that Carter was the owner of them. An assignment of the mortgage is not an assignment of the debt, (as we will have occasion to show hereafter,) and even if the assignment of the mortgage to Carter had been shown before the notes were offered, which it was not, such assignment would not have carried the notes with it. It is true that the notes tendered had the name of Thornton on them as endorser, but it was not proven that Thornton had endorsed them, and without such proof Carter's title was defective, and the notes were properly ruled out.

Though he was the holder of the notes, the proof of Thornton's endorsement was necessary to give him title. Two things were essential to make the notes relevant as testimony, to wit: That they were the notes secured by the mortgage, and also that they were the property of Carter. The failure of proof on either of these points would have justified the court in ruling them out, much more the absence of proof on both points.

For these reasons, we think the third error not well assigned.

IV, V and VI. The fourth, fifth and sixth points assigned for error was the admitting the depositions of Johnson, Brown, Griffin and Collier, witnesses for plaintiff. The object of the testimony was to prove the value of certain lands embraced in Jordan's mortgage to the Bank, and which had been sold to satisfy an execution in favor of

Carter. It is stated in the record that when this testimony was offered in three separate depositions they were objected to severally by the defendant, without stating any grounds of objection. 337

This practice is strongly reprobated by the Supreme Court of the United States in the case of Camden vs. Doremus and others, 3 Howard, 515. In delivering their opinion in that case the court say: — "After each deposition "offered in evidence by the plaintiffs to the jury, it is sta- "ted that to the reading of such deposition the defendant, by "his counsel objected, and that his objection was over- "ruled.

"With regard to the manner and the import of this ob- "jection, we would remark that they were of a kind that "should not have been tolerated in the court below, pen- "ding the trial of the issue before the jury. Upon the of- "fer of testimony, oral and written, extended and compli- "cated as it may often prove, it could not be expected, "upon the mere suggestion of an exception, which did not "obviously cover the competency of the evidence, or point "to some definite and specific defect in its character, that "the court should explore the entire mass for the ascer- "tainment of defects which the objector himself either "would not or could not point to their view. It would be "more extraordinary still if under the mask of such an ob- "jection, or mere hint at objection, a party should be per- "mitted in an appellate court to spring upon his adversa- "ry, defects which it did not appear he ever relied on, "and which if they had been openly and specifically al- "leged might have been easily cured. 'Tis impossible "this court can determine or do more than conjecture, as "the objection is stated in this record, whether it applied "to form or substance, or how far, in the view of it pre- "sented to the court below, if any particular view was so 338 "presented, the court may have been warranted in over- "ruling it.

"We must consider objections of this character as vagueu "and nugatory, and, if entitled to weight anywhere, as "without weight before an appellate court."

"We must consider objections of this character as vague ment with the Supreme Court of the United States upon this point. "A party," says Mr. Justice Paige, "who "objects to evidence or the competency of witnesses, "should state specifically the grounds of his objections. "It is not sufficient to object generally that the evidence "is illegal, or the witness is incompetent; but the party "objecting must put his finger upon the very point, to "apprise the court and his adversary of the precise objec- "tion he intends to make." Elwood vs. Deifendorf, 5 Barbour's S. C. Reports, 406, citing 3. Howard, 515, 1 Cowen, 622, 12 Wendell, 504, 1 ib. 418, 1 Hill, 91.

The character of the objection and the mode of making it, in the case before us are precisely the same as those condemned by these two eminent courts. But there is still another circumstance appearing upon the record which shows still more that (to use the language of the Supreme Court,) "they should not have been tolerated in the court below." Two of the depositions were regularly crossed by defendant, and his cross interrogatories have direct reference to the main points sought to be proved, and in the third he objects only to certain of the interrogatories on grounds not relating to the relevancy of the evidence, and at the trial he makes his objection general, as in the other cases. By permitting the interrogatories to be put without objection as to the relevancy of the testimony, we consider him to have added much force to the condemnation pronounced by the two courts we have cited in regard to the vague and nugatory objection made at the trial.

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For these reasons chiefly, we think these errors not well assigned, though we may add, that the evidence, even if irrelevant, could not have possibly misled the jury. It is a well settled rule that the admission of immaterial testimony cannot be assigned for error by a party, where no injury could have possibly resulted to him from its introduction. As the position will apply to several of the remaining points which we have to examine, it may be proper here to sustain it by authority. In the case of Greenleafs, lessee, *vs.* Birth, 5 Peters, 135, Judge Story, who delivered the opinion of the court, said: "And we wish it "to be understood as a general rule that where there are "various bills of exceptions filed, according to the local "practice, if in the progress of the cause the matter of any of "the exceptions become wholly immaterial to the merits, "as they are finally made out at the trial, they are no lon- "ger assignable as error, however they may have been "ruled in the court below. There must be some injury "to the party to make the matter generally assignable as "error." 339

In 1 Cond. Reports, 263, in the case of Turner *vs.* Fendall, Judge Marshal, in delivering the opinion of the court, says: "Although the testimony rejected was proper and "legal evidence towards establishing the fact, yet the court "committed no error in rejecting the testimony, for which "this judgment ought to be reversed, because the fact does "not appear to have been *relevant* to the cause under consideration."

So in 7 Blackford, 578, in Van Vacter *vs.* McKillip, it is said: "The admission of immaterial evidence (the "merits of the case having been fully tried,) cannot be as- "signed for error."

The testimony referred to in the assignment under consideration was rebutting testimony, and as Carter by the ruling out of the notes had failed to show any title under the mortgage, its admission could not possibly have prejudiced him, and is not therefore assignable for error. 340

VII. The admission of certain bonds executed by Bennett on a claim to the negroes when levied on by Carter under his judgment on the mortgage, is assigned for error in the seventh place.

The assignment on the record connects certain affidavits of Bennett with the bonds, and the affidavits do in fact appear on the record, but it is clearly stated that the plaintiff only offered "two bonds," and as clearly that the "two papers" were objected to by defendant. And the record adds that before reading *said bonds,* plaintiff introduced Joseph Hand—the insertion of the affidavits is therefore a clerical error, caused probably by the affidavits and bonds being written on the same sheet of paper. The exhibition of the bonds could avail nothing to the injury of Carter, while they were calculated to rebut any presumption of acquiescence by Bennett in Carter's claim, "for admissions "may be implied from the acquiescence of the party." Greenleaf, 197.

The objection to this ruling of the court is not sustained

VII. The eighth matter assigned for error is that the court excluded defendant's testimony of the clearance of the slaves at the Custom House for New Orleans, and a certificate appended thereto.

It is impossible for us to perceive the relevancy of this testimony. If Bennett's right to the possession of the slaves was better than Carter's, he had a right to clear them—if it was not better his clearing them did not make it worse.

The error is not well assigned.

IX. It is ninthly assigned that the court erred in refu-

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341 sing to instruct the jury generally upon the points of law arising in the case, when called upon by counsel, and in its construction of the statute of 1848 upon that subject.

The common law principle, as asserted by the defendant's counsel, is undoubtedly true, that it is the duty of the judge to give the jury his opinion in matters of law arising upon the evidence.

Mr. Justice Blackstone says so in those very words. 3 Com., 375. But even if the act of 1848 made no change in the common law, it would not be in error for the judge to omit doing so, when he expressed his readiness to charge upon any point suggested by counsel.

In the case of Pennock *et al. vs.* Dialogue, the Supreme Court of the United States say: "It is no ground of reversal that the court below omitted to give directions to the jury upon any points of law which might arise in the cause, when it was not requested by either party at the trial. It is sufficient for us that the court has given no erroneous directions.

"If either party deems any point presented by the evidence to be omitted in the charges, it is competent for such party to require an opinion of the court upon that point. If he does not, it is a waiver of it. The court cannot be presumed to do more in ordinary cases, than to express its opinion upon the question which the parties themselves have raised at the trial." 2 Peters, 15 .

If the court omits to charge at all, the remedy of the party, who may deem himself prejudiced by such omission, is, in the first instance, to apply to the judge, and ask such instruction as he desires. If the judge refuse, he may then come to an Appellate Court for redress: he cannot come directly to this court without first seeking what he desires from the court below. If the omission to charge is a wrong at all, it is a wrong alike to both parties and to
342 the jury, and either party to make it a wrong against himself, of which he may complain, must point out to the judge what he wants, and be refused.

Such we understand to be the meaning of the Supreme Court in the opinion from which we have quoted. The requirement of the statute of 1848, that the charge shall be in writing, makes it, in many cases, physically impossible for the judge to charge upon every point of law, and according to the reasoning of defendant's counsel, the omission of one point would be error as well as the omission of all. The object of the statute seems to have been to restrain the judge from intermeddling with the facts.

The word "only," in the first section, qualifies the duty of charging—no new duty is imposed. At most, it is left as it was at common law, though the precise description of the mode of charging in the other sections seems, in some degree, to warrant the construction of his Honor, but upon that point we need give no opinion, as we think that, even at common law, there was no error in his ruling.

X, XI. It is assigned in the tenth and eleventh places that the court erred in refusing the first special instruction asked, and in giving a modified instruction in lieu thereof.

The instruction asked was as follows:

"That a party cannot be permitted to gainsay or deny his own solemn oath of record made in this court, setting up the facts sworn to as a defence in the action, and when such oath is introduced to the jury it is conclusive against such party making such oath, and the highest possible evidence;" which the court gave in substance, with this qualification: "But he may be permitted to explain it, and to show that it was made in ignorance of his rights, or under a misapprehension in regard to them."

In the case of Heane vs. Rogers, 9 B. & C., 577, (referred to and quoted in Greenleaf Ev., see 204, *note*,) Mr. 343
Justice Bailey, in delivering the judgment of the court, says:—"There is no doubt but that the express admission of a party to the suit, or admission implied from his conduct, are evidence and strong evidence against him, but we think he is at liberty to prove that such admissions were mistaken or untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition. In such a case the party is estopped from disputing their truth with respect to that person, (and those claiming under him,) and that transaction, but as to third parties he is not bound. It is a well established rule of law that estoppels bind parties and privies, not strangers." See also numerous authorities referred to by Mr. Greenleaf. In the text of the same authority (Greenleaf, 210,) it is said:—"The mere fact that an admission was made under oath, does not seem alone to render it conclusive against the party, but it adds vastly to the weight of testimony, throwing upon him the burden of showing it was a case of clear and innocent mistake."

In Thomas vs. White, 1 Tyrw. and Grang. 110, cited in a note to the same section, "the party had sworn positively to matters of fact in his own knowledge, but it was held not conclusive in law against him, though deserving of much weight with the jury." The charge of the Judge appears to be in perfect accordance with these well established principles.

12th assignment. The facts upon which the twelfth assignment is based are as follows: The plaintiff in the court below had filed an affidavit in another cause, setting forth that the slaves sued for had been removed from the State of Georgia by Warren Jordan and Reuben Thornton, with intent to defraud the Georgia Railroad and Banking Company, and others, contrary to the laws of that State; and further, that Jordan had brought the negroes into Flor- 344
ida in violation of the statute of the Territory.

Defendant asked the court to instruct the jury that a party cannot claim title to property in any court of this State, when such claim comes through such facts as were sworn to in the affidavit just mentioned. The court refused the instructions because "the law was so mixed with the facts in the instructions asked. that one could not be given without the other."

The proposition here asserted by the defendant cannot be maintained upon authority

A voluntary or fraudulent conveyance is perfectly good between the parties and their representatives, and against all persons except creditors. Am. L. Cases, 59, citing 5 Binney, 109, and numerous authorities.

The estate becomes at once subject to the debts of the grantee, (2 Halst. R., 173,) and a voluntary conveyance by the fraudulent grantee to the original grantor will be fraudulent against the creditor of the former, (10 Conn., 39.) Again, the creditor of the fraudulent grantor has no title to the property conveyed to the grantee;—he has a right only to have his debt paid out of the property by a sale under judgment or decree. If he seeks to set aside a conveyance upon the ground of its being fraudulent as to creditors, he must prove himself to be a judgment creditor. In Angel vs. Draper, 1 Vernon, 399, and Shirly vs. Watts, (3 Atk., 254,) cited by Chief Justice Kent in the case of Wiggins vs. Armstrong, 2 John C. R., 144, it was held that the creditor must have completed his title at law by judgment and execution before he can question the disposition of the debtor's property. The same doctrine is declared in Balch vs. Westall, 1 P. Williams, 445.

In the case in 2 J. the Chancellor says: 'The reason of the rule seems to be that until the creditor has established

his title he has no right to interfere, and it would lead to an unnecessary and perhaps a fruitless and oppressive interruption of the exercise of the debtor's rights. Unless he has a certain claim upon the property of the debtor, he has no concern with his frauds." 345

Was Carter, then, a judgment creditor of Jordan, and as such entitled to interfere with the disposal of his property? This depends upon the validity of the proceedings in the suit for foreclosure. The record shows that Carter obtained a judgment at the Fall term against Jordan, but the validity of that judgment it was competent for Bennett to contest. Chief Justice Ruffin, in the case of Hafner vs. Irwin (4 Iredell, 529,) sustaining the view of Chancellor Kent, already quoted, as to the necessity of a judgment, yet adds a qualification in very significant language: "A creditor must establish his debt by judgment before he can raise the question of the validity of a conveyance made by his debtor. As a general creditor by contract, he has no right to the property nor lien for the immediate satisfaction of his debt. He must therefore proceed to judgment. The judgment is not conclusive against the party claiming under the deed, *for judgments may be fraudulent as well as deeds.* It is, therefore, open to the grantee in the deed to show that the recovery was by covin or collusion."

Bennett having the right to impeach this judgment, the inquiring into its validity was a question of fact for the jury. It was only in the event of the judgment being valid that the facts admitted by Bennett in the affidavit were material or conclusive against him, and therefore the judge might well say, "that the law was so mixed with the fact in the instruction asked, that one could not be given without the other." To us who have the record before us, the propriety of the refusal of the instruction is manifest, from a consideration of the facts into which his Honor below declined to look. The judgment of foreclosure was clearly erroneous. There was no notice to Jordan, personally or by publication of the amended petition of Carter, upon which judgment was rendered. 346

There was no proof of the execution of the mortgage, and none of the debt, except by the admission of Thornton as agent, by a power of attorney clearly insufficient to give him such authority.

Again, in the foreclosure suit, according to a former decision of this court in Wilson vs. Hayward, 2 Fla. R., 27, Jordan was not the proper party defendant, for he had parted with his equity of redemption, and for that reason in the words of the court in the case referred to, "the "proper course was to go against the purchaser, as the "proper party to the petition, according to the terms of the "statute itself. The prayer is that the mortgagor and all "persons claiming or to claim by, through or under him, "be foreclosed, and by the 4th section personal service of "notice, &c., shall be served upon the mortgagor, or *other "person* having the equity of redemption."

It is thus apparent that the validity of the judgment being impeachable by Bennett, and depending upon many facts, and yet so necessary to Carter to place him in the relation of a judgment creditor to Jordan in order to authorize him in interfering with Bennett's title, though fraudulently acquired, it is apparent, we think, from these considerations, that the judge was right in refusing the instruction.

But it may be said that Carter was a mortgage creditor, at least, even if the judgment was void, and that under the authority of Phillips vs. Hawkins, 1 Fla. R., 262, he became absolute owner of the mortgaged property upon the condition of the mortgage being forfeited.

Although the mere statement of the objection shows that the matter was strictly within the province of the jury, and that the judge was right in his ruling, yet a brief consideration of the facts proven demonstrates that Carter was not a mortgage creditor in that sense which would have authorized him to call in question the title of Bennett, even though derived in the manner stated in the affidavit. 347

He had given in evidence on the trial an indenture of a mortgage executed by Jordan to the Georgia Bank, which was regularly assigned by the bank to Carter. It is clear, upon authority, that this alone did not constitute him a creditor by mortgage. In 4 Com., 194, Chancellor Kent says: "The assignment of the interest of the mortgage in the land without an assignment of the debts is considered to be without meaning or use. This is the general language of courts of law as well as equity."

"The mortgage interest, as distinct from the debt, is not a fit subject for assignment. It has no determinate value. If it should be assigned, the control over the mortgage premises must essentially reside in him who holds the debt." 4 J. R., 43.

"A mortgage is a mere incident of the debt, and assignment of the interest in the land without the debt is a nullity." 2 Cowen, 195.

So in 2 Cowen, 231, it is said, referring to 19 J. R., 325, that the mortgage is a mere incident to the bond, as personal security for the debt, and that an assignment of the interest of the mortgage without an assignment of the debt is considered in law as a nullity.

See upon this point 7 Penn. R., 280, 17 Serg. & Rawles, 400, 5 Cowen, 202, 6 N. Hamp., 205, 11 N. Hamp., 274.

In the 2d Vol. of Leading Cases in Equity, 445, it is said: "It is a further consequence of the general subordination of the estate in the land to the purposes of the debt, that an assignment of the latter will draw the former with it, (citing the first three cases above referred to,) but that the estate in the land cannot be assigned apart from the debt," citing the other authorities above. 348

The proofs upon the record show that Carter was the holder and assignee of the mortgage by regular assignment, but this alone, according to some authorities, was a transfer of a naked trust, and according to others, a mere nullity. There is no evidence that he had an interest in the debt. It is true that at one stage of the trial, he offered certain notes which were ruled out, because they did not appear to be the debt secured by the mortgage. This ruling, for the reasons already adduced in our consideration of the third error, we deem to have been correct, and Carter stood before the court and jury as the assignee of the mortgage, without an interest in the debt. This was not sufficient to make him a mortgage creditor, or a creditor in any sense of Jordan, and therefore he had no right to complain of the facts set out in the affidavit, nor to defend himself even against the bare possession of Bennett. But the affidavit of Bennett states that the negroes were brought into the State of Florida in violation of the statute prohibiting the importation of slaves, under certain circumstances.

And this is relied on as a ground on which Carter justifies the taking and seizing the negroes out of Bennett's possession, without authority of law, and claiming them as his own.

The authorities cited by Carter's counsel go to prove what may be readily conceded, namely, that a contract made in violation of a statute imposing a penalty, but without declaring the contract void, is nevertheless void.

It is not easy to perceive how this principle of law can be invoked by Carter in this case. Bennett had possession of the negroes, and insisted that such possession gave

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him good title against all except the rightful owner. Carter could not by proving his (Bennett's) admissions, or by any other evidence, that the negroes had been imported contrary to the statute, justify the taking them from Bennett's possession, without authority of law. Bennett's violation of law did not confer any title upon Carter. Carter having failed to prove himself the rightful owner, Bennett's title, founded upon possession, must prevail.

The instruction, therefore, was properly refused, both because the naked legal proposition asserted is wrong, and also according to the ruling of the Judge certain facts would have to be proved before Carter could be placed in such relation to Jordan as to have any concern with his frauds.

XIII. It is assigned in the thirteenth place for error that the third instruction asked was qualified by the Judge below. The third instruction asked was in these words: "That no man can claim title to property sworn by himself "to have been acquired by a direct violation of the statute "of frauds, as against the parties intended to be defrauded;" which the court altered by adding thereto the words, "unless he shows that he made such oath under a "misapprehension as to the law, or the facts, or the evil;" which instruction, so altered, he gave

For reasons already given, and supported by ample authority, it is evident that the instruction asked could not have been properly given. A creditor must establish his debt by judgment before he can raise the question of the validity of a conveyance made by his debtor. This is the concurrent import of numerous authorities we have heretofore cited, and is too well settled to admit of question

Even if the instruction asked was not obnoxious to this objection, the qualification of the Judge was altogether
350 proper, for the reasons we have adduced under the tenth and eleventh branches of the assignment.

XIV. It is alleged in the fourteenth place that the court erred in adding the qualification ("or other consideration") to defendant's fifth instruction, there being no evidence to authorize it, and the bills of sale purporting to be for money. The instruction asked was as follows: "That a voluntary bill of sale in which no money is paid, carries no "title against prior creditors, especially mortgage creditors, and even if another person should buy for money, with "notice of the person holding under such bill of sale, such "new party can claim no title against such prior creditors "or mortgagees." This instruction was given after inserting the words, "or other valuable consideration given," after the words "no money is paid."

This qualification seems to us to be very harmless. We have shown that prior creditors simply, not being judgment creditors, cannot impeach a voluntary conveyance, and as to mortgage creditors, we cannot perceive how the qualification impairs the force of the instruction as asked for. And besides, we may remark here, what applies to many of these numerous exceptions, that the frequent allusions to Carter as a mortgage creditor are not warranted by the law of the facts proved. The ruling of the court on the twelfth error assigned, with the reasons and authority there presented, establish that the assignee of a mortgage is simply no mortgage creditor.

There was an entire absence of testimony before the jury to prove that Carter was the assignee of the mortgage debt, and not being such, he was in no sense a creditor of Jordan. The matter of this instruction, therefore, had no reference to him, and it might have been properly refused altogether.

XV. It is alleged in the fifteenth place for error that the court refused the defendant's ninth instruction, which is 351
in these words: "That the title to the sixteen negroes "mentioned in the action of trover in Georgia was de-"cided in that case to be in Farish Carter, and the jury "cannot reverse or review that decision, and must throw "that number of negroes from their consideration." The court refused this, "because involving facts upon which "the court is prohibited from instructing the jury."

The exemplification of a record of another State is evidence of a very high order, but still it is evidence for the jury, involving facts, and in the case before us the identity of the negroes mentioned in this record with the negroes sued for by Bennett, was a very material fact, and necessary to be proved in order to give any value to the record as testimony for the defendant. Well, therefore, might the Judge hesitate to tell the jury that they must throw sixteen negroes from their consideration. He left that properly and appropriately for them to decide upon the facts before them. But however erroneous this refusal might have been, why should the defendant complain, since, at an antecedent stage of the trial, and before the case was argued to the jury, the plaintiff's counsel, as it is stated in the record, "abandoned his suit to the negroes in the declara-"tion mentioned, proved to have been re-captured by "Bennett from Long's plantation—same being included in "the Columbus judgment, Carter vs. Bennett."

It seems to be at least a waste of the time both of the court below and of this court, to have asked for the instruction there, and to have assigned the refusal for error here, under the circumstances we have just mentioned.

XVI. It is said in the sixteenth place that the court erred in refusing the thirteenth instruction asked by defendant. The instruction asked for was as follows. "That "the record in the case of Peninah W. Thomas vs. Farish "Carter, being in evidence before the jury, and comment- 352
"ed on by plaintiff, is conclusive as to any subject matter "decreed upon in said record, and if the record shows that "a foreclosure has been had in Georgia on the personal "property by said mortgage conveyed, on the fifth of Ju-"ly, 1842, the title to the personal property became abso-"lute in the mortgagee—an action of trover for said per-"sonal property subsequently commenced by the mortga-"gor, or any person claiming by, through, or under him, "cannot be maintained." It was refused by the court because it was not conclusive against any but those who were parties or privies to the record.

This exception seems to have been abandoned by defendant's counsel. It is certainly untenable. Mr. Greenleaf tells us, "it is a most obvious principle of justice that no "man ought to be bound by proceedings to which he was "a stranger." Greenleaf on Ev., 522.

And persons who have no right to make defence, or to control the proceedings, and to appeal from the judgment —to adduce testimony and to cross-examine the witnesses adduced on the other side, are regarded as strangers to the cause. Ibid, 523.

XVII. It is assigned as the 17th error that the court refused the 14th instruction asked for without qualification. The instruction asked was that "a party whose title is "tainted with fraud, cannot rely upon such title to object "to the regularity of a decree rendered in favor of the "creditor against the debtor, who did so fraudulently part "with his title, and this will apply in the case of a fore-"closure of mortagage by mortgagee against mortgagor, "where the decree is attacked by any one claiming title "under a mortgagor who has fraudulently conveyed his "equity of redemption to hinder and delay the mortga-"gee;" which the court refused, but gave with this quali-

fication: "Such person being cognizant of the fraud at the time of his purchase." 353

We have already said, upon the authority of Chief Justice Ruffin, that judgments may be fraudulent as well as deeds, and that they are open to the grantee in a fraudulent deed to show fraud or irregularity if he can. And "it is a general rule that a decree in Equity shall not, any "more than a verdict or judgment at law, either conclude "or in any way prejudice the rights of those who are not "parties to the suit." 20 Wendall, 262.

The judge, by his qualification, confines this privilege to persons not cognizant of the fraud at the time of their purchase, and if the positions cited from the North Carolina and New York Courts be true, the charge of his Honor was more favorable to the defendant than he was entitled to.

The cases referred to by defendant's counsel in the Florida Reports, do not contradict these conclusions. In 2 Florida Rep., 518, it is said: "Fraud will vitiate any, even the "most solemn transactions, and an asserted title to prop-"erty founded upon it is utterly null," and reference is made to 15 Peters and 2 Howard, and the Court adds: "No doubt a record may be affected and even vitiated by "fraud."

All this is in perfect harmony with the conclusions which we have elaborated elsewhere. Counsel do not seem to distinguish between fraud and fraudulent conveyances.

The first vitiates all transactions, and the latter are fraudulent and void only as against certain specified parties.

Carter has never brought himself (as we have clearly shown,) among those specified parties, and therefore Bennett's title, however fraudulent it may be to others, is not so as to him.

XVIII. The eighteenth error assigned is that the Court refused the sixteenth instruction as written, but gave it 354
with the additional words in brackets below, viz:

"In cases of foreclosure at common law, under our stat-"ute, any person claiming by, through or under a mortgagor, "can come in and state his objections, under oath, show-"ing cause against foreclosure of the mortgage proper;" to which the court added, [provided, he is served with legal notice, either personally or by advertisement.]

His Honor clearly meant, we suppose, by this ruling, that no party can be affected by a foreclosure under the statute, unless he is served with legal notice, which is too obviously true to require comment. But if we mistake the intention of the court, and his proposition is meant to be understood literally, still it was but a qualification, either with or without which the instruction asked was a mere abstract proposition, having no reference to the facts of the case. The most that is asserted is that Bennett might have come in without notice—it is not alleged that he was under obligation to do so.

The fact is that he had no notice, and was not therefore concluded by the judgment, however true or false the proposition may be as laid down by the defendant in his instruction.

We think, therefore, the error is not well assigned.

XIX. The nineteenth point assigned for error is that the court erred in refusing to give the third clause of defendant's eighteenth instruction.

This clause of the instruction asked is in these words: "That no such property or possession can be maintained "against a prior creditor of the vendor, Thornton or Jor-"dan, unless such property or possession was obtained "bona fide;" which was refused by the court because it was "mixed with fact."

His Honor might have refused the instruction for a still better reason. The principles we have established, show- 355
ing the necessity of a cerditor obtaining a judgment before he has a right to impeach a conveyance, apply with all their force in resistance to the position here assumed by defendant. Nay, more, a judgment creditor, as such simply, has no title to the debtor's property till it is consummated by the execution of the judgment. It is surely not necessary to quote authority to prove that "in trover posses-"sion, whether rightfully or wrongfully obtained, is a suf-"ficient title in the plaintiff as against a mere stranger." 10 Vt., 208, 11 Vt., 351.

We have, in the progress of this opinion, exhausted argument to show that Carter, so far as the record informs us, was a stranger, and that it was perfectly immaterial to him what was the nature of Bennett's title or possession, if any title or possession at all was proved.

XX. The twentieth error assigned is that the court erred in refusing defendant's motion for a new trial.

The motion in this case is based upon the allegation that there was error both in the ruling of the court upon the law and in the finding of the jury upon the facts of the case. So far as the questions of law are concerned, they have been presented to the consideration of this court in every variety of aspect. The skill and ingenuity of the eminent counsel having charge of the case, seem to have been tasked to the uttermost in exhibiting every possible question in every possible phase, and the court must take some credit to itself for the patience with which it has pursued the multiform enquiry which has been asked at its hands.

Has the appellant a right to demand of us to pass upon the facts? Have we a right to control the discretion of the court below in relation to its granting or refusing a new trial?

The question is not a new one before the appellate tribu- 356
nals in Florida; for it was presented to the late Court of Appeals, in the case of the United States vs. Jerrison & Foster, (not reported,) and decided adversely to the application. We see no reason to justify us in departing from that decision.

Although we have given to the subject as much thought and research as its importance seems to merit, we feel constrained, by the unusual length to which this opinion has been unavoidably protracted, to allude very briefly to the considerations which have influenced our judgments. The whole frame work of our judicial structure is derived from our English forefathers, and the practice of reviewing the decisions of a court, upon motions for a new trial, is wholly unknown to the judicial system of that country. Such also is the case with the Courts of the United States, while the courts of the several States seem to be about equally divided upon the question. The weight of authority, therefore, is clearly against the exercise of the right of controlling the discretion of the inferior courts on the subject of new trials.

When we consider the expediency of asserting such a right, we are at once met by the enquiry whether we are as competent to judge of the weight of evidence as the court and jury before whom it is given? One of the courts which accord the right to an Appellate Court of reviewing the decisions of inferior courts on this point, says: "Great deference is due to the judgment of the legitimate "triers of matters of fact." "That court has opportuni-"ties greatly superior to those enjoyed by this court, of "determining whether the verdict is against the weight of "testimony." (7 Missouri, 221.)

In this admission, we conceive, rests the whole argument against the expediency of the exercise of this power. Every one at all familiar with the incidents of a jury trial,

357 must admit the impossibility of conveying to an appellate tribunal a perfect transcript of the evidence given to a jury. The tongue of the witness is not the only organ for conveying testimony to the jury; but yet it is only the *words* of a witness that can be transmitted to the reviewing court, while the story that is told by the manner, by the tone, and by the eye of the witness, must be lost to all but those to whom it is told. The testimony of one witness, given with calm self-possession, an erect front, and an unhesitating accent, imports verity as strongly as a record, while the confusion, the hesitation, and trembling of another, will contradict to the eye what his faltering tongue has uttered to the ear. Yet the testimony of each will stand alike before the court of review.

For this reason mainly, and for others which we need not adduce, we deem it our duty to adhere to the practice, sanctioned by the most venerable authorities, of leaving the question of granting or refusing motions for new trials to the Judge who has had the privilege of hearing the evidence.

The points assigned for error, subsequent to the twentieth, were not noticed in the argument, and are understood to have been abandoned by the defendant. But as they are upon the record, it is our duty to pass upon them, which we shall do in the briefest possible terms.

XXI. The twenty-first point denies he jurisdiction of the court, which question we have disposed of in our consideration of the first and second points.

XXII, XXIII. The twenty-second and twenty-third points deny the right of Judge Douglas, who was the Judge of the Eastern Circuit, to sit in the case, which was tried in the Western Circuit.

The State Constitution provides, in the 7th sec. of the
358 5th article, "That the Judge of the several Circuit Courts "may hold courts for each other."

XXIV. The twenty-fourth point seems to have reference to the same point, and the assignment is, therefore, not sustained.

XXV. The twenty-fifth point presents an objection to the verdict, upon the ground of excessive damages. This was a matter proper to be brought to the attention of the court below on a motion for a new trial. *We* have nothing to do with it.

XXVI. The twenty-sixth point is obnoxious to the same objection.

XXVII, XXVIII. The twenty-seventh and twenty-eighth points are mere recapitulations of others already decided upon.

The true elements of this controversy, when divested of the multitudinous wrappings in which it has been presented to our notice, (the printed record making a well sized octavo volume,) are very few and very simple. Bennett was in possesion of the slaves when they were taken from him by Carter, and converted by Carter to his own use. Whether Bennett's possession was rightful or not, Carter had no right to divest him of it *munu forti*, without showing that he was a judgment creditor or a mortgage creditor of Jordan's. He failed to do both, and stands before the court simply as a stranger, intermeddling without authority with the possession of another.

Having reviewed in detail the many complicated questions presented upon the record of this case, we conclude by saying, we find no such error in the proceedings in the court below as to require us to set aside the judgment, and we shall accordingly direct the judgment to be affirmed, with *costs*.

Let the judgment be affirmed, with costs, and the case 359
remanded to the court below.

NOTE BY THE REPORTER.—In the 8th line of the Head Notes, on page 283, instead of *"former,"* read latter.

THE SOUTHERN LIFE INSURANCE AND TRUST COMPANY, AND THE STATE OF FLORIDA, PLAINTIFFS AND APPELLANTS, AND CHARLES COLE, RESPONDENT.

An Appeal in Equity is substantially a re-hearing of the cause, and the appeal opens the whole case to the Respondent;—and although the Appellant may show that the view taken by the Court below is erroneous, yet the Respondent is at liberty to show, if he can, that upon the whole case, no other decision can be rightfully made of the case in the Appellate Court.

The act of February 10th, 1832, gives authority to the Appellate Court to pronounce "such judgment, sentence or decree, as the Court below ought to have given." This power could never be exercised, if the Court had not the right to look into the whole case as it is presented in the Record.

But though this Court will re-examine questions decided against the Respondent as well as such as passed *sub silentio*, or consider points made here for the first time, if raised by the pleadings and proofs, yet care must be taken that neither party be permitted to surprise or mislead his adversary, or to make objections which, if made in the Court below, might have been obviated.

It is well settled that the members or shareholders of corporations created for private emolument,are not admissible as witnesses for such corporations on account of their direct and certain interest. The liability of the company for costs,is a sufficient interest to render a shareholder incompetent as a witness.

Time in a Court of Equity is rarely considered as material where the value of the property contracted for and the circumstances of the parties remain unchanged, but performance will not be decreed where time has elapsed and an important change in respect to value or circumstances has taken place. In sales of stock in the public funds, time is of the essence of the contract; and, in all cases where time is material, or of the essence of the contract,the rule in equity is the same as at law—that is, if the contract is not carried into effect within a reasonable time, by the vendor or the purchaser, it is 360
deemed to be dissolved or abandoned by mutual consent.

Where several acts are to be done, and a contract is entered into for their performance, the execution and performance of one act depending upon, and constituting the consideration for the execution and performance of another—or where there is a variety of instruments forming one transaction,the law will not give effect to any one act, or any one instrument, unless the whole transaction is completed.

Delivery of a deed is a matter in *pais*, and though the possession of a deed by the grantee is *prima facie* evidence of delivery, yet the circumstances under which the grantee became so possessed, may be shown even in a Court of law so as to avoid the effect of delivery. The delivery of a deed to an officer or servant of a corporation, is delivery to the corporation itself, provided it is for the use and benefit of the corporation, and with intent to pass an absolute property or interest. But there is no such personal identity between a corporation and its officers as to prevent or preclude a delivery to the latter as an *Escrow*, to take effect upon the performance of some condition. Nor is it necessary or material that there should be any formal notification of its delivery as an *escrow*. Under the 24th section of the act of November 23, 1828, in an action at law a plea of want of consideration in under oath, throws the burden of proof of consideration on the plaintiff;—and such by analogy is the rule in equity.

The Statute of Frauds of this State is more comprehensive than the British Statute; for though shares of stock have been held not to be "goods, wares and merchandise," within the meaning of the act of 29th, Charles 2d, ch. 8, the statute of this State uses the words "personal property" as well as the words "goods, wares and merchandise," and there can be no doubt that shares of stock in an incorporated company are included within the very comprehensive terms, "personal property."

Where there is no consideration of benefit or advantage to the grantor in a deed or of detriment to the grantee, it is *nudum pactum*, and must be so declared by a Court when such want of consideration is made manifest.

Appeal from a decree of the Circuit Court of the county of Leon, made the 5th day of August, 1850.

A bill was filed by appellants in February, 1849, to foreclose a mortgage made by defendant to the Southern Life Insurance and Trust Company, dated the 20th December, 1841, to secure the payment of $6500, which mortgage was acknowledged by Cole, the respondent, to be his act

361 and deed, for the purposes therein mentioned, and was duly recorded 24th December, 1841.

After the filing of the bill and while the suit was pending, the bond and mortgage so executed by the respondent were assigned to Thomas R. McClintock, a judgment creditor of the Southern Life Insurance and Trust Company.

The defence set up in the case made by complainants' bill, was—

1st. That the bond and mortgage were delivered as an *escrow.*

2nd. That there was no consideration upon which a court of Equity could make a decree in favor of complainants.

3d. That there was a total failure of consideration—and that the Southern Life Insurance and Trust Company never performed what it had stipulated to do until long after the execution of said bond and mortgage, and when the stock which was the consideration of their execution was greatly depreciated, if not entirely valueless to respondent—that when an attempt was made, after such lapse of time and under such circumstances, to transfer to Cole $6,500 in shares of stock, he refused to accept, and rescinded the contract, as he had a right to do. These grounds of defence were ably and elaborately argued by the counsel for respondent, and were fully sustained by the court.

The decree of the Circuit Court from which this appeal was taken, was the following, viz :

"This cause having been submitted to the court upon the bill, answer, exhibits and proofs, and full argument having been had thereon, and the court having maturely considered the same, and being of opinion that there is no equity in the said bill for which the same should be sustained; that said bond and mortgage are not valid and binding as between these parties, having been executed for a purpose not consummated nor carried into
362 effect, and that the same was without any consideration : It is, therefore, decreed and ordered, that the said bill be and the same is hereby dismissed, and that complainants pay to defendant his costs in this behalf expended."

The opinion of the court is full and clear as to all the points and facts in the case.

The case was argued by *Archer* and *Davis* for Appellants, and by *Long* and *Branch* for Respondent.

THOMPSON, *Justice,* delivered the opinion of the court.

In the decision of this case, it becomes important *in limine,* to dispose of the question made as to the effect of the appeal—how far it opens the cause to the consideration and judgment of this court. It is contended on behalf of Appellant, that all questions made by the pleadings and proofs, or which arose in the court below and which were either decided against the respondent, or passed over *sub silentio,* cannot be urged upon the consideration of this court by the respondent, unless a cross appeal had been entered by him, founded on the decision adverse to him, or the omission to decide the question raised.

It is laid down by Mr. Daniel, in his Chancery Practice, that on a re-hearing or appeal, the whole case is open to the respondent; thus, if the appeal is against the whole decree, it is competent to the court to modify the decree, by making it more favorable to the respondent. (Vol. 3, 126, 127—Harrisburg Ed.) In Sullivan vs. Jacob, (1 Moll. R. 472,) where a defendant appealed from a decree, on the re-hearing the court decreed the plaintiff more extensive relief; and in Oldham vs. Stonehouse, (3 Myl. & C. R. 317,) where a plaintiff appealed from a decree which had been pronounced in his favor, with costs, upon the re-hearing, the respondent satisfied the court that the plaintiff was not entitled to any decree, and the decree was re- 363
versed and the bill dismissed. See also Rawlins vs. Powel, (1 P. Wms., 300,) and Consequa vs. Fanning, (3 Johns. Ch. R. 594-'5) to the same point. In Beekman vs. Frost, (18 Johns. R., 558,) which was an appeal from the Court of Chancery to the Court of Errors, Spencer Ch. J. reviews a number of cases on this point, and deduces from them the following principle: That in the appellate Court, no party shall be allowed to surprise or mislead his adversary; that if a party in the court below shall purposely suffer a decree or judgment to pass against him, by default, without contesting it there, he shall not be heard in the appellate court, or if counsel shall for the first time raise a point here, which might have been obviated had it been made in the court below, he ought not to be permitted to do so. So in Watts vs. Waddle, (6 Peters' R. 389,) the Supreme Court of the United States allowed a plaintiff, who appealed from a decree dismissing his bill, to assume in the appellate court a new ground of relief, not specifically prayed for in the bill, and not asked for in the court below, saying: "There is no rule of "court or principle of law which prevents the complain- "ants from assuming a ground in this court which was "not suggested in the court below." And, although the Supreme Court affirmed the decree appealed from, yet they opened it so far as to let in the new relief, and remitted the case that the relief might be given. See also the cases of Kerr vs. Watts, 5 Peters' Cond. R., 179, and Kerr vs. Moon, 5 Peters' Cond. R., 686. There seems to be no distinction taken in the Chancery practice of the English Courts, or in that of New York, between re-hearings and appeals, but both are treated as the same proceeding.

From a careful review of the authorities, we are satisfied that an appeal in equity is substantially a re-hearing
of the cause, and that the appeal opens the whole case to 364
the respondent in the appellate court; and although the appellant may show that the view taken by the court below was erroneous, yet on the other hand, the respondent may argue and show, if he can, that upon the whole case, the same result must be attained here. The authority of this court, by Sec. 5th of the Act of Feb. 10th, 1832, (Thomp. Dig. 449,) is, "to reverse or affirm the "judgment, sentence or decree of the court below, to "award a new trial in the court below, or to give such "judgment, sentence or decree as the court below ought "to have given." It is very clear that the power to give the decree which the court below ought to have pronounced, could never be exercised if this court did not possess the right to look into the whole case as it is presented in the record, and to consider it as the court below should have considered it. We are, therefore, satisfied that we have a right to look into the whole cause, as it is presented in the record, to re-examine questions decided against the respondent, and also such as passed *sub silentio* in the court below, or to consider points made here for the first time, provided, they are raised by the pleadings and proofs, but adopting, however, for the protection of the parties, the guards laid down by Ch. J. Spencer, in the case before cited, that neither party will be permitted to surprise or mislead his adversary, or to make objections which might have been obviated had they been presented for the consideration of the court below.

We now proceed to the consideration of the question of the competency of Mr. Robert Lyon as a witness on behalf of the appellants. The respondent in the court below, moved that the deposition be suppressed, upon the allegation that he was incompetent, by reason of his inter-

365 est; which motion was overruled, and the deposition was read at the hearing. The objection is now renewed in this court, and the counsel for respondent contend that Mr. Lyon, being, according to the proof, at the time of his examination, a share-holder in the corporation, he was so interested as to be incompetent to testify on its behalf; that the assignment to Thomas R. McClintock, previous to his examination, did not make him competent, because such assignment was made pending this suit, which leaves the corporation liable for costs as a party to the record. It is also urged that, notwithstanding the assignment, there is still an interest in the company, in the event of this suit, beyond the question of costs, which incapacitates the witness. It is argued that the Company, by the assignment to McClintock, impliedly warrant their title to and the validity of the bond and mortgage, which is the subject matter of the suit and the assignment; that the company also warrants that it has no knowledge of any facts, which, if the instruments were originally valid, would prove them worthless, and therefore the company, and Mr. Lyon, as one of its members, have an interest in the recovery here, to prevent a recovery over against the company on the failure of the present suit. That the members or share-holders of corporations created for private emolument, are considered as having a direct, certain and vested interest, and therefore not admissible as witness for such corporation, is well settled, upon authority, 1 Greenlf, Ev. 333, and authorities cited in the margin. The company being a party to this suit upon the record, is undoubtedly liable for costs, and liability for costs, it is also well settled, is a sufficient interest to render a witness incompetent. The court below should have granted the respondent's motion, and suppressed the deposition of Mr. Lyon, and in the examination of the case here,
366 it will be excluded from our consideration. As the incompetency of the witness is clear, upon the point considered, we do not express any opinion on the other.

The bill is filed for the foreclosure of a mortgage, which it is alleged, was executed to the company to secure the payment of a bond for the penal sum of thirteen thousand dollars, conditioned to pay the sum of six thousand, five hundred dollars on or before the expiration of the term of eight years from its date, with legal interest from the 1st day of January, 1841, preceding the date of the bond. The allegation is, that the respondent, on the 20th December, 1841, being indebted to the Southern Life Insurance & Trust Company, did sign, seal and deliver the bond and mortgage described. The answer denies positively any indebtedness on the part of respondent to the Southern Life Insurance & Trust Company, and admitting the signing and sealing of the bond and mortgage exhibited, denies positively that the said instruments were ever delivered to the Company by the said respondent, or by his authority or direction, and proceeds to give the history of the creation of these instruments, and the purposes for which they were executed. It is in substance this: That being desirous to raise a sum of money to meet some urgent necessity, he concluded to become a property stockholder in the said company, in order to avail himself of the privilege granted to shareholders therein of borrowing two-thirds or three-fifths of the amount of stock; and accordingly commissioned one N. M. Martin to engage for him as many shares of stock as his property, on appraisement, would cover; that he was informed by Martin of the engagement to purchase shares of one Thomas J. Linton or one William L. Tooke, he does not recollect which; that he caused an appraisement of his property to be made, executed the bond and mortgage in question by signing and sealing the

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same, and deposited them with the cashier or officers of 367
the company, to be delivered to and to become the property of the company upon the transfer of the shares of stock to him which his agent, Martin, had contracted for. It is further alleged that no shares of stock where transferred to him by Tooke or Linton, until December, 1842, when, after the company had become embarrassed, &c., and its stock had become worthless and its notes greatly depreciated in value, and after he had expressly declined to receive any transfer for the reasons before stated, the cashier, Mr. Lyon, procured an assignment to be made on the books of the company, by William L. Tooke, to the respondent, of sixty-five shares of stock, without the knowledge or assent of the respondent, and which assignment and transfer he never accepted.

The defence set up has been considered in argument as resolved into two points: First, that the bond and mortgages are invalid for want of delivery; and secondly, that they are invalid for want of consideration.

It is not pretended that there was, at any time, any loan of money by the Southern Life Insurance & Trust Company to the respondent, nor indeed any transaction whatever, except that which related to the effort of respondent to acquire stock in the company. It appears that the appraisement of the property, which he proposed to mortgage as security for the stock amounted to thirteen thousand dollars, and which, according to the rules which the company had established, would secure sixty-five shares of the nominal value of one hundred dollars per share, and making an aggregate of six thousand, five hundred dollars. The fact from whom the stock was to be procured is involved in some obscurity. The respondent, in his answer, says that he employed Martin to purchase the shares for him, and that Martin informed him he had done so from Tooke or from Linton, he cannot distinctly recollect from 368
which of them. Martin, being examined, says, in his deposition, that he contracted with Linton, and not with Tooke, for the stock, and was to allow a premium of ten dollars per share, that it was to be delivered immediately, and that no memorandum in writing was made of the contract. Mr. Tooke, who was also examined on this point, says he never saw the respondent; that, being the holder of one hundred and fifty shares, he had authorized Martin to sell them for him, and that Martin informed him he had contracted to sell sixty-five of the shares to the respondent. A book is also introduced, called "Bond and Mortgage Ledger," which, if it could be considered as evidence, would not serve to dispel the doubt, for, as the book has been explained to the court by the counsel for appellant, the respondent, Cole, is charged to Linton for the value of sixty-five shares, and Tooke, not Linton, is credited by the same amount under the same date. The book of minutes of the proceedings of the directors of the company, is also introduced in which the following entry appears under date of Monday, December 20, 1841: "Voted to ap-"prove the appraisement of Charles Cole's property to the "amount of thirteen thousand dollars, and upon the com-"pletion of the papers necessary, to authorize the transfer "of sixty-five shares stock from William L. Tooke to "Charles Cole, provided the interest of sixty-five hundred "dollars of Wm. L. Tooke's bond be paid to January 1st, "1841." Upon whose application this order was passed, and from whom the statement was derived, that it was Tooke's stock which was purchased, does not distinctly appear. This fact might be one of importance, for if the respondent had bought, the shares of Linton, it would not authorize the company to cover the bond and mortgage by procuring an assignment to the respondent from any other

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369 person, without his assent. Martin is the only witness who speaks of his own knowledge, and his testimony is direct, positive, and affirmative. Tooke derives his information from Martin, and it is but hearsay; so also the statement in the vote of the directors may have been derived from Tooke or from Martin. The direct and positive testimony of Martin, under oath, may be considered as weakened by the declarations made by him out of doors; yet if the case turned on this fact, we should feel bound to take the statement of Martin as conclusive upon the point, he being the person best calculated to know the facts; or, if such a course would be admissable, to remit the case to the court below to take further evidence thereof.

We do not, however, think it necessary to decide the question; for whether the purchase of the shares was from Linton or from Tooke, they were to be delivered, that is transferred immediately, and according to the proof, they were not transferred until nearly twelve months after the execution of the bond and mortgage, and not until after the stock had greatly depreciated in value, arising from the pecuniary embarrassment of the company.

Time, in a Court of Equity, is rarely considered as material, for the value of the property contracted for and the circumstances of the parties remain unchanged; yet where the value of the property is greatly diminished, performance will not be compelled. In cases of sales or contracts relating to stock in the public funds, time is considered as of the essence of the contract, Forrest vs. Elwes, 4 Vesey R., 492. There is no proof of the acceptance of the transfer of stock by the respondent, at or after the time of transfer, and we are clearly of the opinion that, upon the contract to transfer and deliver the shares presently, the respondent would not, in a Court of Equity, have been compelled to accept a transfer and delivery
370 nearly twelve months thereafter, when the stock had greatly depreciated in value, and, as he would not be compelled to complete the contract, he was not bound to accept the transfer when made, but might consider the contract as abandoned. At law, where time is considered material, if the contract is not carried into effect within a reasonable period, either on the part of the vendor or the purchaser, it is deemed to be dissolved and abandoned by mutual consent, and such must be considered the rule in equity, where, from the express terms of the agreement, or from the nature or character of the subject matter of sale, time would be considered as of the essence of the contract.

It is, however, argued on the part of appellants, that the liability of the respondent to the company upon the bond and mortgage, does not depend on the fact whether Linton, or Tooke, or any body else transferred any stock to him.

Either the court or the counsel greatly misapprehended the terms, nature and force of the contract proved. It seems to us not to be one of much complexity, when rightly understood. Assuming as a fact what we have heretofore held was not sufficiently proved, that it was Tooke's stock which the respondent was to buy, the transaction is simply this: Tooke held one hundred and fifty shares of the stock of the company, which had not been paid for with money, but which he had been permitted to subscribe for on credit, securing the payment by his bond for the nominal value, say fifteen thousand dollars, with interest from the date of his subscription, and a mortgage upon property. It was proposed that Tooke should transfer to the respondent sixty-five of those shares, and that the respondent should execute his bond for the nominal value thereof and interest, secured by a mortgage upon his property, and when the transfer was made, and the bond and mortgage of respondent accepted by the company, Tooke would be 371
entitled to a release from the company of so much of his bond and mortgage as that of the respondent would cover. These were all concurrent and dependent acts—integral parts of one contract, which must all be executed, in order to give validity to any one of them. They must be performed, too, in conformity with the agreement and with good faith. In this agreement, the company was not only one of the parties to the compact, but it had an important interest—it was to release to one of the parties a sum of money due it on his bond and mortgage, and to accept in lieu of it the security of the personal responsibility and property of another. It was not only bound to know and did know all the acts to be performed by each of the contracting parties, but also that the several acts to be performed were dependent upon each other, and were to be executed concurrently.

The evidence of the connection of the company with, and its participation in the arrangement between Tooke and the respondent, so as to make itself a party to the contract, is found in the order or vote of the board of directors, considered in reference thereto.

It is said by one of the counsel for appellants that this order or vote was misconstrued by the judge below, and which misconstruction led to the erroneous decree complained of. We have examined this entry with great care, and if we would give effect to each and every part of it, we would find it susceptible of but one interpretation. To make ourselves perfectly intelligible, we will eliminate the several parts, and put them as distinct sentences, viz:

"Voted to approve the appraisement of Charles Cole's "property, to the amount of thirteen thousand dollars;" and also,

"Voted, upon the completion of the papers necessary to "authorize the transfer of sixty-five shares of stock from 372
"Wm. L. Tooke to Charles Cole, provided, the interest of "sixty-five hundred dollars of Wm. L. Tooke's bond be "paid to January 1st, 1841."

To give the construction contended for by counsel for appellants, is to render insensible and wholly useless the words, "and upon the completion of the papers necessary," while our construction not only gives effect to every word, but is consistent with the intentions of the parties, as they are gathered from their acts, conduct and declarations, considered with reference to the parol proofs of the agreement.

For the purpose of the performance of the agreement, the abstract of respondent's titles was laid before counsel in whose opinion the company had confidence, and the report thereon was accepted, and the respondent had executed his bond and mortgage. Yet there was wanting to the complete consummation of the contract and agreement of the parties, the transfer on the books of the company, by Tooke, to the respondent, the sixty-five shares of the stock, according to the terms of the said agreement, and the release by the company to Tooke of the sum of sixty-five hundred dollars, upon his bond and mortgage.

The several acts were to be executed concurrently, and each part would have effect and vitality only from the performance of the others, and the execution or performance of one formed the consideration of the others. The respondent was not bound to deliver his bond and mortgage until Tooke should make the transfer of the shares. Tooke was not bound to execute the transfer until the respondent was in condition to assume Tooke's responsibility to the company for the nominal value of the shares, and had paid or was ready to pay the premium agreed on.

372 And the company was not bound to release Tooke until the respondent was in condition to assume Tooke's liability.

It would ordinarily happen in the execution of such triplicate contracts, that one or the other parts might be executed before the others. Yet the parts so executed cannot on any just principle be regarded as distinct and substantive contracts, against the consent of the parties so performing; but they would be considered as steps taken towards the consummation, the whole being *in fieri* until each and every part was accomplished, for all the parts formed but one whole. In Dutton vs. Morrison, (17 Vesey R., 200,) Lord Eldon says: "In many cases the law "considers a variety of instruments as forming one trans-"action, and would not give effect to any instrument un-"less the whole transaction is completed;" and this is precisely the case here.

The appellants, however, plant themselves upon an alged delivery of the deeds to the Southern Life Insurance & Trust Company, its acceptance of them as valid instruments, and an alleged credit to Tooke as conclusive of their right to the decree of foreclosure prayed for. And first, as to the delivery of the deeds: Delivery of a deed is a matter of *pais*, and there is no doubt that the possession of a deed by the grantee, acknowledged by the grantor for record, is evidence of delivery, but the authorities cited do not make it more than *prima facie* evidence of the fact. It is, even in a court of law, susceptible of explanation, or rebuttal. The grantor may show that such possession is the result of fraud, mistake or accident, (2 Greenlf. Ev., § 297, and authorities cited in the margin.) But what is the evidence of delivery in the case before us? On the part of the appellants, there is nothing more than the *prima facie* case made by the possession of the deeds;—on the part of the respondent, there is the express denial of

374 the answer, which is responsive, not only to the allegations of the bill, but the special interrogatory addressed to him. The explanation which he gives as to the manner in which the company became possessed of the deeds, is perfectly consistent with the contract proved, of which the execution of the deeds was an integral part. The respondent executed the instruments and deposited them with the casher, or other officer of the company, at its office, the place where the execution of the contract was to be finally consummated, so far as the respondent was interested, to wit: the transfer of the shares, which, to be full and perfect, must be made on the books of the corporation, there to be ready for the final completion.

It is said that delivery to an officer or servant of a corporation, is delivery to the corporation. To this we assent, with the addition that such delivery is for the use and benefit of the corporation, and with intent to pass an absolute property or interest in the deed delivered; and the rule would be the same if the delivery should be made to a mere stranger. We do not think there is such a personal identity between the corporation and its officers, that a deed may not be placed in the hands of the latter, as an *escrow* until the performance of some condition, &c.

Whether there was any formal notification by words or not, at the time of the deposit or delivery to the officers of the company, that it was to operate as an *escrow*, is not it seems, material. In Bowker vs. Burdekin, (11 Mess. & Wels. R., 145,) Parke, B., says: "I take it now to be "settled, though the law was otherwise in ancient times, "as appears by Sheppard's Touchstone, that in order to "constitute the delivery of a writing as an *escrow*, it is "not necessary, that it should be done by express words, "but you are to look at all the facts attending the execu-"tion—to all that took place at the time, and to the result

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"of the transaction; and therefore, though it is to form an 375
"absolute delivery, if it can be reasonably inferred that it
"was delivered not to take effect as a deed till a certain
"condition was performed, it will nevertheless operate as
"an *escrow*."

We find no sufficient proof of the delivery of the deeds in question. The presumption of a delivery, as an independent and substantive contract, is repelled, not only by the answer, but by the proofs, of the contract which was in fact made, and of which the deeds were but an integral part; a contract of which the company had full notice, for it was not an unimportant party thereto.

It must be borne in mind that this court is now sitting as a Court of Equity, which regards not the circumstances or outward ceremonial, but the substance of the act, and therefore we think that if the respondent had entered the parlor of the company, the president and directors being there in session, and by the most formal act had delivered the deeds in question to the head of the corporation, stating the circumstances under which and to accomplish which they were executed, we should be compelled to regard it as a delivery, to take effect only on the final consummation of the contract.

In Flagg *vs.* Mann, (2 Sumner R., 510,) that learned jurist, Justice Story, says, though there is a technical difficulty in the suggestion of the delivery of the deed to the grantee as an *escrow*, yet a Court of Equity will not govern itself exclusively by technical principles of law, where the intentions of the parties will be thereby defeated. It requires, however, he says, clear evidence of what that intention is, and whether it will be so defeated, otherwise the rule of law must prevail. In this case we are perfectly satisfied of the intention of the parties, and that if the possession of the deeds by the company be regarded as an absolute technical delivery, the intention of the party will 376 be frustrated and defeated.

Was the difficulty subsequently obviated by the transfer on the books of the company, in December, 1842, of sixty-five shares of stock by William L. Tooke to the respondent, and were the officials authorized, on this transfer, to consider the condition as complied with, and the bond and mortgage the property of the company? We are well satisfied of the negative of both branches of the inquiry.

Assuming again that it was Tooke's stock, and not Linton's, which the respondent had agreed to purchase, and that he got by that transfer the stock which he had actually contracted for, yet, as we have before said, in this contract, from the very nature of the transaction and the subject matter thereof, time was of the very essence of the agreement. After the lapse of nearly twelve months, and after the value of the shares had greatly depreciated, owing to the embarrassments and the threatened insolvency of the company, which finally ensued, it was too late to require the acceptance of the transfer by the respondent, and there is not a title of proof that he did accept it.

The circumstances under which the assignment was made are not wholly free from suspicion. No one was present but Tooke, who made the transfer, and the officers of the company. The respondent was not notified and required to attend, accept the act of transfer, and consummate the contract.

Martin, who was respondent's agent for the purchase, had a store and was in business at Tallahassee, where the transfer was made, was not notified to attend and represent his principal. Martin says, too, he agreed that the respondent should pay a premium of ten per centum, or ten dollars per share, for the stock, yet we find no demand made for this premium, but the claim for it is quietly abandoned

377 Under this state of facts, it is asking too much of a court of conscience to consider this act of transfer as rightly done, and obligatory on the respondent. If the appellants would avoid the effect of the lapse of time, they were bound to show that no injury resulted to the respondent from the delay, and that the value of the shares of stock remained unchanged. The proof, however, is full the other way.

We come now to the question of consideration. The respondent, in his answer, alleges that the bond and mortgage is also invalid for want of consideration. At law, under the 24th section of the act of November 23, 1828, regulating judicial proceedings, (Thompson's Digest, 331, chapter 2, section 1, article 4,) a plea of want of consideration, put in under oath, throws the burden of proof on the plaintiff of showing a consideration; and such by analogy we consider the rule here, the existence of a consideration being denied in the answer, which is under oath. It is contended, on behalf of the appellants, that the consideration is not to proceed from the company, that it did not contract to sell any stock or shares to the respondent, neither did it guarantee that Linton or Tooke, or any body else, would do so. This is true, and yet the deeds must be founded on a sufficient consideration, or else they are *nuda pacta*, and nullities.

The officers of the company must be presumed to know that, to make the deeds valid securities in the possession of the company, they must be founded on such consideration, and it was therefore their duty to see that the consideration passed from and to the proper parties, and this upon the tri-partite contract before mentioned.

It is urged upon us here that, by the agreement and by the execution of the bond and mortgage in question, the respondent obtained a right to demand the transfer of the
378 shares from Tooke, and that this right of action is a sufficient consideration to support the deeds in the possession of the company; and, on the other hand, it is argued that no such right of action existed, because the contract or agreement is within the 11th section of the act of November 15th, 1828, regulating the conveyance of real and personal property, &c., (Duval's Compilation, 206. Thompson's Digest, 218, § 2.) It is true that the English Courts, in the construction of the 17th section of the act of the 29th Chas. 2, Ch. 3, have held that shares of stock in an incorporated company, are not goods, wares, or merchandise within the meaning of the act, yet we consider that our statute is more comprehensive than the British statute of Frauds.

Our statute provides, "that no contract for the sale of "any personal property, goods, wares, or merchandise, "shall be good, unless the buyer shall accept the goods or "part of them so sold, and actually receive the same, or "give something in earnest to bind the bargain, or in part "payment, or some note or memorandum in writing, of the "said bargain or contract be made and signed by the par-"ties to be charged, or their agents thereunto lawfully au-"thorized."

It will be observed that our statute uses the words personal property, as well as goods, wares and merchandise, and therefore, though shares of stock in an incorporated company may not properly be considered as goods, wares or merchandise, yet there can be no question but that they are included within the very comprehensive terms, "personal property." Was anything done to take the agreement without the statute? There was no acceptance and actual receipt of the thing sold, or any part thereof by the buyer; nothing given in earnest to bind the bargain, or in part payment, and no written memorandum of the bargain or contract signed by the parties to be

charged or their lawful agents. The execution of the bond 379
and mortgage by the respondent, could not have the effect of a part payment, to take the case without the statute, if at all, until delivery and acceptance by the Company with the express assent of Tooke. Payment or part payment, pre-supposes the act of two persons, the bargainee to give and the bargainor to accept, and until it is both given and accepted, the contract is not complete. We think that the respondent had no right of action against Tooke upon the parol contract for the stock, but if he had acquired such right of action, it did not amount to a sufficient consideration to support the deeds, for the respondent did not propose to buy a law suit, but to buy shares of stock.

Again it is argued, that equitably, the shares of stock belonged to the respondent, as soon as the Company approved of the bond and mortgage, which the respondent had executed; and this upon authority of the maxim, that equity regards that as done, which ought to be done. If to the maxim as stated be added this qualification, "where "nothing has intervened which ought to prevent a perform-"ance," we are prepared to yield our assent to the existence of such a rule of equity law, but we deny its applicability to the present case. It has never been so applied as to make a party who has contracted for legal title to property, on payment of the purchase money, liable at all events to pay the price, as upon a contract executed, before conveyance is made, merely because the vendor ought to have conveyed: Nor has any case occurred where it has been held that an executory contract invalid as being within the positive prohibition of a statute, ought, in a court of equity, to be considered as executed.

We are well satisfied that there was no benefit or advantage resulting to the respondent, as a sufficient consideration to support the deeds in question. Let us now exam-
ine and see if any detriment or injury resulted to the Com- 380
pany, which will support the deeds as a consideration.

It is alleged that the Company released to Tooke the sum of six thousand five hundred dollars, with interest from the 1st of January, 1841, at eight per centum, in consideration of the bond and mortgage executed by the respondent. The only evidence produced, and which is now before us, to sustain this allegation, is that said to be afforded by a book, styled "Bond and Mortgage Ledger," which we have before adverted to, and which we will now consider more fully. This book, it is admitted, is not a part of the regular sett of account books of the Company, but it is a memorandum book, kept by the cashier for the purpose of readily ascertaining the amount of principal and interest due the Company upon its bonds and mortgages. It is not shown to have been opened and kept by any order of the Board of Directors, nor is the period when the book was first opened ascertained with any degree of certainty. It is also admitted that as the entries therein consist simply of names, dates and figures, without any descriptive explanations, it is not intelligible, save by the personal explanations of the cashier of the Company. The book therefore, cannot be considered as an account book, the entries in which would be evidence against the Company as admissions, but must be considered simply as memoranda of the cashier, and of no higher authority than statements made by him not under oath. In a suit between the Company and Tooke, this book could scarcely be held, under the circumstances, evidence against the Company of the release of six thousand five hundred dollars on his bond of the date of July 1st, 1841. The entry in this book, however, of the debit of the respondent, and the credit of Tooke, bears date January 1, 1842, when the stock was not actually transferred until the month of December of that year. If the

Company considered that Tooke was entitled to the credit 381
of the amount of respondent's bonds and mortgage on the 1st of January, 1842, why was not the amount endorsed upon Tooke's bond, which was then in the possession of the Company? Was it just to Tooke or Lahens & Co., subsequently to transfer it to the latter parties, without an endorsement of the credit? If the respondent became liable to the Bank for the sixty-five shares of stock on that day, surely Tooke became entitled to be discharged to the amount of the nominal value of shares, and if so, to a release or acquittance therefor; to some evidence which he might keep in his own possession. No credit was endorsed upon the bond and mortgage of Tooke when it went in the possession of Lahens, and none was entered while it remained in his possession and that of his attorneys, which continued up to final settlement by compromise in 1847, and when that compromise is adjusted, a release is executed for the whole sum secured by the said instrument, and no mention is made of the credits by Cole. Did the omission to endorse the credit upon the bond of Tooke, at the time of its transfer, result from the fact that it would be premature, the shares not having been transferred to respondent? If so, then the entry in the book is clearly not an evidence of release, if there was no other objection. If this supposition is correct, why did not the Company in December, 1842, upon the transfer of the shares by Tooke, notify Lahens & Co., and ask them to accept the respondent's bond and mortgage, and credit Tooke's which was in their possession? Tooke's action is equally as inexplicable as that of the Company. In December, 1842, he transfers sixty-five shares of his stock to the respondent, from which he expects a credit to the amount of their nominal value, and yet receives no acquittance therefor—it does not appear that he demanded any. So, although, according
382 to the testimony of Martin, the respondent was to pay a premium of ten per centum or ten dollars per share for the stock to the vendor, we do not find Mr. Tooke, on the occasion of the transfer or at any time since, making any claim therefor. Conduct and action so much out of the usual course of business, require explanation, and yet none is offered. It is very clear that the Company was not bound to release Tooke until the respondent had irrevokably assumed the payment of the sum stipulated, to their satisfaction, and as we find no evidence of release to Tooke, founded on the consideration of respondent's bond and mortgage, we are bound to conclude it did not release him. We find no consideration of benefit or advantage to the grantor, or of detriment to the grantee, to support these deeds, and must declare them *nuda pacta*. We have examined carefully every position assumed by the appellant's counsel in the argument here, and whether we consider the deeds upon the question of their delivery, or that of a want of consideration, they are equally invalid in the possession of the Company or of its assignee.

Our judgment is that the decree of the court below be affirmed, with costs.

SEMMES, *Justice*, dissenting.

JOHN F. HIGGS, SURVIVING PARTNER, &c., PLAINTIFF IN ERROR, vs. MARY SHEHEE, DEFENDANT IN ERROR.

A book account, in this State, is not admitted as evidence of the sale and delivery of the goods, even though it may be proved that the account sued on is an exact transcript from plaintiff's books, and that they were fairly and honestly kept.

So, also, the testimony of a witness that he knew of the delivery of a part of the article charged to defendant, and another part to defendant's overseer,

without any evidence as to the particular articles, or their value, is not 383
sufficient to justify a judgment for plaintiff for *any* amount.

A party demurring to evidence admits the truth of that to which he demurs, and those conclusions of fact which the jury may fairly, that is, legally, draw from it.

When the evidence is so loose, uncertain and indeterminate, that no verdict could be rendered upon it by a jury, the court, upon a demurrer to such evidence, should not give judgment, but set aside the demurrer and award *a venire facias de novo*.

The opinion of the court, as delivered by the Chief Justice, contains a statement of the case.

Maxwell for plaintiff in error.

ANDERSON, *Chief Justice*—

This was an action of assumpsit, brought in the Circuit Court for Madison county, by the present appellant, against Mary Shehee, on a merchant's account. The declaration is in the usual form, and the bill of particulars filed with it is an account against the defendant for sundry articles of merchandise, amounting to $107 48.

The defendant filed the general issue, and with it a notice that at the trial she would prove payment and set off. The evidence does not tend to establish this allegation of payment and set off, so that there was no other real issue than that presented by the plea of non assumpsit.

Thomas J. Chace was the only witness examined, and his testimony was substantially as follows:

He was in the employment of Rowles & Higgs during the year 1843, as clerk and book-keeper—knows of the existence of an account against the defendant for that year; its amount was $107 48, "as by examination of the books "now before the witness"—the account constituting the bill of particulars, was made out by witness from the books of Rowles & Higgs, and is a correct transcript from them.

Witness believes that the books of Rowles & Higgs were
384 fairly and honestly kept—witness knows that a part of the articles enumerated in the account were purchased by the defendant, and delivered, and others were got by the overseer of defendant, and delivered to him, as witness presumes, by her order or direction, which were at times written by her.

Witness believes, from an examination of the books, that the account, "as above stated, and now in controver- "sy, is correct, unpaid, and justly due to the firm of said "Rowles & Higgs, according to the best of his knowledge "and belief."

Defendant offered no evidence, but demurred to the plaintiff's evidence, and the plaintiff joined in the demurrer.

Upon this issue, the court gave judgment for the defendant, with costs, to which judgment the plaintiff excepted, and his bill of exceptions being signed and sealed by the Judge, is a part of the record which has been brought before us.

The effect of a demurrer to the evidence is, "that the "party demurring admits the truth of the testimony to "which he demurs, and also those conclusions of fact "which the jury may fairly draw from that testimony. "Forced and violent inferences he does not admit, but "the testimony is to be taken most strongly against him, "and such conclusions as a jury might justifiably draw, the "court ought to draw." Pawling et al. vs. United States, 2 Cond. R., 93. In the case of Young et al. vs. Black, in the same volume of Reports, 609 p., Mr. Justice Story says: "The party demurring is bound to admit as true, "not only all the facts proved by the evidence introduced "by the other party, but also all facts which that evi- "dence may legally conduce to prove."

In applying the rule thus laid down by the Supreme

385 Court to the evidence in the case before us, we find, in the first place, that the facts stated by the witness, though taken to be true, do not directly establish the plaintiff's case. Those facts are of two distinct kinds; first the testimony of the witness as to the books; and, secondly, as to the delivery. The facts, though admitted by the demurrer to be true, that the witness was clerk and book-keeper for the plaintiff, and knew of the existence of the account, and of its amount, from an examination of the books; that the account filed was a correct transcript from the books, and that he believed the books to be fairly and honestly kept, are not direct proof of the assumpsit of the defendant as charged in the declaration. A book account is not admitted in this State to be evidence of the sale and delivery of goods. Such is the general rule of the English law, even in the case of a regular tradesman's books, 1 Buller's N. P., 282, and in those countries and States where tradesmen's books are admitted as evidence, it is always in connection either with the suppletory oath of the party, or from the supposed necessity of the case, where the party does not keep a clerk. See Pothier on Obligations, quoted in 12 J. R. 464, and cases referred to in the same book from several of the New England States. In this State, we have not relaxed the English rule, which is in perfect consistency with the general law of evidence, (unless the allowing a party to swear to an account under fifty dollars in a Magistrate's Court may be so considered,) and we hope that it will never be relaxed.

In this case, however, the book account is not even sustained by the oath of the party, nor is there any supposed necessity, as in the New York cases, from there being no clerk, of admitting it: so that there is really no direct proof in this branch of the testimony to sustain the case. So also it is very clear that the testimony of the witness,
386 that he knew of the delivery of a part of the articles to defendant and another part to her overseer, without saying how much and what was their value, however true, is not sufficient of itself to justify a judgment for the plaintiff for any amount.

The facts proved being thus insufficient of themselves and directly to establish the plaintiff's case, let us see, in the second place, if the conclusions of fact which the jury might fairly draw from the testimony without forced and violent inferences, (to use the language of Judge Marshall,) will answer.

The word "fairly," which here qualifies the right of a jury to draw their conclusions, must be understood to import "legally," for nothing is fair in a Court of Justice but what is sanctioned by the rules of law, and in the citation made from Judge Story, it is said the demurrent admits "all the facts which the testimony legally may conduce to "prove." Could, then, a jury have legally concluded, from the facts proven, that the goods were bought by defendant? Could they have legally come to this conclusion, because the account was a correct transcript from books which were admitted to be fairly and honestly kept?

If the jury had any doubt on this point, it would be their duty to ask counsel of the court, and they would then learn that they could not arrive at such conclusion, without doing violence to plain and well established rules of law.

There are two distinct characteristics of evidence which are to be regarded in this connection: I mean its relevancy and its weight. The first it is the province of the court to determine; the second belongs to the jury. The demurrer to the evidence, while it substitutes the court for the jury in its peculiar duty of weighing the evidence, does not relieve the court of its own appropriate duty of

judging of its relevancy. Nor is it to the discharge of this 387
part of its duty by the court that the rule of finding all that a jury might fairly find, has any application. The rules of law are uniform and inflexible.

The relevancy of evidence is the same, with or without a demurrer to the evidence, and in both cases must be decided by the Judge. The weight of evidence, when determined to be relevant, is variable, and it is only in this regard that the Judge, when put in the place of the jury, must lean as much as he fairly can against the demurring party. In this case the Judge knows, in his character as Judge, that account books of themselves are no sufficient evidence of an account, and however much weight is given to the evidence with that qualification, it will avail nothing to the plaintiff, for it is not proper evidence, and must be discarded by the Judge from his consideration, as he would instruct a jury to discard it from their's.

These considerations have satisfied me that the court below committed no error in not giving judgment for the plaintiff on this demurrer.

It is not so clear to me that his Honor was right in giving judgment for the defendant. To ascertain this, will lead us into a more extended inquiry into the future of a demurrer to evidence, and the law regulating it.

The older books made a distinction between written and parol evidence, "but it is now well settled that evidence "of any kind, written or parol, direct or circumstantial, "is a subject of demurrer." (Gould's Pl. 433.) But it is not in every case that the opposing party is compelled to join in demurrer. Where the evidence is direct and certain, he will be compelled; but it is otherwise when the evidence is "loose and indeterminate," or when it is "cir-"cumstantial." In cases of this latter sort, he cannot be compelled to join in demurrer, unless the demurring party admit expressly on the record every fact that the "loose and 388
"indeterminate" and "circumstantial" evidence conduces to prove—thereby relieving the court from the task of weighing doubtful and uncertain evidence. Without an express admission of this nature, the other party is not bound to join, and if he does, the court can pronounce no judgment on the demurrer.

These general rules are found in Mr. Gould's Treatise on Pleading in his chapter on demurrers, and he illustrates them by a reference to the leading case of Gibson & Johnson vs. Hunter, in 2 H. Black, 205. "That was an action "by the holder against the acceptors of a bill of exchange, "payable to a fictitious payee, or order, and which, after "the acceptance had been endorsed by the drawers in the "name of the fictitious payee, for valuable consideration "to the plaintiff. The latter exhibited evidence of a long "course of dealing in similar bills between the drawers "and acceptors—for the purpose of raising a presumption, "from these circumstantial facts, that the defendant, at "the time of accepting the bill, knew the payee to be fic-"titious; and of then urging, as matter of law, that if this "presumption was established, the defendants were bound "by their acceptance. To this evidence, the defendants "demurred, without admitting, upon the record, their "*knowledge*, at the time of accepting the bill, that the "payee was fictitious, and the plaintiff joined in demur-"rer. But it was resolved in the House of Lords, by the "unanimous opinion of the Judges, that, because the de-"fendants' knowledge of the payee being a fictitious per-"son, (which was the great point of fact in issue,) was not "expressly admitted on the record, the point of law inten-"ded to be raised by the demurrer could not arise upon the "record, and consequently that no judgment could be "given upon the demurrer."

389 The Lord Chief Justice, (Eyre,) in giving to the House of Lords this opinion, concludes as follows: "We conceive "no judgment can be given on this record. The examin- "ation of the witnesses in the case has been conducted so "loosely, or this demurrer has been so negligently framed, "that there is no manner of certainty in the state of facts, "upon which any judgment can be founded. There "ought to be an award of a *venire facias de novo*. The "issue joined between the parties, in effect has not been "tried, and the case of Wright vs. Pindar is expressly in "point, that another *venire facias* should issue."

The only portion of the evidence, in the case before us, which legally conduces to the proof of the issue, is the testimony of the witness in relation to the delivery of some of the articles enumerated in the bill, to the defendant and her accredited agent, but it is so "uncertain and indeter- "minate" as to render it impossible for any reasonable verdict to be founded on it. The amount of goods thus delivered, and their value, are alike left uncertain.

A judgment for one cent, as suggested by the counsel for the plaintiff, would be doing injustice to the plaintiff, if his demand has any merit in it, while at the same time the evidence is not determinate enough to justify even that judgment against the defendant, for no attempt is made to prove any value in the articles delivered, and this should not be left to mere conjecture. On the other hand, the evidence is sufficient to prove that there were some indebtedness on the part of the defendant to the plaintiff, however impossible it was to fix its amount from the testimony on the record. The fact that the evidence in the case of Gibson vs. Hunter was uncertain and indeterminate, insufficient to warrant a judgment for the plaintiff, was not thought to be a competent reason for rendering judgment for the defendant; but the Lords were advised by the
390 judges that it was a reason for ordering a new *venire*, and such was their judgment.

So, in the case before us, while the evidence is manifestly insufficient to justify a judgment for the plaintiff, we think there were sufficient grounds for his Honor below to refrain from pronouncing any judgment on the demurrer, which he had a right to do. Gould's Pl., 437, 2 H. Bl., 209.

It is accordingly the opinion of the court that a *venire facias de novo* be awarded.

THOMPSON, *Justice*, delivered the following opinion:

A demurrer to evidence is a proceeding by which the Judge before whom a cause is tried, is called upon to declare what the law is upon the facts shown in evidence, and is analogous to the demurrer upon facts alleged in pleading. The effect of it is to take from the jury, and refer to the court, the application of the law to the facts.—Regularly before the party demurring can call upon his adversary to join in demurrer, he should admit, upon the record, every fact which the evidence conduces to prove, or if this is not done, the court is to draw the same inferences and conclusions which a jury might fairly do, for the demurrer admits the truth of all facts which, upon the evidence stated, might be found by the jury in favor of the party offering the evidence. (Gibson vs. Hunter, 2 H. Blk. R. 187. Cocksedge vs. Fanshaw, Dougl. R., 131.) The demurrer acts upon facts, not the evidence of facts, and the evidence is to be taken most strongly against the party demurring; the court is not to investigate the facts in dispute, or to weigh the force of testimony, but to assume as fact what the evidence reasonably conduces to prove.

These rules are well established upon authority, and I propose to take them as my guide, in arriving at a con- 391
clusion upon this demurrer. This action is for goods, &c., sold and delivered, and the pleas, the general issue and payment. Under the issue on the first named plea, it was incumbent on the plaintiff to prove the sale and delivery of the goods, and the price agreed upon to be paid for them, or the value thereof. The only evidence offered by the plaintiff was the deposition of Thomas J. Chace, who was examined under a *dedimus*. This witness deposed that he was in the employment of plaintiff and his late partner during the whole time mentioned in the account, in the capacity of clerk and book-keeper; that the account annexed to the deposition, amounting to $107 48, was correctly transcribed from the books by himself; that they were fairly and honestly kept, and that he knows a part of the articles enumerated in said annexed account were purchased by and delivered to defendant herself, and others were gotten by defendant's overseer, and were delivered to him by defendant's order and direction, which were sometimes in writing. The account, or bill of parcels, to which the witness refers as annexed, exhibits the price or value of each item charged therein.

Taking this testimony most strongly against the party demurring, and in favor of the party offering, it seems to me that if a jury had passed upon it, and found a verdict for plaintiff, the court would not have been authorized to disturb it as a verdict against evidence. The witness was clerk and book-keeper; it may therefore fairly be presumed that he either sold and delivered the goods, or was cognizant of the sale, and made the entries in the books by which they were charged. There was therefore no one more competent to prove the plaintiff's demand, or the character of the books for fairness and honesty. Again, he speaks of his personal knowledge of the delivery of a part of the articles to the defendant in person, and others 392
to her overseer upon her orders and directions. The value or prices of the articles being fixed to each item respectively in the bill of parcels, to which the witness refers, is certainly some evidence of the value thereof. But it is supposed that there may have been other clerks and book-keepers, and that some of the sales and entries may have been made by such others, and that there may have been some articles charged, the sale and delivery whereof, he may not have known anything about, save by the entry on the books; and the testimony is not sufficiently precise to exclude such a presumption. The answer is, that it is not the province of the court to scan with such nicety the evidence of the facts: it is the province of the jury to weigh testimony and decide: under the demurrer the court is to assume as facts what the evidence conduces to prove, not what it conclusively proves. So again it may be answered, "*idem est non esse, et non apparere*," as the witness does not speak of any other clerks or book-keepers than himself, or any other goods sold than those which he knew were delivered to the defendant, or her overseer, it must be presumed there were no others.

Upon every point of view, I am satisfied that the court below erred, for if, in his opinion, the evidence was loose and indeterminate, he should have refused to give any judgment, but should have set aside the demurrer and awarded *a ve nire de novo*. Gibson vs. Hunter, 2 H. Blk. R. 187. Fowle vs. Common Council of Alexandria, 6 Peters' Cond. R. 328. Believing as I do that this demurrer has been inconsiderately entered and joined, that the force and effect of the pleading was not fully appreciated; and as there was an issue on the plea of payment by the defendant, on which of course she has had no opportunity of offering proof, and that the entry of a judgment in this

393 court for the plaintiff on the demurrer would operate as a surprise upon the defendant, and possibly cut off a defence on the merits, I find but little difficulty in concurring with the Chief Justice in his conclusion, to reverse the judgment and remit the case to the court below with an award of a *venire facias de novo*.

SEMMES, *Justice*, dissented, and delivered the following opinion:

I cannot assent to the judgment of the court in awarding a *venire facias de novo*.

I give my unqualified concurrence to that portion of the opinion delivered by the Chief Justice which maintains that the evidence in the court below was insufficient to warrant a judgment for the plaintiff; and I frankly confess I know of no principle of law which would authorize a court or jury to refer to the bill of particulars in a plaintiff's declaration to supply any defect or omission in the evidence.

If it can be referred to as proof, or to aid the proof, for one purpose, it can be for all purposes.

If it is evidence to establish any one item, it is evidence to establish the whole cause of action; and as a consequence, the extent of a plaintiff's recovery, instead of depending upon the well defined rules of evidence, would be determined by every plaintiff in framing his bill of particulars. The sole object of a bill of particulars is to apprise the opposite party of the cause of action, its character and extent; not that it contains intrinsic evidence of its correctness, or raises the slightest presumption of indebtedness.

But I am compelled to dissent from the opinion so far as it determines that the court below committed error in sustaining the demurrer. If, as is conceded, the court be-
394 low could not, under the evidence, overrule the demurrer and give judgment for the plaintiff, it was bound to sustain the demurrer and give judgment for the defendant. I do not say that this would follow in every case, but under the facts in this, it does result as a necessary consequence. The opinion of the court, as I understand it, is based on the hypothesis that the evidence in this case was of such character that no judgment could be given for either party upon demurrer.

If this be true, the judgment pronounced by this court is sustained by authority, and cannot be questioned.

There can be but little diversity of opinion as to the effect of a demurrer to evidence. It is well settled that a party who demurs, withdrawing thereby the consideration of the facts from the jury, is bound to admit not only the truth of the evidence, but every fact which that evidence legally conduces to prove in favor of the other party; and if, upon the facts, a jury, by a fair construction of the evidence, would have been authorized to have given a verdict against the party demurring, the court would also be at liberty to give judgment against him. 3 Peter's Rep., 36, 96, 2 Blackstone Rep., 209. In other words, the Judge being substituted in the place of the jury, in the consideration of the facts, is bound to give the same weight and construction to the evidence which the jury could do, under his construction of the law, arising from the facts. The whole proceeding upon a demurrer to evidence being under the control of the Court, it will not, I admit, rule a party to join in a demurrer, where the evidence is purely circumstantial, or of such a loose and undefined character that a doubt is entertained as to its effect, unless the party demurring admit, if need be on the record, every fact which could be reasonably inferred from it or which, in the words of the authorities, it conduces to establish.

Higgs vs. Shehee.—Opinion of Court.

The application of these well settled principles to the 395
evidence in this case, will determine the question before us. The facts proven are substantially these: That the account sued on is a correct transcript from the books of Rowles & Higgs, and that witness knows that a part of the articles enumerated were purchased by the defendant, and delivered. Is this evidence so uncertain and undefined that there is a doubt as to its meaning? And was not the court below as fully competent to determine its import and effect as a jury? If the evidence was circumstantial, operating beyond proof of the fact of sale and delivery, or if it was susceptible of more than one construction, and a reasonable doubt existed as to which construction should prevail, then I concede it was the province of a jury to draw the inference and determine the question. But what does this evidence legally conduce to prove? Certainly not the value of any one of the items charged, or any other fact available to the plaintiff.

Instead of demurring to the evidence, had the issue been submitted to a jury, what would have been the result? The court would have been bound to have instructed the jury to have found for the defendant, and for the reason that there was no evidence to sustain the issue; for, so far from the transcript of the books, though attested by the clerk or book-keeper, being in evidence, the books themselves would have been no evidence; and that in the utter absence of all proof of the value of any article, it was not the province of the jury, from the isolated fact of the delivery of some of the items, to infer a delivery of all, and arbitrarily affix any value, or assess any damages; for, unlike a judgment by default, the plea in this case denying all cause of action, the plaintiff was not entitled to even nominal damages.

It cannot be said that the evidence in this case was cir- 396
cumstantial, from which the jury could have inferred any fact sufficient to sustain the cause of action, or any part of it. The evidence did not warrant any inference or deduction beyond the fact proved.

The case of Gibson vs. Hunter, 2 Blackstone Rep., 187, is relied on by the court as authority in this case. But, with due deference, I do not think the authority applicable. It is unnecessary to refer particularly to the facts in that case, as reported; it is sufficient to say that the evidence was purely circumstantial. And in answer to the question propounded by the House of Lords, whether upon that evidence any judgment could be rendered by the court upon demurrer, Chief Justice Eyre said, "That "the examination of the witnesses in the case had been con- "ducted so loosely, or the demurrer had been framed so "negligently, that there was *no manner of certainty in* "*the state of facts*, upon which *any judgment* could be "founded," and a *venire de novo* was awarded upon the ground that, by reason of the party demurring, not admitting upon the record the facts which this circumstantial evidence conduced to prove, the issue between the parties had not in fact been tried. But it is further said in this authority, that the same rule of law requiring a party to join in demurrer, where the evidence offered is *written*, applies to parol evidence, when it is certain, and admits of no variance.

Wherein consists the analogy between the authority and the case before us? Is the evidence here "loose, inde- "terminate and circumstantial?" Or is it not well defined, admitting of no variation or inference? In one sense the evidence in this case is uncertain, and so may be said of all evidence, however definite, which fails in establishing the point in issue. And so all *relevant* evidence offered by a plaintiff *conduces* to prove the issue.

397 But this is not the sense in which the term is used in the authorities; otherwise, no one could demur to evidence unless he admitted the *facts put in issue*, which admission would be a sufficient answer to and overrule the demurrer.

If, as contended, the plaintiff in the court below was not compelled to join in demurrer, under the proofs, I ask what fact was the defendant bound to admit under his demurrer beyond the sale and delivery of the articles? If their value as charged, it would in effect have been a confession of judgment for the entire demand; and the effect of a demurrer to evidence would, therefore, be to defeat its very object and purpose.

One of two propositions we are bound to admit;—either that the evidence in this case conduces to prove no fact beyond a sale and delivery of the goods, in which event the judgment of the court below was correct, or that the evidence conduces to prove the entire demand of the plaintiff, which no one, I apprehend, would be willing to concede.

Giving to this evidence the utmost latitude, I do not find that the facts as proven, unaided by other testimony, establish anything material to the issue, and that, as it admits of no inference or interpretation in favor of the plaintiff, I do not see the necessity of calling for the investigation of a jury, which must result in a verdict no wise different from the judgment of the court.

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398 THE TALLAHASSEE RAILROAD COMPANY, APPELLANTS, VS. HAYWARD AND WALKER. APPELLEES.

The act of February 10th, 1832, which requires an appellant to file a true copy of the proceedings in a cause in the Circuit Court with the clerk of the Supreme Court on or before the first day of the next succeeding term thereof, is imperative in its terms, and makes it the duty of the Supreme Court to dismiss the appeal upon an application based upon the certificate of the clerk of the court below that an appeal has been obtained and a bond given.

Motion to dismiss appeal from judgment of the Circuit Court of the County of Leon, on the ground that the transcript of the record of the proceedings of the court below had not been filed with the clerk of this court as required by law.

Archer, for motion, cited Thomp. Dig. 448, and contended that the court had no discretion, and that the appeal should be dismissed.

Baltzell, for appellants, resisted the motion.

SEMMES, *Justice*, delivered the opinion of the Court.

The appellees move the court to enter this cause on the docket, and dismiss the appeal for want of prosecution. Though the question presented is one purely of practice arising under our statute, yet the court deems it of sufficient importance to accede to the request made by counsel, and deliver its opinion in writing.

In aid of their motion, the appellees exhibit to the court a certificate from the clerk of the court below that an appeal had been taken, and bond given as required by law.

This application is predicated on the following statute: "It shall be the duty of the party appellant to demand "from the clerk a true copy of all the proceedings in such "cause in the circuit court, and file said copy with the

"Clerk of the Supreme Court on or before the first day of 399
"the next succeeding term thereof," &c. A subsequent part of this statute also provides that "if the party ap-"pellant fail to file the proceedings as aforesaid, it shall "be the duty of the said court, unless good cause be "shown, to dismiss said appeal, on the adverse party pro-"ducing a certificate from the clerk of the court below "that an appeal has been obtained, and a bond given as "aforesaid." Thomp. Dig. 448, § 1.

By reference to this certificate, it appears that the appeal in this cause was taken on the 10th of November, 1851, during vacation, from a judgment of the Circuit Court of Leon County.

It is conceded in argument that no notice of the appeal has been given to the adverse party, and it is not pretended that a copy of the record was filed with the clerk of this court on the first day of the term, as required by the statute.

The construction which the court has given this statute is, that it is the imperative duty of the court to dismiss an appeal upon an application based on a production of the certificate, unless the party in default shows some good cause for not having complied with the provisions of the statute.

It is a penalty which an appellant subjects himself to on failing to prosecute his cause—a penalty imposed by law, and over which this court has no discretion. This construction, which the court has been constrained to give, is the only one which, in its opinion, the words of the statute are susceptible of, and it seems too manifest to admit of discussion.

No reason is assigned by counsel for appellants, why the record was not filed in this court at the commencement of the term, except the fact informally presented, that at the time, or shortly after the appeal was taken, the President 400
of the Railroad Company was temporarily absent from Leon County. This statement unsupported by affidavit, being objected to by the adverse party, cannot influence the judgment of the court. But conceding to it all the weight it could be entitled to if formally presented, it constitutes no excuse for the default in this case.

It is insisted by counsel for appellants that the court should regard this application as purely technical in its character, and calculated to defeat the ends of justice; and that the adverse party cannot be prejudiced by denying their motion, and docketing the case for trial at this term. If reference is had solely to the merits of the cause, the objection may be considered as technical, and so may be considered every condition, imposed by law, to the exercise of the right of appeal, but it is none the less our duty to enforce these terms and conditions, when our judgment is invoked by the adverse party; and, in the opinion of the court, the ends of justice can only be attained by administering the law as we find it. A departure from this principle would be to assume a discretion where none is given, and substitute our own terms to the right of appeal, for the fixed and well defined rules prescribed by the Legislature.

Some stress has been given to the fact that the motion to file the record and go into trial, is made simultaneous with the motion to dismiss. The court is at a loss to know how this cures the default, or places the appellants in any better position than if they had made no motion; for, having incurred the penalty, it is at best but an appeal to the opposite counsel, and not an argument for the consideration of the court.

If we relax the rule in this case without cause, upon what principle could we refuse the application to file the record

401 if made on the last day of the term? Surely not upon the ground that the party in default offers, as in this case, a trial to his adversary. In either event, the adverse party would be prejudiced by being forced into trial, without notice and without preparation, or by a continuance, have the execution of their judgment suspended. By denying this motion, we would compel the appellees to adopt one or the other of these alternatives. This we have no power to do.

Let the appeal be dismissed.

THOMPSON, *Justice,* was understood to dissent from the judgment of the court, and to place his dissent on the following grounds: That the statute did not direct the appeal should be peremptorily dismissed, but vested a discretion in the court to relieve the appellant from that penalty, upon good cause shown. The Legislature evidently intended not only to put within the power of respondent, in cases where the appeal was frivolous and entered merely for delay, a summary and speedy remedy, instead of the old common law remedy of a *scire facias quare executionem non,* but to make the fact of such omission by the appellant to file the transcript of the record by the first day of term, presumptive evidence of the frivolousness of the appeal. Whatever therefore will remove or repel this presumption, is good cause upon which the court can and ought to exercise the discretion vested, and relieve the party from the consequence of his *laches.* As in this case, where the transcript of the record is brought in by the appellant, before the appeal is actually dismissed, and he moves to docket it for trial, the presumption of frivolity, or the intent to create delay merely, is, *pro hac vice,* repelled, and *his* motion ought to prevail over the motion to dismiss.

He further observed that, if the transcript of the record
402 should be brought in by the appellant so late as to preclude a disposition of the case at the term to which the appeal is returnable, or it should otherwise be made to appear that the respondent would be prejudiced, the court, in the exercise of its sound and just discretion, could and ought to impose the penalty provided by the statute. The whole matter was lodged in the discretion of the court; and it was always competent, while the rights of the adverse party were duly respected, to relieve the appellant from a mere technical point, in which the merits of the case were not involved, and thus dispense full and equal justice.

WILLIAM D. MOSELEY, GOVERNOR, &C., FOR THE USE OF THE COUNTY OF MONROE, APPELLANTS, VS. ASA F. TIFT, APPELLEE.

A statute conferring authority to impose taxes, must be construed strictly. The 32d Section of the Act of 1845, ch. 10, authorizes the Board of County Commissioners to levy a tax upon the same persons and species of property as are subject to state tax.

The Legislature, in imposing a tax upon "sales at auction," does not seem to have had in contemplation either a tax upon the person of the auctioneer, or upon the property sold by him. The tax so imposed is in the nature of a commission upon the amount received by him for sales made, and for which he is personally liable to the State. The Legislature did not design to confer the power of imposing taxes of this sort for county purposes.

Appeal from the Circuit Court of Monroe county.

The case is stated in the opinion.

Baltzell for Appellant.

ANDERSON, *Chief Justice,* delivered the opinion of the Court.

This case is brought up by appeal from the Circuit

Court sitting in Monroe county. It was an action of debt 403
brought by the plaintiff here in the court below, on an official bond given by the defendant as an auctioneer.

The bond is in the form required by law, and is conditioned that the defendant "shall well and truly discharge "the duties of auctioneer, and pay into the treasury of "the State of Florida two percentum of the gross amount "of sales made by him or by his order, or in any other "manner, according to the laws now in force, or which "may hereafter be passed, regulating sales at auction, and "prescribing the duties of auctioneers in relation to the "same."

The breach assigned is in substance as follows: That the defendant did not well and truly discharge the duties of auctioneer, according to the conditions of the obligation aforesaid, in this: that in the year 1847 the County Commissioners of Monroe county had assessed a tax of one per cent. *on the amount of auction sales* made in that county and that defendant had made auction sales during that year to the amount of $30,000, and had not paid the tax of one per cent. so assessed.

The defendant demurred to the declaration, and for cause of demurrer, said, "that the said County Commis- "sioners had not the authority by law to levy said taxes."

The condition of the pleadings presents a single question to our consideration.

The power of the County Commissioners claimed by the plaintiff, and thus denied by the defendant, depends upon the construction given to the 32d Sec., ch. 10, of the Acts of 1845. See Thompson's Digest, 99. It is there provided, "that the Board of County Commissioners shall in every "year lay a county tax *upon the same perons and spe-* "*cies of property* as are subject to State tax.„ &c.

A statute conferring authority to impose taxes, must be
construed strictly, and in this rule of construction be ap- 404
plied to the case before us, there seems to be no difficulty in ascertaining the limits of the powers of the Commissioners. They extend to the right of taxing "persons and property," under certain restrictions as to the kind and amount. In imposing a tax upon "sales at auction," the Legislature does not seem to have had in contemplation either a tax upon the *person* of the auctioneer, or upon the property sold by him. The tax is in the nature of a commission upon the amount received for the sale of property, and is not to be satisfied out of the property itself, as other taxes. It is a personal charge upon the auctioneer, for which he alone is responsible, and yet it is not in the nature of a capitation tax. We do not think the Legislature designed to give authority to the County Commissioners to impose a tax of this sort for county purposes. We do not know of any instance in which this right has been elsewhere asserted, and the general sense of the limitation of the authority of the Commissioners, indicated by the absence of any such claim, we believe to be warranted by a true construction of the statute.

The judgment of the court on the demurrer must be affirmed.

RICHARD HAYWARD AND THOMAS H. AUSTIN, PLAINTIFFS IN ERROR, VS. CHARLES LEBARON, ADMINISTRATOR OF GEO. L. FAUNTLEROY, DECEASED, DEFENDANT IN ERROR.

The law which obtains in a place at the time the contract is made, enters into and forms a part of such contract, as fully as if it was incorporated therein.

Where there is a loan of bank notes which, though depreciated at the time, yet serve and pass as money, both the borrower and the lender acting *bona fide* and innocently, regarding and treating the notes as money, and there

405 is no shift or device to cover a loan of money, and thus evade the statute against usury, the transaction is not usurious.

Usury cannot result from the act or intention of one of the parties to the contract;—both must concur in the same design—the lender must agree to accept and the borrower to give the usurious interest.

This case was brought up by writ of error from the Circuit Court of Leon County, under the following state of facts, viz:

1st. The note or memorandum which was filed as the cause of action, and offered and read as evidence, was given by defendants to J. H. T. Lorimer, the agent of Geo. L. Fauntleroy, upon the consideration of a loan or deposit of fifteen hundred dollars in bills of the Union Bank of Florida, which at the time were at a discount of about eight per cent. for par funds, but which were generally received and paid in Middle Florida in payment of debts. This loan of deposit, it was admitted, was not made with any corrupt intent to evade the statute of usury.

The note or memorandum referred to as the cause of action was in these words, viz:

Borrowed from J. H. T. Lorimer, Att'y for Geo. L. Fauntleroy, fifteen hundred dollars, payable on demand. $1,500. (Signed) HAYWARD & AUSTIN.

Tallahassee, May 25, 1839.

2d. The note was delivered to LeBaron, as administrator of Fauntleroy, and as part of the assets of his estate. LeBaron placed it in the hands of Austin, one of the plaintiffs in error, prior to the Spring term, 1842, of Leon Superior Court. The latter placed it, together with other notes due to LeBaron as administrator, in the hands of an attorney. Suit was not brought by the attorney upon the note in question, because, according to his recollection, it was expected to be paid out of collections by him on claims in favor of Hayward & Austin which had been put in his hands for suit.

406 3d. It appeared and was admitted that the Union Bank had, previous to the date of said note, suspended payment in specie, and has continued suspended ever since, and is now insolvent.

Upon the foregoing state of facts, the court gave judgment for the plaintiff (LeBaron) in the court below, for the amount of the note, with interest from the time of the demand proved.

To which judgment the defendants excepted.

Walker & Hayward for plaintiffs in error—

1st. The general rule is, that a loan of depreciated bank paper at its nominal value, taking or reserving the legal rate of interest upon such value, constitutes usury. 8 Smedes & M., p. 533, 2 J. J. M., p. 140, 2 Peters, 527.

2d. The absence of a *corrupt intent* to evade the statute of usury, does not take *this case* out of the statute. 9 Peters, p. 378, Marsh. vs. Martindale, 3 B. & P., 158, 5 Randolph, p. 132, 12 Smedes & M., p. 286, 4 Florida, p. 119, 4 J. J. M., p. 48-87, 1 Yerger, p. 244, 2 Harr. & Gill p. 13, 3 Iredell, p. 415, 522, 5 Iredell, 698.

3d. The fact that the money lent passed currently in the payment of debts in Middle Florida, does not take this case out of the statute. 5 Iredell, p. 698, 8 Smedes & M., p. 533-543.

Archer and *Hogue* for defendant in error—

Cited and relied upon the case of Bank of the U. S. vs. Waggoner. 9 Peters, 378.

Baltzell for plaintiffs in error, replied, and contended—

1st. That the judgment should have been for $1380 principal, that sum being the cash value of $1500 of nominal amount of Union Bank bills loaned.

2d. That the statute of this state prohibits the taking,

"directly or indirectly," above the rate of eight dollars for 407
the loan of one hundred dollars for one year, &c., and says nothing about corrupt intent.

THOMPSON, *Justice,* delivered the opinion of the Court.

The question in this case is whether the contract, which is the foundation of the action, is tainted with usury or not. The Supreme Court of the United States in the case of the Bank U. S. vs. Waggoner, (9 Peters, R. 399,) says: "To "constitute usury within the prohibitions of the law, there "must be an intention knowingly to contract for or to take "usurious interest, for if neither party intend it, but act "*bona fide* and innocently, the law will not infer a corrupt "agreement. Where indeed the contract on its very face "imports usury, as by an express reservation of more than "legal interest, there is no room for presumption, for the "intent is apparent—*res ipsa loqutur.* But where the con- "tract, on its face, is for legal interest only, then it must "be proved that there was some corrupt agreement or de- "vice, or shift, to cover usury, and that it was in the full "contemplation of the parties." These distinctions thus laid down are fully sustained by the cases cited in the decisions of the English Courts.

In the case at bar, it is not pretended there was any express agreement for any particular rate of interest, and the inquiry must be, whether upon the facts set forth in the bill of exceptions, any corrupt and unlawful bargain, loan, exchange or shift, by which usurious interest was reserved, is to be inferred. The facts of the case show that the consideration of the note sued upon was fifteen hundred dollars in the bills or notes of the Union Bank of Florida, computed at their nominal value but which were then at a discount, for specie, of about eight *per centum;* that said bills or notes were generally 408
received and paid in Middle Florida, where the transaction occurred, in the discharge of debts; that the Bank had suspended specie payment, had never resumed, and was then (at the time of trial,) insolvent. It was also admitted that in the transaction there was no intention to evade the statute of usury. Do these facts constitute a case of usury? A number of cases in the State Courts of the States of the Union have been cited by counsel for plaintiffs in error to maintain the affirmative of the proposition, but as this transaction took place while Florida was a Territory of the General Government, and the Supreme Court of United States had jurisdiction by appeal and writ of error, over the judiciary established in the Territory, and its judgments upon common law principles were of binding force and obligation therein, we feel bound in the decision of this case, to be governed by the decisions of that high tribunal.

The decision of the case of the Bank of the U. S. vs. Waggoner, was made in 1835, and the contract in this case was made in 1839, and the latter must be presumed to have been made with reference to the former. The law which obtains in a place at the time a contract is made, enters into and forms a part of such contract, as fully as if it was expressly incorporated therein.

In the case cited, the court puts the case distinctly upon the ground, whether there was an intended loan of money and a reservation of illegal interest, and a shift or device to cover it, and evade the law by advancing something other than money upon the loan: in other words, whether the parties intended usury, and made use of any shift or device to cover a loan of money; or whether they intended in good faith a loan of bank notes, which to the lender were of the full value of their numerical amount,

and were so treated *bona fide* by the borrower. In that 409
case, the good faith of the parties in the transaction, and the absence of the corrupt intention to evade the statute, were gathered from the facts of the case, and when so ascertained, the conclusion of the law was applied that the statute had not been violated.

Here, in the case before us, the absence of the unlawful and corrupt intention is expressly admitted; and who is there so competent to know the true character of the contract as one of the parties thereto? For it will be recollected that usury cannot result from the act and intention of one of the parties to the contract alone, but that both must concur in the same design; the lender must agree to accept, and the borrower to give the usurious interest; and this is the rule whether the contract be upon an express reservation of more than the legal rate, or it be the result of a shift or device to evade the statute in the pretended bargain and sale or exchange of any goods, bank notes, or any other commodity whatever.

We would be fully warranted, upon the authority before cited, to rest an affirmance of the judgment upon the admission in the record of the good faith of the contract; but when this admission is coupled with the other facts of the case, the conclusion is irresistible of the perfect innocency of the transaction: indeed we cannot find "a loop to hang a doubt upon."

Fauntleroy was possessed of bank notes, depreciated it is true, eight per centum, if he desired to convert them into specie, because of the suspension of the bank, yet generally current in the payment of debts, and of course available to him to this extent; he lends them to the plaintiffs in error for their promissory note, and there is nothing to negative the presumption that the bank notes were not equally available in the hands of the borrowers for the same
410 purpose—no pretence of any loss or sacrifice in the disposition actually made of the notes.

The Supreme Court, in the case cited, says: "Because "an article is depreciated in the market, it does not follow "that the owner is not entitled to demand or require a "higher price for it, before he consents to part with it. "He may possess bank notes, which to him are of par "value, because he can enforce payment thereof, and for "many purposes they may pass current at par, in payment "of his own debts, or in payment of public taxes, and yet "their market value may be far less.

"If he uses no disguise, if he seeks not to cover a loan "of money under the pretence of a sale or exchange of "them, but the transaction is *bona fide* what it purports to "be, the law will not set aside the contract, for it is no vio-"lation of any public policy against usury." We do not wish to be understood as holding that a loan of bank notes depreciated in value may not be a cover or cloak for an usurious transaction, but merely that such a contract is not disclosed in this case.

If it had appeared from the evidence that the plaintiffs in error were embarrassed, and pressed by executions, or other urgent demands, and had applied to the agent of Mr. Fauntleroy for a loan of money to relieve their necessities, and depreciated bank notes had been put upon them as the condition of the loan, and they had accepted them because, under the pressure of their circumstances, they were compelled to have money though at a sacrifice, the cloak or device to cover the usury would have been apparent, and the protestations of innocence of both parties would afford no protection against the conclusion of law. If Fauntleroy, in making this contract, designed to play the usurer, we find in the facts of this case no such cupidity and unhallowed love of gain as the imagination would portray 411
incident to such a character.

The small discount of eight per centum is all the difference between the notes loaned and specie coin, amounting to a gain of one hundred and twenty dollars; he takes the borrowers note *payable* on demand, not reserving any interest; he then quietly remains for nearly three years before he makes a demand, and puts the debt upon interest. If he had really intended the unlawful gain which is supposed by counsel for plaintiffs in error, he would have made the demand at an early period, possibly the very next day, which he might have done. But his carelessness on the subject of interest, leaving the borrower to enjoy the loan, if such it be, for two years and seven months, without interest, is of itself, a strong circumstance to repel the intention to violate the statute.

Upon the whole case, we are perfectly satisfied that the judgment of the court below was correct, and it is affirmed with costs.

THE TALLAHASSEE RAIL ROAD COMPANY, PLAINTIFFS IN ERROR, VS. HAYWARD AND WALKER, DEFENDANTS IN ERROR.

An injunction bond becomes forfeited on the dissolution of the injunction; and upon the failure of the obligors to perform the conditions, a right of action accrues to the obligee for the penalty of the bond. The court is bound to give judgment for the penalty, and such damages as may be ascertained by a jury for the breaches proved.

The bond declared on must be described with such precision, certainty and clearness as to fully apprise the defendants of the cause of action which they are required to answer. It is sufficient for the plaintiff to set forth such facts in his declaration as constitute a breach of the condition. The extent of the damages is matter of proof, to be ascertained by the jury.

Where the condition of the bonds is to pay the balance due upon a certain judgment specifically mentioned and set forth in a decretal order of the court, 412
bearing a particular date, and ten per cent. thereon, the precise amount of such judgment need not be stated in the declaration, that being a matter of proof on the trial.

Error to the Circuit Court of Leon county.

Hon. J. WAYLES BAKER, Judge.

The defendant in error sued in the court below on an injunction bond conditioned for the payment of the balance due on a certain judgment therein referred to, and ten per cent. thereon. The suit was brought after the dissolution of the injunction, for the recovery of ten per cent. on the amount of said judgment.

Issue was joined, and a jury being waived, a trial was had before the court, and a judgment entered against the plaintiffs in error for the sum of $941.

The plaintiffs in error, defendants in the court below, then moved in arrest of judgment, for the reasons appearing in the assignment of errors here, which are set forth in the opinion delivered by the court, the motion in arrest having been overruled in the court below.

Baltzell for plaintiffs in error.

Archer and *G. K. Walker* for defendants in error.

SEMMES, *Justice*, delivered the opinion of the court.

The appeal taken in this case having been dismissed, for reasons contained in the opinion of the court delivered at this term, the case is now presented for our consideration upon a writ of error subsequently awarded by the court.

The suit is an action of debt, commenced in Leon Circuit Court, upon an injunction bond executed by the plaintiffs in error on the 7th December, 1850, and payable to the defendants in the penal sum of $18,417.70.

The bond recites that in a certain cause in Chancery,

Tallahassee R. R. Co. vs. Hayward & Walker.—Opinion of Court.

413 pending in the Circuit Court of Leon county, wherein the Tallahassee Railroad Company were complainants, and Hayward & Walker and others were respondents, the Judge of said court granted an injunction upon certain conditions set out in the decretal order, made and entered on the 7th of December, 1850, on the minute book of said court, &c.

'The condition of the said bond is that the Tallahassee Railroad Company shall well and truly pay the balance due upon a certain judgment and execution mentioned and set forth in said decretal order, and ten per cent. thereon, in case said injunction shall be dissolved, or the bill be dismissed.

The declaration is in the usual form, making profert of the bond, averring a dissolution of the injunction, and assigning as breaches the failure on the part of the obligors to pay the balance due on said judgment and ten per cent. thereon. The defendants, after craving oyer of the bond, plead performance of its conditions; upon which issue was taken and the parties went to trial. A jury being waived, the cause was submitted to the Judge of the court below, who, upon the evidence, rendered a judgment for the plaintiffs below, in the penalty of the bond and nine hundred and forty-one dollars as damages, to be discharged by the payment of the said damages.

The defendants, in the court below moved in arrest of judgment on the following grounds:

First. The declaration is imperfect, deficient, and sets forth no sufficient cause of action to enable the court to render judgment against the defendants.

Second. There is no allegation of a judgment, nor of the amount of the balance of the judgment, nor of the amount of damages claimed as due to the plaintiffs, nor is there a
414 direct averment of the dissolution of the injunction, without which no judgment could be rendered for plaintiffs.

This motion was overruled by the court, and judgment entered up for the plaintiffs.

The defendants below assign the following grounds of error:

First. The Circuit Court erred in giving judgment for plaintiffs below.

Second. Judgment should have been arrested, and the motion for the purpose should have been granted, and not overruled.

Third. The judgment is for too much, even upon the *data assumed* by the court.

Fourth. The obligation of the defendants below, was to pay the balance due upon the judgment and execution, mentioned in the decretal order of the 7th of December, 1850, and ten per cent. thereon, when in fact there is no averment in the declaration of the amount of said judgment or execution, the time of rendition. the court which rendered the same, or any other circumstance connected therewith.

Fifth. The judgment is informal, irregular and illegal. being for $18,417.70, and $941 damages, to be discharged by the payment of $941.

It is unnecessary to notice separately these several assignments of error. An examination of some of the leading questions, arising from them will dispose of the others. One of the main rules laid down by all writers, upon the subject of pleading is, that the declaration should set forth the facts of the case with certainty, by which is understood a clear and distinct statement of the facts, which constitute the cause of action, so that they may be understood by the party who is to answer them, by the jury who are to ascertain their truth, and by the court who is to pronounce the judgment. Applying this rule to the declara- 415
tion before us, is it liable to anyone of the objections raised by counsel for plaintiffs in error? We think not.

The cause of action in this case is manifestly the bond declared on, and not as is insisted by counsel, the judgment and execution enjoined by the court, and for the payment of which, with ten per cent., the bond was executed.

On the injunction being dissolved, and the obligors failing to perform the conditions, the bond became forfeited and the right of action accrued to the defendant, in error, to demand the *penalty.* This they sued for, and by the judgment of the court, recovered.

It cannot be pretended, but that the bond is declared on with such precision, certainty and clearness, that the defendants were fully apprised of the cause of action, and what they were called on to answer.

But it is insisted that, upon the pleadings, the court could not, consistently with the rules of law, give judgment for the *penalty,* or assess any damage. But the court below was bound, under the pleadings upon the issue being maintained, to give judgment for the *penalty,* and assess such damages, as the evidence proved the plaintiffs were entitled to recover.

At common law, the plaintiff not only had judgment for the penalty in the bond, but was also entitled to take out execution for the whole amount, without any regard to the actual damage he had sustained by a breach of the covenant, and the defendant was compelled to resort to a Court of Chancery to relieve him from the excess of the penalty, over and above the damages, the plaintiff had sustained. But by the statute, 8 and 9 W.3,c.11, §8, and the construction given it by the English Courts, the plaintiff was bound to assign the breaches of such covenants as he proceeded to recover satisfaction for, and the jury were bound to assess not only 416
the damages and costs as before, but also damages for such of the breaches as the plaintiff upon the trial of the issues should prove to have been broken, and the like judgment was entered up as before the passage of the statute, which was for the debt (penalty,) nominal damages and costs. The execution issued for the debt and cost recovered, but was endorsed to levy only the damage assessed for the breaches of the covenant and costs. The true character of the plaintiff's *demand,* upon suit on the bond, is the same under this statute as it was at common law. He sues for the penalty, and is entitled to a judgment for the penalty, but the statute being remedial in its character, while it secures to the paintiff relief to the extent of the damages he has actually sustained, protects a defendant from the payment of any further sum than is in conscience due.

The action being on the bond and for the recovery of the penalty, it is sufficient for the plaintiff to state in his declaration such facts as constitute a breach of the condition, and thereby shew a title to demand the penalty. But it never was held necessary either before or after the passage of this statute for the plaintiff to aver that he had sustained damages by reason of the breaches.

The law will imply damages, and the extent of them is matter of proof, to be ascertained by the jury. The condition of the bond in this case was to pay the balance due upon a certain judgment and execution mentioned and set forth in the decretal order of the court of the 7th December, 1850, and ten per cent. thereon. The precise amount of this judgment was a subject matter to be proved on the trial, and not necessary to be averred in the declaration to sustain the cause of action or the issue presented by the pleadings.

As to the third ground assigned as error, not having be-

417 fore us the data upon which the court below based its judgment in assessing damages, we cannot say whether they are too much or too little.

With nothing to guide us but the record, we are bound to presume that the court below did not *assume* any data, but pronounced its judgment upon the evidence, and that the evidence was sufficient to warrant the judgment. If the defendant below desired this court to review the testimony given on the trial, he should have made it a part of the record by bill of exceptions or otherwise. We cannot go beyond the record, and judge of the force and effect of evidence not incorporated in it.

In regard to the averment, in the declaration, of the dissolution of the injunction, the court is satisfied that it is sufficient. In point of form, an averment may be in any words amounting to an express allegation of the existence of a particular fact. This has been done in this averment, besides the words used are precisely those recommended by Mr. Chitty in his Treatise on Pleading. 1 Chitty, 324.

Independent of the foregoing considerations, the court is satisfied that, if any defect existed in the pleadings in this case, they have been cured by the verdict, because it became necessary to prove the facts alleged to have been imperfectly stated or omitted, and without which the judgment could not have been rendered. Arch. Pl. 164. 6 Pick. Rep. 413.

Let the judgment below be affirmed.

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418 JOHN H. LEWIS AND WIFE, APPELLANTS, VS. GREGORY YALE, APPELLEE.

It is well settled principle of law that where husband and wife file a join. answer, such answer may not be read in evidence against the wife, where the subject matter relates to her estate of inheritance.

A *femme covert* is not competent to enter into contracts so as to give a personal remedy against her.

When, therefore, a bill seeks to affect the separate property of the wife, through her personally, it should be dismissed. The wife may pledge her separate property, but in order to charge it, her trustees must be made parties to the bill.

There cannot be a decree *in personam* against a married woman, even where she has signed the contract, the specific performance of which is sought.

The power of the Courts to reform contracts between attorney and client, is limited to the duty of protecting the latter against the undue influence of the former. Therefore, where a special contract has been entered into, by which the value of the services of an attorney has been fixed and ascertained, a Court of Equity cannot interpose to increase the compensation agreed on.

The question of title, so far as respects charges and incumbrances, depends upon their character and amount. Upon a reference to a Master, if it should ascertained that they are of such a character and amount as to enable a vendor to get them in within a reasonable time, the report should be in favor of the title.

A Court of Equity cannot award compensation in damages for injury sustained by non-performance of a contract, where the primary relief (specific performance) cannot be decreed.

As a general principle it may be asserted that a party seeking a specific performance must recover on the case as made in the bill; but such latitude has been allowed in the matter of amendments, as to authorize a plaintiff to amend his bill, and take a decree according to the case made by the answer.

Appeal from a decree of the Circuit Court of the Eastern Circuit, sitting in Equity in and for the County of Alachua, made by the Hon. THOMAS DOUGLAS, Judge.

The case is stated in the opinion.

Archer and *DuPont* for Appellants.

Forward for Appellee.

THOMPSON, *Justice*, delivered the opinion of the 419 court.

It appears from the facts in this case that the appellant, Mary, wife of the other appellant, was, at the time of their intermarriage, seized in fee, as the residuary devisee of her father, Samuel Betts, of an interest or share of a tract of land in East Florida, known as the "Alachua Arredondo Grant," as tenant in common with divers other persons—that a suit in equity for the partition of the respective interests of the several owners, was instituted by some of the tenants against the others, among the latter of whom were the present appellants—that the appellants employed the respondent, who is a solicitor and counsellor, to represent them and defend their interests in the said litigation —and out of this employment, the present suit has arisen.

The respondent, who was complainant in the court below, alleges in his bill in detail the foregoing facts, and that after a decree for partition had been passed in the partition suit, ascertaining the respective interests of the tenants, and among others that of the appellants as 62,000 acres, out of the aggregate of the whole, amounting to 250,000 acres, or thereabouts, the appellants, by John H. Lewis, entered into a contract with him for his remuneration, which contract is in writing, and is exhibited with the bill. It is in the following terms: "In consideration "of services rendered as counsel, in behalf of my self and "wife, in the partition of the Alachua Grant, by Gregory "Yale, Esq., I bind myself to have conveyed to him by "deed of release, with special warranty, one thousand "acres of land, the same to be of average quality to the "total amount of sixty-two thousand acres decreed to Ma- "M. Lewis at the Superior Court of St. Augustine, sitting "this month. Witness my hand and seal, the 4th July, "1845. JOHN H. LEWIS. [Seal.]"

Although the consideration of the promise and the cov- 420 enant to convey the land, seems, by the terms employed, to have been a past or executed consideration, yet both parties admit, and the proofs in the cause show it was not considered as such by either party, but was intended to and did include such future services of the respondent as were incident to and should be requisite and necessary to be performed in and about the execution of the decree, and the confirmation thereof by the court. Subsequently, however, to the decree aforesaid, which in point of fact was not carried into full execution, the report of Commissioners under said decree being excepted to, further litigation ensued, in an application by some of the parties for a re-hearing, and to set aside the decree on the ground of surprise, and subsequent discoveries of matters affecting their rights, and also in the filing of a supplemental bill or bill of review.

The bill further alleges that the respondent attended to this additional litigation as solicitor and counsel for the appellants, and made divers necessary journies and attendances at distant places and courts, and which were and ought to be considered as distinct substantive services, for which he should have been allowed additional compensation. He further alleges that on application by letter to the appellant, John H. Lewis, the said appellants agreed, by letter of the 12th of April, 1847, enclosing copy of a letter to the Hon. Wm. Law, of the 7th of April, 1847, so to modify the contract of July 4th, 1845, as to give to the said respondent the "right of location" of the said tract of land, which he seems to consider in his said bill of complaint as equivalent to the right of selection, by claiming to be entitled to "a selection or right of location of one thousand "acres under said modified contract," omitting the qualification of its average quality.

Lewis and Wife vs. Yale.—Opinion of Court.

The bill further alleges the submission by the tenants or claimants of the land, of the question of their respective interests to the arbitrament of the Hon. Isaac H Bronson, the award of the arbitrator by which the interest or share of the appellants was ascertained and fixed at 24,000 acres of land—the confirmation of the award, and such other proceedings as finally led to a sale of the whole tract, for the purposes of a partition, and the purchase by the appellants of 11,774 acres.

The bill further alleges a refusal by the appellants to convey one thousand acres of land, to be selected by the said respondent, out of the land in their possession, and prays for a decree for the specific performance by the conveyance of one thousand acres of land selected by the respondent, as provided in the modified contract, or compensatory damages in lieu thereof.

The appellants answer the bill in a joint answer, and to which reference will hereafter be made. It will be sufficient here to state that the contract, as it is understood to be insisted upon in the bill, is denied, although a contract is admitted, which they allege they have at all times been willing to perform, have offered to perform, and are still willing so to do.

In the examination of the questions presented by this record, it will be important primarily to consider and ascertain who are properly the parties to this contract, and what has been agreed upon by them.

The respondent in his bill alleges that the contract was made by both the appellants, Mrs. Lewis assenting and acting through her husband. Is this allegation correct? The covenant of July 4th, 1845, is signed by John H. Lewis alone, and by its terms it professes to be entered into by him alone, and to be binding on himself, and not on any other person, although from the expression that he "binds himself *to have conveyed*" the land mentioned, he must be understood as contracting for the conveyance of property, in which he did not assert a perfect title in himself.

It is true that the consideration expressed is for services rendered by both Lewis and Wife in the partition suit, and the tract of land to be conveyed is to be carved out of the lands decreed in the suit as the property of the wife; yet there is not one word which evinces an intention to bind her, or to make her a party to the covenant.

It is impossible to give any other interpretation to this instrument than that it is a personal contract of John H Lewis. So, also, the correspondence by which the contract is claimed to be modified and enlarged, is between the appellant, John H. Lewis, and the respondent. John H. Lewis in this speaks of himself alone: what he thinks what he is not willing to grant, and what he does concede. The counsel for respondent has argued with much earnestness the admissions of the joint and several answer of the appellants, and especially the answer which they jointly make to the ninth interrogatory as conclusive upon the point. That interrogatory requires the disclosure, whether the said appellants did not enter into a contract with the respondent, as in the said bill is set forth, and whether or not, the "copy of the obligation of July 4th, 1845, by "the said Lewis and Wife, through the said John H. Lewis," is not a true copy, &c.? And the answer is, they "admit they entered into a contract with the complainant "for his services, that they have no copy or duplicate of "said contract, and ask that the complainant verify his allegation," &c., but admit they believe the copy exhibition to be a true copy. This admission of Mrs. Lewis, so totally at variance with the exhibits and proof of the respondent, the written contract and the letters in evidence can only be ascribed to inadvertence, or to the peculiar structure of the interrogatory to which it is an answer, as leading to the error. Or it may have been supposed by the appellants or their counsel to be a corollary from the facts elicited and brought out by the twenty-ninth interrogatory of the bill, viz: "That the defendant, John H. "Lewis, has been the agent of the defendant, Mary, his "wife, in all things touching her interest in the Arredondo "Grant; that she was knowing to and did sanction "the contract between the complainant and John H. Lewis and a modification thereof, but not as set forth by "the complainant, and to that construction, understanding "it according to the construction given thereto by the complainant, she never could have assented but under duress: they admit fully her knowledge of the fact that "complainant, since his connection with the suit, has been "of counsel in their behalf, and that John H. Lewis has 'been, as meet he should have been, her counsel and adviser in the premises."

In such a conclusion we cannot concur. If John H. Lewis, as agent of his wife, had power or authority to bind her in this contract, he has not executed or pretended to execute the power. There must be a contract in writing signed by the party to be charged, or by some one duly authorized.

In Aylett vs. Ashton, 1 Mylne & C. 105, a *femme covert,* possessing property, two-thirds of which was supposed to be settled to her separate use, and the remaining third to belong to her brother in India, whose concurrence it was represented she could procure, in the presence of her husband, and with his concurrence signed an agreement in writing to grant a lease. The husband present offered also to sign the agreement, but it was waived as unnecessary. It was soon after discovered that one-fourth only was settled to her separate use; to one other fourth she was entitled absolutely; one-fourth belonged to her brother in India, and the remaining fourth had belonged to a deceased sister, which latter was afterwards purchased by the husband. On a bill against husband and wife for a specific performance, it was held, that the husband, not being a party to the contract, there being no written agreement signed either by himself, or by a person duly authorized in his behalf, there could be no decree against him for his marital interest, in the fourth owned absolutely by the wife, or for the other fourth which he had purchased, and which he held in his own right.

But a full and conclusive answer to the argument is to be found in the principle of law, that where husband and wife put in a joint answer, such answer may not be read in evidence against the wife where the subject matter relates to her estate of inheritance. Evans vs. Cogan, 2 P. Wms. 450. Hodgson vs. Merest, 9 Price R. 556. Elston vs. Wood, 2 Mylne & C. 678.

It may be as well however to state, in this connection, as we will have to advert to the point when we come to the consideration of the decree, rendered in this cause, that the respondent's case, as made by the bill, would not have been aided, if Mrs. Lewis had signed the contract with her husband.

The prayer for a specific performance involves a decree *in personam* against her, which a Court of Equity cannot grant. There is no case, says Vice C. Plumer, in which this court has made a personal decree against a *femme covert.* She may pledge her separate property and make it answerable for her engagements; but where her trustees are not made parties to a bill, and no particular fund is sought to be charged, but only a personal decree against her, the bill cannot be sustained. Francis vs. Wigzell, 1 Mad. R.

148. Holmes vs. Tenant, 1. Bro. C. C. 16. In Aylett vs. Ashton, before cited, the bill was dismissed as to the wife, as well as the husband. The court says, a *femme covert* is not competent to enter into contracts, so as to give a personal remedy against her. The bill there, like the present, did not seek to effect the separate property, except through Mrs. Ashton personally.

If, says the court, it had sought to affect the property upon the ground that the contract had given the plaintiff a right against the property, the suit would have been brought against the trustees; for there must be some trustees of that part of the property settled to her separate use. Although a *femme covert* has power, and the court has jurisdiction, over the rents and profits of her separate property, no case has given effect to her contracts against the *corpus* of her separate estate. The recent case of Owens vs. Dickinson, 1 Craig and Phillips R. 48, to which we have been referred, is not in opposition to the doctrine here asserted.

Although we are satisfied that Mrs. Lewis is not a party to the contract, yet we think she is properly made a party to the bill, because it is her property which is the subject matter of the contract. The bill should, however, not in such case, pray any discovery from, or relief against her.

We will now proceed to the consideration of the terms of the agreement. As to the covenant of July 4, 1845, and its proper interpretation, there is no contest. It is admitted that thereby John H. Lewis promised and agreed, as the remuneration for the services of respondent, to have conveyed to him by deed of release, with special warranty, one thousand acres of land, the same to be of average quality to the total amount of 62,000 acres decreed to Mrs. Lewis, and, ot course, as interpreted by the respondent, of the average of the entire tract of 250,000 acres.

It seems likewise to be admitted by the bill of complaint, and by the letters of respondent, that although the consideration expressed was for services rendered, yet that certain duties "necessarily incident to, and connected with, "the duties of the Commissioners, and the action of the "court thereon," remained to be attended to on his part. The report made by the Commissioners, under the decree of June Term, 1845, was excepted to, and was never confirmed. The difficulties specified and detailed in the bill arose, which were only finally settled by the award of the Honorable Isaac H. Bronson, on the reference to his arbitrament of all the matters in difference between the owners of the Arredondo Grant, touching their respective interests. Pending these difficulties, the respondent addressed the appellant, John H. Lewis, the letter of the 29th of January, 1847, (Exhibit K.,) in which he states that, since the decree of June Term, 1845, new and important matters have come to light, unknown at the time of the contract of July 4, 1845, giving a new character to the controversy, and producing, in a certain sense, the only litigation in the case; that he had attended to it exclusively at great labor and sacrifice; that he had, so far, realized nothing for his services, and, to be candid, he regarded the one thousand acres of an average quality out of the 62,000 acres, and that again of an average quality out of the 250,000 acres of the Grant subject to distribution, as being subject to "precarious location," of little value, unless he should receive the estimated value made by the Commissioners. This, he says, he is willing to do, and to stand by Lewis in the lower courts until the case shall end, if he (Lewis) will give him that estimate for the one thousand acres.

This letter is not only important, as the first of the series which led to the modification, as it is termed, of the original contract, but because it gives also the grounds of dissatisfaction with it, namely: more labor than he had anticipated, by the new aspect the case had assumed, and the *precarious location* to which the land promised by the contract was subject.

The complaint is not that one thousand acres of land of average quality, is not sufficient compensation, for he offered to go on to the end of the law suit in the Circuit Court, if he can only be secure in the receipt of the average value fixed by the Commissioners, which, we presume, was the received opinion, at the time, of the value of the lands.

To this letter John H. Lewis replies, on the 15th of February, 1847, and parries the application, saying: "I "beg you not to discuss your interest in the Lion's skin "until it is off your back. You would not have had, nor "shall you have any cause of complaint when the battle "is ended. Our enemy now should be our care." This answer being unsatisfactory, the respondent again addresses Lewis, on the 2d March, 1847, and expresses his unwillingness that the question of a new arrangement of his compensation should be thus indefinitely postponed; again urges its consideration upon him, and pointedly and distinctly informs him that if he (Yale) continues to act as his solicitor and counsel, he (Yale) must have the privilege of selecting one thousand acres out of the quantity which shall be ultimately decreed to appellants, instead of the same quantity of land of average quality, according to the contract of July 4th, 1845, or that he should be paid in money at the rate of one dollar and fifty cents per acre. In this letter he distinctly asserts that he considers all services he has rendered since the rendition of the decree of June Term, 1845, except as incidental to that decree, as extra, and entitling him to additional compensation.

The senior counsel, the Hon. Wiliam Law, having, as it appears, made a similar application, about the same time, for an increase of compensation, the appellant, John H. Lewis, replies to Wililam Law on the 7th, and to the respondent on the 12th of April, 1847.

It seems that the application of Mr. Law, as well as that of the respondent, was for the right to select lands. In the letter to the Hon. William Law, the appellant, John H. Lewis, says: "If litigation ensues beyond what could have "been reasonably anticipated when we entered into the "contract, and which should justify a claim to equitable "compensation, I will, under the contract, submit to im- "partial counsel, what this shall be, or I will give you your "election, under your contract, to take money and land, or "land only; or, should you prefer it, I will give you such "a favorable location as will ensure a speedy sale." And again he says to him: "If you knew the value of the "*selection* of lands you propose, you would not think it just." Of the respondent's claim, he says: "Mr. Yale, who has "borne manfully the brunt of the battle, asks me for a fa- "vorable location. I shall concede it to him, as his atten- "tion, zeal and talents entitle him to the boon beyond his "contract." A copy of this letter is enclosed to the respondent, and he is informed in the letter of the 12th of April that, so far as concerns his interest, it may be regarded as the answer to his letter. He says, further, that he (John H. Lewis,) trusts it will prove satisfactory, and says that it is yielded not only as the proper reward of respondent's diligence, but to prove the writer's conviction that there should be, at all times, not only good faith and inviolable fulfillment of contracts between counsel and client, but that the friendliest feelings should prevail. In

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this letter, Mr. Lewis speaks of an application by respondent for a *favorable location*, which was the application of the 29th of January, overlooking the fact that in the letter of the 2d of March, the respondent's demand is enlarged to the claim of a right to select lands, or probably being misled by the fact that the alternative or money proposition, was the same in both letters, viz: fifteen hundred dollars.

It is to be observed that the appellant, John H. Lewis, neither in this nor any other letter, makes the slightest admission of the performance of extra services calling for additional compensation. Indeed, in the letter of the 7th of April to Judge Law, he says: "To avoid misconstruction "of this offer, I wish it to be understood that I shall not "deem this as a substitute for the original contract, or that "unexpected litigation has occurred, unless it may be ne- "cessary for you to attend other terms than the next at St. "Augustine."

From this extract, and the ground upon which Mr. Lewis puts the modification of a favorable location conceded to the respondent, it will be seen that he fairly informs his counsel that he does not admit as true the existence, at that time, of unexpected litigation since the decree of June term, 1845, which would warrant a claim to extra compensation. On this point they are at issue.

On the 18th of May, the respondent, acknowledging the receipt of Mr. Lewis' letter on the 12th of April, says: "Un- "derstanding from the letter to Judge Law, to which "you refer in mine, that you concede to me the right of loca- "tion, and so far modify the contract of July 4th, 1845, I "hereby express myself satisfied with the modification." The respondent here, it will be seen, varies the form of expression. Mr. Lewis says he concedes to him a "favora- ble location." which respondent interprets or says he
430 understands it to be the "right of location.' If there be any substantial difference between the two phrases, which it is not material for us to inquire into, and if the correspondence had closed here, a well-founded doubt would arise whether the minds of the contracting parties had assented to the same thing.

But the appellant, John H. Lewis, on the 29th May, acknowledges the receipt of this letter, and expresses himself gratified that the respondent is satisfied with his modification of the contract of July 4th, 1845, and says he (Lewis) always intended to go beyond his contract, but was unwilling to define limits until the result was ascertained and the measure of service fully conveyed.

By this we ascertain that by the terms or phrase, "a favorable location," the appellant, Lewis, and the respondent both understood that the latter should have the right of location, and we have now the terms of the contract as modified. Is the respondent correct in his interpretation thereof when he treats the "right of location" conceded by this correspondence, and the "right of selection" demanded by his letter of the 2d of March, as convertible terms or expressions?

Recurring to the respondent's letter of the 29th of January, we find the complaint to be founded on the fact that his one thousand acres of land, of average quality, was subject to "precarious location," and therefore, of little value, unless he could realize the average price or value thereof, as estimated by the Commissioners, of one dollar and fifty cents per acre. We understand him as expressing the opinion that the contract of July 4th, 1845, might be satisfied by the conveyance of any tract of the quantity of one thousand acres, which will answer to the quality of an average, no matter where it is located or placed, within the limits of the grant, and therefore of little value to him.

He therefore desires that the average value shall be se- 431
cured to him, irrespective of location, by an undertaking on the part of the client to pay that value in money, assuming the correctness of the Commissioner's estimate; and although in his letter of the 2d of March, he asks to be allowed to select one thousand acres from the body of land which may be ultimately decreed to the appellants, yet he presents the same money alternative of fifteen hundred dollars, the average price of one dollar and fifty cents per acre, showing that his claim did not at any time exceed the average value so estimated. Again, in the letter of May 18th, after stating his understanding of the concession made by Lewis, he adds, *"and so far modify"* the contract of July 4th, 1845, clearly indicating that all he asked for was granted. Coupling these facts with the very emphatic expression of the appellant, John H. Lewis, to Judge Law, in his letter of the 7th of April, that if the counsel knew the value of one thousand acres of selected land, he would not think it just, we are bound to conclude that the intention was to concede this requisition did not exist in the mind of John H. Lewis, and that the respondent could not at the time have so understood him. The value of one thousand acres selected from the tract, according to the proofs in the cause, and the concession of counsel for respondent in the argument here, is stated to be worth at least seven thousand dollars, and this fact well justifies the remark of Mr. Lewis as to the want of justice in the requisition. If Lewis had yielded to the importunity of the respondent, and was now here resisting the performance of the promise, upon reason and authority, this court would be bound to declare it unconscionable. Justice Story, in his observations upon the relation of client and attorney or solicitor, says that it must give rise to great confidence between the parties, and to very strong influ- 432
ences over the actions and rights and interests of the client. The situation of an attorney or solicitor puts it in his power to avail himself not only of the necessities of his client, but of his good nature, liberality and credulity to obtain undue advantages, bargains and gratuities. Hence the law, with a wise providence, not only watches over all the transactions of parties in this predicament, but it often interposes to declare transactions void which, between other persons, would be held unobjectionable. By establishing the principle that, while the relation of client and attorney subsists in full vigor, the latter shall derive no benefit to himself from the contracts, or bounty, or other negotiations of the former, it supercedes the necessity of any inquiry into the particular means, extent and exertion of influence in a given case—a task often difficult and ill supported by evidence which can be drawn from any satisfactory sources. Comm. on Eq. Ju., 310. So a gift, made to an attorney *pendente lite* will be set aside, as arising from the exercise of improper influence; for it has been said with great force that there would be no bounds to the crushing influence of the power of an attorney who has the affairs of a man in his hands, if it were not so. And sales made and annuities granted to attorneys under similar circumstances, will, upon the same principles of public policy, be set aside, at least unless they are established to have been transacted *uberrima fide*. Ibid, § 312.

But we are very clear in the conclusion that the modification or enlargement of the agreement extended only to the right to locate the tract upon lands of average quality within the grant—that no more is conceded, and that the right to select land is limited and restricted to the lands of average quality, and this we find to be the contract admitted in the answer of the appellants.

It has been urged upon the court by the counsel of the

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433 respondent, that this construction of the contract of the appellant, John H. Lewis, makes the remuneration grossly inadequate to the services rendered the appellants, and from the proofs at the hearing it is no doubt as he alleges. All unite in their testimony of the merit of the respondent, and none gives stronger evidence in his favor than Mr. Lewis himself. We can only express our regret that he should not receive adequate compensation for his labor, skill and fidelity, but we cannot afford any remedy. In the absence of a special contract, the courts will afford solicitors, attorneys and counsel every legal and proper facility to secure a fair and reasonable remuneration for services rendered; but when a special contract is entered into, by which the value of the services is to be ascertained or measured, or where property is accepted in lieu of money, the courts can only enforce the contract according to the legal import of its terms. The power of the courts to reform contracts between attorney and client, is limited to the duty of protecting the latter against the "crushing influence of the power" of the former, and to relieve him from unreasonable and unconscionable exactions, agreements, gifts, etc.

The decree rendered in this cause in the Circuit Court recites that specific performances of the contract set forth in the bill, cannot be decreed. Why, we are not informed. It cannot be for the reason that Mrs. Lewis refuses to join her husband in the execution of the conveyance, for there is no evidence in the record of such refusal. It cannot be, for the reason that the appellants do not own any lands answering to the description in the agreement, for we find neither allegation nor proof to that effect.

It is conjectured, however, by the respondent's counsel that it was because the appellant's share of the whole tract as ascertained by the sale made in February, 1849, was
434 $11,906 77, and that they purchased lands to the extent and value of $18,979 84: thus exceeding their interest, under the general average, the sum of $7,073 07; and that, by decree of the court, this excess was directed to be paid by installments, and was to be a lien and charge upon the whole of appellant's lands until paid, and because of some supposed lien of Judge Law for his compensation.

There was no refrence to a Master to ascertain the state of the titles, &c. From the same exhibit, the decree of the court in the partition suit, it appears that the appellants purchased eighteen sections of land, on which the sum of $7,073 07, together with a sum due for costs, was charged; and it further appears that if the instalments had been duly paid, about which payment however there is no evidence, there would have remained due for principal and interest at the time of the decree, about $3,200. Taking this hypothesis to be true, is a charge of $3,200 upon eighteen parcels of land, containing in the aggregate 11,774 acres, and valued at $18,979, such an incumbrance as would justify a Master in reporting against a title?

In Daniel's Chy. Pr., it is said, that when the title is clear, but there are terms or incumbrances to be got in, the Master should report in favor of the title. Before he does so, however, he should be satisfied that the terms or incumbrances can be got in. If he is not satisfied on this point, he should report that a good title cannot be made, unless the terms, &c., can be got in. Vol. 2, p. 873, (Harrisburg ed.) citing Bennett, 152. In Coffin vs. Cooper, 14 Vesey R. 205, on a motion to discharge a purchaser upon the Master's report, Lord Eldon ruled that where the Master's report is that the vendor getting in a term or getting administration, &c., will have a title, the court will put him under terms to procure it speedily, and denied the motion. See also Wood vs. Bernal, 19 Vesey R. 221, and Halsey vs. Grant, 13 Vesey R. 73. From these citations, 435
it will be seen that the question of title, so far as respects charges and incumbrances, depends on their character and amount, and whether or not they can be got in within a reasonable time by the vendor; and from the want of a Master's report, or proofs of the state of the title at the date of the decree, we have no means of testing the correctness of the recital that specific performance could not be decreed for this cause. As there are no facts in the record upon which any of the foregoing hypotheses can be sustained, can the recital aforesaid be founded on the position assumed in the argument here by the counsel for the appellants, that a Court of Equity will not enforce against a husband a specific performance of an agreement to dispose of his wife's estate, but will refer the purchaser to a court of law for his remedy, and upon which it was argued that the decree should be reversed, and the bill dismissed? The point has been the subject of much difference in opinion. In Hall vs. Hardy, 3 P. Wms. R. 139, Sir Joseph Jekyl, M. R., said: "There have been an hundred pre-"cedents where, if the husband, for a valuable considera-"tion, covenants that his wife shall join with him in a fine, "the court has decreed the husband to do it, for that he "has undertaken it, and must lie by it if he does not per-"form it." To the same effect, are the cases of Barrington vs. Horn, decided by Ld. Ch. Cowper, (5 Vin. Ab. 547, pl. 35,) Morris vs. Stephenson, decided Sir Wm. Grant, M. R. (7 Vesey R. 478,) and that of Withers vs. Pinchard, decided by Lord Rosslyn, cited in the argument of the last cited case. In opposition may be cited Otread vs. Round, also decided by Ld. Ch. Cowper, (4 Vin. Ab. 203, pl. 4,) in which the wife had expressly refused. The Chancellor says: "It is a tender point to compel the husband by a "decree to procure his wife to levy a fine, though there "have been some precedents in this court for it, and it is 436
"a great breach upon the wisdom of the law which secures "the wife's lands from being aliened by the husband with-"out her free and voluntary consent, to lay a necessity "upon the wife to part with her lands, or otherwise to "cause her husband laying in prison all his days;" and said he did not think it proper in the case to decree a specific performance of the covenant, but that the defendant must refund the purchase money paid, with costs. In Emery vs. Wase, (8 Vesey R. 514,) Lord Eldon doubts whether the point was as well settled as it was understood to be; and in Innes vs. Jackson, (16 Vesey R., 370,) he says he considers it still doubtful. There is also a *dictum* of Ch. Baron Alexander, in Frederick vs. Coxwell, (3 Young and Jer. 514,) that he considered the rule to be shaken. Amidst this contrariety of opinion, and believing, as declared by Lord Eldon, that the policy of the law is, that a wife is not to part with her property but by her own spontaneous and free will, we should be inclined to refuse in any case an absolute decree for specific performance against the husband, on the ground that it is calculated to invade that policy.

We regard with much favor the decree made by Sir John Strange, M. R., in Sedgewick vs. Hargrave, (2 Vesey Senr. R. 57.) In that case the sum of $200 had been paid to the husband as a compensation for the relinquishment of his wife's interest in an estate. On refusal to convey, and upon bill filed against them, the Judge observed, that he feared a bare decree on the husband to join or procure his wife to join, might not answer the ends of justice; and as he was not warranted to make a personal decree on the wife, he directed the husband to join in a conveyance, and to procure her so to do; and to induce him, he added the alternative that if he does not, in the time and manner di-

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437 rected by the Master, perform it, he should repay the plaintiff the money advanced. So, in this case, regarding the service rendered as the payment for the land, the court might decree in the alternative that the appellant, John H. Lewis, convey and procure his wife to join with him, or pay the value of the lands, which value should be previously ascertained by reference to a Master, whose report, with the evidence on which it is founded, would enable the Chancellor to arrive at a correct conclusion on the point.

The decree continues to recite that, considering the respondent here entitled to compensation for his services as solicitor for said appellants, it is therefore ordered, adjudged and decreed that the appellants, (John H. Lewis and Mary his wife,) pay or cause to be paid to the respondent the sum of two thousand five hundred dollars, with interest from the decree, and awards execution generally, &c. This decree is doubtless intended to be in accordance with the alternative prayer of the bill for compensatory damages, but would more properly seem to be based upon a rescision of the contract.

Upon the question whether a Court of Equity may award compensation in damages for the injury sustained by the non-performance of a contract, in the event of the primary relief for a specific performance failing, we have no doubt. It is not within the jurisdiction of the court. The cases in the English Courts which maintain the affirmative of the proposition are Denton vs. Stewart, 1 Coxe's cases, 258, and Greenaway vs. Adams, 12 Vesey R., 395, both of which are doubted in Gwillin vs. Stone, 14 Vesey R., 128, and expressly overruled in Todd vs. Gee, 17 Vesey R., 274-279, and in Sainsbury vs. Jones, 5 Mylne. & Craig R. 1-3. The American cases cited in the argument here, so far as they are upon the point, are decided expressly on the authority of the overruled cases, and are not consider-
438 ed as giving any additional weight to them. The cases of compensation in Equity, says Ch. Baron Alexander, in Newham vs. May, 13 Price R., 749, have grown out of the jurisdiction of the Courts of Equity, as exercised in respect of contracts for the purchase of real property, where it is often ancillary as incidentally necessary to effectuate decrees of specific performance. Thus, where a specific performance is decreed, upon the application of either party, with an allowance to be made for any deficiency as to the quantity, quality or description of the property, or for any delay in performing the contract. Nelson vs. Bridges, 2 Beavan R., 239, Todd vs. Gee, 17 Vesey R. 278, Grant vs. Munts, Cooper's Equity cases, 173, Dyer vs. Hargrave, 10 Vesey R., 505, Wilkinson vs. Torkington, 2 Y. & Coll. cases, 726, Hepburn vs. Auld, 5 Cranch R., 278. Or where the suit is by the vendor or against the vendee, the court decreeing specific performance, will also decree the payment of the purchase money, or, as in the case of Sedgewick vs Hargrave, before cited, where the vendor was decreed to convey, and procure his wife to join, or to repay the purchase money. In all these and similar cases, the jurisdiction properly attaches in equity as ancillary to the relief granted by the decree, and as necessary to make it effectual. By keeping this distinction in view, it will reconcile the apparent contrariety of the decisions on the subject. When the court below ascertained that specific performance could not be decreed, the jurisdiction of Equity terminated, and the bill should have been dismissed.

How far the principle we have asserted would be applicable in a case where *pendente lite* and with a view to defeat the plaintiff of his specific performance, the vendor should convey or incumber the property, it is not necessary for us to decide, as we do not find any such fraudulent 439 conduct imputable to the appellants.

The compensation or damages awarded, appear by the decree to have been ascertained on the basis of the value of the services of the respondent as solicitor, &c., for the appellants, which was a virtual rescision or setting aside of the contract between the parties, by which the value of the services was estimated. One thousand acres of land of average quality, to be located by the respondent, was settled and fixed as the equivalent of the services rendered. It was threfore erroneous; the damages or compensation, if proper to be allowed, should have been estimated by the value of the land.

The decree is also erroneous in rendering a judgment in *personam* against Mrs. Lewis, for the reasons and upon authorities heretofore cited.

We are, therefore, of opinion that the decree rendered in this cause should be reversed—holding, as we do, that the contract which the respondent prayed to be enforced against the appellants, is not the contract which the parties entered into; that there is no sufficient showing in the record to support the declaration in the decree that the contract, which the court below ascertained, could not be specifically performed; that compensation cannot be decreed when specific performance is denied; that the basis on which the amount of compensation was ascertained, is incorrect; and that a decree in *personam* cannot be rendered in a Court of Equity against a *femme covert*, and especially upon a contract she never entered into.

What disposition shall be made of the case?

The counsel for the appellants insist that a party seeking specific performance, must recover on the case as made in the bill, and cannot recover on a case made by the evidence at the trial, and that this court should dismiss the bill of complaint. As a general proposition, the author- 440 ities cited seem to sustain the position assumed, but great latitude has been allowed to a plaintiff in making amendments. Lord Redesdale in Lindsay vs. Lynch, (2 Sch. and Lefroy R. 9) mentions a case where a plaintiff filed a bill stating an agreement, and the defendant, by his answer, admitted that there was an agreement, but different from that stated by the plaintiff; and it was held that the plaintiff might amend his bill, abandoning his first agreement, and praying for a decree according to that admitted by the defendant.

Although this course was denied by Lord Redesdale to the plaintiff, in Lindsay vs. Lynch, it was because the plaintiff had amended his bill after the coming in of the answer; and had persisted in his original demand, praying in the alternative for that, or for a decree according to the agreement admitted by the answer; which course his Lordship considered as unfair and improper.

This case differs from Lindsay vs. Lynch, which was the case of a parol agreement; here it is in writing, and the reason given does not apply. We are inclined to adopt the precedent mentioned by Lord Redesdale as the rule to govern this case.

Let the decree of the court blow be reversed, and the cause remanded to the Circuit Court of the Eastern Circuit sitting in the County of Alachua, with directions to allow the respondent, upon application, to amend his bill according to the suggestions herein, and pray for a specific performance of the contract admitted by the appellant, John H. Lewis, in his answer, upon the terms of furnishing said appellant with a copy of the amendments gratis; and for such other and further proceedings, not inconsistent with this opinion, and acording to the usual.

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441 course of proceedings in Equity, as may be requisite and proper in the premises.

Let the appellants recover the costs and charges by them expended and incurred in and about the prosecution of their appeal.

JOHN H. LEWIS AND WIFE, APPELLANTS, VS. GREGORY YALE, APPELLEE.

The general rule in regard to costs is, that they follow the result of the suit. In a Court of Equity this rule is departed from where the failing party can show to the court any circumstances which would render it unjust that he should pay the costs of the proceedings.

But the rule will not be departed from in a case where the course and conduct of the losing party have been the chief cause of great accumulation of costs.

Motion by counsel for appellee to re-consider and change so much of the decree of the court in the foregoing case as awards to the appellants, against the respondent, the costs and charges by them incurred and expended in the prosecution of their appeal.

Motion denied.

THOMPSON, *Justice*, delivered the folowing opinion:

We have been asked by the counsel for respondent to reconsider so much of our judgment in this case, pronounced at a former day, as allows the appellants, against the respondent, the costs and charges by them expended and incurred in and about the prosecution of their appeal, upon the ground of the merits of the respondent in the services rendered the appellants, which formed the consideration of the contract between the parties and the hard bargain he has made for his remuneration, it being alleged to be grossly inadequate.

442 The general rule in regard to costs is that they follow the result. In a Court of Equity, however, the rule is departed from in those cases where the failing party can show to the court any circumstances which may satisfy it that it would be against the ordinary principles of justice that he should pay the cost of the proceedings. Conceding that the services of the respondent were valuable, and that he did make a hard bargain on his part, is it sufficient Equity in this case to induce the court to depart from the general rule?

In considering such questions, a Court of Equity is very much governed by its desire to discourage and repress unnecessary litigation, and will generally withhold costs from the party who is guilty of any misconduct with reference to the subject matter of the suit. The respondent, who was plaintiff in the court below, is a lawyer of eminence, and the court would for this reason look for more accuracy of view and propriety of action with regard to the institution of the suit, and its conduct, than from a mere layman, or one less distinguished in the ranks of the profession.

It was proved in the record, that at the sale of the lands in February, 1849, the appellant, John H. Lewis, gave the respondent written authority to bid for, and buy on his account, a tract of one thousand acres of land, in satisfaction or performance of a contract, but the dispute arising as to the value of lands so to be purchased, the respondent returned it. The testimony of the witness is not very precise on this subject, but the answer of the appellant alleges it was an offer on his part to perform the contract which is admitted in his answer, and which this court has ascertained to be the true contract. Willingness to do what a party ought in equity and good conscience to do, places him, with regard to the question of costs, upon a vantage ground. Lewis was willing to perform his contract, but 443 not to accede to the demands of his adversary. There is surely no misconduct in this.

Again, the demand of Yale is for a construction of the contract which, if it had been the true construction, he as a lawyer must have known a Court of Equity would not enforce, because it was unconscionable. Upon the principle of discouraging unnecessary litigation alone, notwithstanding the merits of the respondent, we would be bound to adhere to the general rule. But there is another consideration which presses itself upon us, and which is entitled to much weight. The principal and heaviest item of costs is that of ascertaining the voluminous record of the cause, upon the institutions of this appeal.

The bill filed by the respondent contains much useless and redundant matter, in the very prolix and circumstantial history of the services rendered by him in the Circuit Courts for the appellants, and which formed the consideration of the contract, and the bill was thereby swelled to an unnecessary length.

To the bill were annexed, as exhibits, the voluminous record of the suit for the partition of the Arredondo Grant including the petition for rehearing, and the proceedings thereon, the bill of review and the answers thereto, with the proceedings thereon, including the reference to the arbitrator and his award, and the final decree thereon, together with copies of agreements made in said cause, and correspondence between the counsel of appellants, all tending to show the magnitude and importance of his services, but wholly foreign to the questions properly presented in this controversy. Of the four hundred and seventy odd pages of the record sent up from the court below, not more than one hundred pages, if so much, properly belonged to the cause.

When the appellants sought relief in this court from an 444 erroneous decree against them, they were obliged to bring up the whole record, encumbered, as it was, with such a large amount of extraneous and useless matter. If the appellants had been wrong in resisting the respondent's claim, still they should not be mulct in unnecessary expense.

The respondent is properly accountable for this unnecessarily voluminous record, and we regret that we are compelled, under the circumstances of the case, to consider that his merit, so far as regards the services he has rendered the appellants, is more than counterbalanced by his demerits in the institution and conduct of this suit; and that, if the costs awarded to the appellants prove a heavy burden, he has contributed much to it himself by the reckless manner in which he encumbered the record.

We find nothing in the defence made by the appellants to object to. They were resisting an unjust demand, and in doing so, have, no doubt, incurred heavy expense for counsel fees, and it would be unjust in this court to add to the burden by taking from them one of the fruits of their success.

In the exercise of the sound discretion invested in us, we must deny the motion.

SUPREME COURT

TERM AT JACKSONVILLE

EASTERN DIVISION

HEIRS OF JACOB BRYAN vs. DENNIS, MARY, AND OTHERS.

In the construction of interpretation of a statute, all laws in *pari materia*, should be considered in order to ascertain the will of the Legislature; for that which is within the intention of the makers of the law, is as much within the statute as if it was in the letter.

Laws which have reference to the public welfare or the policy of a State, should be construed liberally.

The policy of this State is, and ever has been, opposed to the settlement of free negroes within her borders, and consequently to the unrestricted manumission of slaves.

The Act of 1829, which gives the right to manumit slaves, provides, at the same time, a remedy for the evil, by requiring the owner, after the act of manumission, to transport them beyond the limits of the State. The design of the Legislature manifestly was, that this restriction should apply in the case of a manumission of slaves born in the State, as well as to slaves brought here from other States.

The repealing section of the Act of 1842, is in relation to "Free Negroes and Free Mulattoes," and does not, in any wise, affect the Act of 1829, in reference to slaves.

The Act of 1829, imposes a penalty upon the person who shall manumit any slaves brought into this State, of $200 for every slave so manumitted; and provides that, *before* the grant of manumission, he shall enter into bond for their transportation beyond the limits of the State.

A deed of manumission, made by a person who has not complied with the conditions of the Act, is absolutely void; the title to the slaves remains unaffected, and descends to his heirs.

This was a proceeding instituted by the appellants in the Circuit Court of Duval county, before the Honorable Thomas Douglas, Judge of the Eastern Circuit, to test the
446 right of the appellees to their freedom, under a deed purporting to be a deed of manumission executed by Jacob Bryan in his life time, and bearing date the 25th November, 1842.

The nature of the proceeding, and the facts of the case, are stated in the opinion of the court.

Sanderson, for appellants, contended:

I. The act of 1829, Thomp. Dig. page 533, must be *strictly* complied with, or the slaves attempted to be manumitted under it, take nothing, and *"shall not be deemed free."* The appellees claim to be free under and by virtue of the deed of manumission, introduced in evidence. That deed must be shown to have been executed in strict conformity with the requirement of that act, and the *onus probandi* rests with the appellees, as well in this court as in the court below.

The statute of 1829 requires "that such person or persons shall, before he grants such manumission, give *bond* with two or more securities," &c.

The record shows, and the facts agreed upon and submitted admit, that no such bond was ever executed as required by the above cited act. The giving and filing of the bond was a condition precedent, required by said act, and must have been *strictly* complied with, or the deed is void, and the slaves attempted to be manumitted "shall not be deemed free." This principle is recognized and established in the case of Henry Miller, Adm'r., vs. Herbert & Herbert, 5 Howard, 72; and when "a statute limits a thing to be done in a particular form, it includes in itself a negation, viz: that it shall not be done otherwise." Plowd. 206*b*. Also, in Bazzi vs. Rose & Child, cited in Wheeler on Slavery, 307, and Mary vs. Morris, Wheeler, 311. If, then, the deed is not such a deed as is required and con-
447 templated by the act, the affirmative of the propositions of appellants necessarily results.

II. The act of 1829 prescribes the manner in which slaves brought into the States after its passage, may be manumitted, and imposes a penalty for a violation of its provisions. If a statute inflicts a penalty for doing an act, the penalty implies a prohibition, and the act is unlawful. 1 Kent, 467. 5 Barn. & Ald. 335. Dwarris on Statutes, 667-680.

This deed, not having been executed in terms of the act, is *void,* and nothing was granted by it: the title to the negroes remained in Jacob Bryan, the grantor, until the State enforced her rights under the statute. The State having released this right to the heirs of Bryan, the title, upon his death, vested in claimants.

III. The act of 1829 applies to the *descendants* of such as are brought into the State after its passage, as well as to the ancestors so brought in. *Partus sequitus ventrem* obtains. Butler & Boarman, Wheeler 21. Timms & Potter, Wheeler 24. The rule of the civil law, Wood's Civil Law, 114, is of force in this State.

IV. The policy of the State is against manumission, and requires a strict enforcement of this act, and embraces alike within its provisions the issue as well as the ancestor.

That the policy of the State is to prohibit emancipation, and the consequent increase of a free negro population, is evidenced by the Constitution and several acts of the General Assembly. In the act of 1829, "prescribing the terms of manumission in certain cases;" the act of 10th February, 1832, Thomp. Dig. 534, "prohibiting the migration of free persons of color into the State;" and again in the 16th Article of the Constitution, Section 1st, the State has declared her will. She has there clearly indicated and prescribed such to be her policy, and it is unquestionably the duty of this court to *determine* and *carry into effect* that 448
policy by its judgment. And this court will, in giving a construction to the act of 1829, consider its policy, and give it such an interpretation as may appear best calculated to advance its object by effectuating the design of the Legislature.

Livingston, with whom also was *Frazier,* for appellees, contended that the judgment of the court below, refusing the order for the sale of Dennis and Mary, and declaring them free, was a proper one for the reasons—

I. That they were duly emancipated by their former master, Jacob Bryan, deceased, by deed dated 25th November, 1842, which was recorded on the same day, according to law.

II. If this act of manumission was contrary to the provisions of the act of 1829, it only created a forfeiture to the State of Florida, who could proceed against them in a manner prescribed by the statute, but which right or remedy cannot be assigned or *released* to the present parties, to enable them to proceed as they have attempted in this suit.

The act of 1850, (Pamphlet Laws, 174,) confers no right or interest on the petitioners, because the only word of conveyance used in said act is *release,* which is a technical term, and has a well known and certain definite meaning at common law.

If terms of art are used in this statute, they are to be taken in their technical sense; and if a statute make use of a word, the meaning of which is well understood, and has a certain definite sense at common law, the word shall be expounded and received in the same sense, in which it is understood at common law. See Dwarris on Statutes, 44, 48. 1 Kent Com. 465.

449 The State of Florida could make no *release of property* in the defendants to the petitioners, because—

I. The petitioners were not in possession, nor had any kind of interest or estate in said negroes or mulattoes at the time of the release. See 4 Cruise Dig. 84, 85, 86, 88. Bouvier Law Dictionary, Title Release, and Tomlin's Law Dictionary, Title Release.

II. Because there was no *privity* between the releasor and the releasee. See 4 Cruise Dig. 87, 89, 90, and Tomlin's Law Dictionary, Title Release.

This statute transfers no right of action to the petitioners, because the right of the State is a mere "chose in action," which is not transferrable by release, and can only be released to the persons against whom the remedy existed. 4 Cruise Dig. 88. Tomlin, Title Release.

The act of 1829, entitled, "An Act to prevent the manumission of slaves, in certain cases, in this State," is a penal statute, and should be construed liberally in favor of defendants, and strictly against them. See Daggett vs. the State, 8 Wheeler's Am. Com. Law, 139. Rex. vs. Powell, 4 T. Rep. 472. Dwarris on Statutes, 736, 737, 749, 770.

This statute is an innovation upon the common law, and must be construed strictly, and not extended further than the case absolutely requires. See Dwarris on Statutes, 685, 729; 1 P. Williams R. 252, and 1 Kent's Com. 464.

Jacob Bryan, deceased, had a right of common law, to emancipate defendants. Wheeler on Slavery, 297, 301.

The act of 1829 is merely directory, and not mandatory, and the authorities of the State may proceed against persons manumitted under it, or not, at their discretion.

The defendants, Dennis and Mary, were born in the State of Florida, and not having been brought into the State since the passage of the act of 1829, are not subject to the penalties imposed by the act.

450 The act of 1829 was repealed by the 9th section of an act entitled, "An act to prevent the future migration of free negroes or mulattoes in this Territory, and for other purposes," approved 5th March, 1842, and was not in form at the time of the making of this deed of manumission. See pamphlet Laws 1842, p. 34.

SEMMES, *Justice,* delivered the opinion of the court.

The proceedings in this cause, somewhat informal and novel in their character, were commenced by petition in Chancery, before the Judge of the Circuit Court of Duval county for the recovery of certain negroes, alleged to have been the property of one Jacob Bryan, in his heirs at law.

Under the prayer of the petition, process was issued by the court below against these negroes, and three of them, Dennis, Mary and Sarah, the defendants in this proceeding, were taken into custody by the Sheriff of the county. These defendants afterwards appeared, by counsel, and filed to said petition their plea, and upon the issue of *liber vel non,* the cause was set for hearing. At the December term, 1851, of said court, a jury being waived, the case was submitted to the Judge, who thereupon decreed that the said Dennis and Mary were free and entitled to their discharge, and that the said Sarah was a slave, and as such to be sold, and the proceeds deposited in the registry of the court. From that portion of the decree liberating Dennis and Mary, an appeal was taken to this court.

The facts of the case, so far as they are material to the present investigation, are the following: In the month of January, 1830, Jacob Bryan, a resident of the State of Georgia, removed to Florida, bringing with him certain negro slaves, among whom were Sarah and Susan, the mother of Dennis and Mary, who were subsequently born in this State.

On the 25th of November, 1842, Jacob Bryan executed 451 an instrument in writing, purporting to be a deed of manumission, which, by its terms, emancipated and set free the defendants, by name, as well as other negroes mentioned, in said petition. It is in proof that Bryan never gave bond, as required by law, for the transportation of these negroes beyond the limits of Florida, and that they continued to reside here until after the death of Bryan, which took place in 1847, he dying intestate.

The main question arising under the issue upon these facts is, whether the deed of manumission, by virtue of which these negroes claim their freedom, is valid under the laws of this State?

The act of the Legislature upon the subject of manumitting slaves, passed November, 1829, declares that any person who shall manumit any slaves brought into this State (Territory) after the passage of the act, shall forfeit and pay for every slave so manumitted the sum of two hundred dollars, and that any person bringing into the State any slaves after the passage of this act, and wishing to manumit them, such person, before he grants such manumission, shall give bond, with two or more securities, in a sum equal to the value of such slaves, to be approved by the Judge of Probate, conditioned for the transportation of such slaves beyond the jurisdiction of said State, within thirty days after such manumission. It is further declared by the statute, that any slave manumitted contrary to its provisions, "shall not be deemed free," but shall be liable to be taken up, under an order of the Circuit Court, and sold by the Sheriff at public sale, and the proceeds paid into the Treasury of the State. No proceedings were ever taken under this statute against these negroes, in behalf of the State; but on the contrary, the Legislature, in 1850, passed a special act for the relief of the appellants, as the heirs of Jacob Bryan, releasing to them all the right, title 452 and interest of the State of Florida in and to said negro slaves.

It is insisted by counsel for defendants that the act of 1829, above referred to, was not in force at the time the deed of manumission was executed, being repealed by the latter clause of the act of 1842, and that consequently the said Bryan had, as at common law, the unrestricted right of manumitting slaves. Whatever may have been the effect of a repeal of this statute upon the common law right of a master in this State to free his slave, it is unnecessary for us to determine. It is a sufficient answer to the position taken by counsel to say, that the repealing section of the act of 1842 is restricted to laws in relation to "free negroes and free mulattoes;" the act of 1829 is in reference to slaves. True, it provides for their manumission, upon certain conditions, but this does not bring it within either the spirit or letter of the repealing clause, because it is manifest that before the slave can become a "free negro," and consequently be embraced within the terms of the repealing act, the conditions to his freedom imposed by the act of 1829, must be fully complied with. The act of 1842 was designed to amend the law, as it then stood, in relation to the migration of "free negroes and free mulattoes" to the Territory, and hence the propriety of the repealing clause in reference to laws on the same subject. A fair construction of the act of 1842 would not exend its operation beyond this.

It is further contended by counsel that two of these negroes (Dennis and Mary) having been born in this State, are not comprehended in the statute, although they are the descendants of slave Susan, who was brought into the Territory in 1830. This construction of the act, however plausible it may be considered, cannot be sustained. That

Heirs of Bryan vs. Dennis, et al.—Opinion of Court.

453 these two negroes are not within the letter of the law, is conceded, but *non constat*, they are not within its policy and spirit. By reference to the well settled rules of law in the construction of statutes, and in view of the policy of this State in regard to the manumission of slaves, it will become manifest that the interpretation we have given this act is sound and legitimate. In the construction of a statute, all laws in *pari materia* should be considered in order to ascertain the will of the Legislature; for that which is within the intention of the makers of the law, is as much within the statute as if in the letter; and the intention of the Legislature may often be collected from the cause of necessity of enacting the law.

Hence the proposition is indisputable, that a statute often times comprehends within its spirit a case not within its letter, because it is within the mischief for which a remedy is provided. And to the same effect, whatever is within the equity of a statute should be considered a part of it, though to effect this it may become necessary to enlarge or restrain particular words. It is held by all legal writers that laws which have reference to the public welfare, or the policy of a State, should be construed liberally, and with a view to carry out, as far as practicable, the design of the law; and although the natural import of the words used in a statute is to be considered as expressing the intention of the Legislature, yet where such import is repugnant to the principles of national policy, it is the duty of the court to enlarge or restrain the words, by such construction as will repress the mischief and advance the remedy. See 7 Mass. Rep., 523.

As to the policy of this State in reference to free negroes, it is well defined and well settled. From her early history as a Territory, she has been opposed to the settlement of this class of persons within her borders, and as a conse-
454 quence, to the unrestricted right of her citizens to manumit their slaves. The repeated action of the Legislature in reference to this subject, is a sufficient indication of public sentiment and the policy of the State. The conviction upon the public mind is settled and unalterable as to the evil necessarily attendant upon this class of population, and although treated by our laws humanely, they have ever been regarded with a distrust bordering on apprehension—a class of people who are neither freemen nor slaves, their presence at all times deleterious and often dangerous to the public welfare. In 1832, the Legislature of the then Territory were compelled to enact the most stringent laws to arrest the evil, by prohibiting the further migration of free negroes within her limits; and the emphatic language of the Constitution of the State, depriving the Legislature of the power of passing laws for the manumission of slaves, was but carrying out the principles of that policy settled upon by the previous Legislation of the country. By the act of 1829, the Territorial Legislature, in giving the right to emancipate slaves, provided at the same time a remedy for the evil necessarily growing out of an unrestricted exercise of the right, by compelling the owner forthwith to transport them beyond the limits of the State. If we construe this law so as to restrict its application to slaves brought into the State, and not include their descendants within its provisions, we at once lose sight of the whole policy of the law, and entail upon the State an evil of the most dangerous character, and which it is manifest it was the design of the Legislature to suppress.

The act of 1829 being, in our opinion, in force at the time the deed of manumission was executed, and its provisions embracing all the negroes mentioned in said petition, was the [illegible] manumission contemplated by the grantor consummated by the deed? Or had the deed at its execution any vitality? It is not pretended that the 455
grantor ever gave bond, as required by the first section of the act. The bond is a condition precedent to the act of manumission, and without it the deed has no legal existence, and consequently is inoperative in vesting in the contemplated beneficiaries any rights whatsoever.

But it is said that though the State may have claimed a forfeiture of this property, yet the deed is good as against the grantor and his heirs, and that the latter are estopped, by the act of their ancestor, from asserting any property in these slaves. The law is otherwise. The deed, upon its execution, was absolutely void, for all purposes—a mere gratuity, made in contravention of law, and imposing no disabilities on the grantor over this property, further than it remained in possession, *liable* to the claim of the State. Though the statute contains no prohibitory clause, yet it inflicts a penalty, and every contract having the subject matter for its consideration or object, is invalid. 4 Serg. & R., 159. Formerly it was held that unless the statute contained a prohibitory clause, the contract was not void. But in the more recent case of Bartlett vs. Vinor, Holt, C. J., held, that every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself does not mention it shall be so, but only inflicts a penalty; *because a penalty implies* a prohibition, though there are no prohibitory words in the statute. And such is the law as recognized both by the English and American Courts. See 1 Binn., 118, 4 Dall., 269, 10 Bing., 107, 5 B & Ald., 335.

Independent of this, the statute itself expressly declares that all slaves manumitted contrary to its provisions, shall not be deemed free—terms emphatic and comprehensive enough to dispel all doubts as to the condition of these negroes. The deed being void, the title to the slaves remain- 456
ed unaffected. It continued in Bryan during his life, and descended to his heirs on his death. The title did not, as contended by counsel, at any time vest in the State, but remained undisturbed in Bryan, subject to be divested by the State upon seizure and sale.

It is true, on the execution of the deed, the State had an inchoate right to the property, under the statute, to be consummated or relinquished at her pleasure. The act of 1850, is a full relinquishment and renunciation of this right, in favor of the heirs of Bryan. A general release or relinquishment, upon the part of the State, of her claim, would have enured to the benefit of these heirs, the title being in them.

Before the passage of this act for their relief, the appellants had the right to reduce this property to possession, and since its passage, their right of possession and right of property is paramount and complete. And we do not understand the necessity that existed of instituting the proceedings in this case in their behalf, or of invoking in any way the action of the Circuit Court in asserting their rights over this property.

SUPREME COURT

TERM AT TAMPA.

SOUTHERN DIVISION.

THOMAS P. KENNEDY, APPELLANT, VS. THOMAS MITCHELL, APPELLEE.

A defendant in attachment, under the statute of this State, has at all times, up to the trial of the suit upon its merits, the right to traverse the allegations in the plaintiff's affidavit, either as to the debt or the cause of suing out the attachment. This right is available to the defendant as well after as before plea to the action.

But if the motion to dissolve be made after the defendant has appeared and pleaded to the action, the plaintiff amy still proceed in his suit, and prosecute his claim to final judgment, though the attachment may be dissolved —otherwise, if the attachment is dissolved before plea to the motion. In the latter case, the suit abates.

The *proviso* in the seventh section of the act of 1834, (Art. 5, Thomp. Dig., 370,) which requires motions to dissolve attachments to be made at or before the first term of the court, &c., has reference only to causes pending at the time of the passage of the act.

The nature of the case and the questions involved are stated in the opinion of the court.

Gettis and *Pearson* for Appellant.

Magbee for Appellee.

SEMMES, *Justice*, delivered the opinion of the court.

This suit was commenced by attachment in the Circuit Court for the county of Hillsborough, by the appellant, Thomas P. Kennedy, against Thomas Mitchell, the respondent.

The writ of attachment was sued out on the 26th of March, 1851, and made returnable to the following Spring
458 term of said court. The Sheriff returned the writ as executed, by levying on certain property, and reading the same to the defendant in attachment. The plaintiff afterwards filed his declaration, in accordance with the statute, on the first day of the appearance term.

On the 4th of September following, the defendant filed his affidavit traversing the special cause assigned by plaintiff for suing out said attachment, and entered his motion for a dissolution of the same, a notice of which was duly served on the opposite counsel.

Afterwards, at the Fall term of said court, the plaintiff moved for a judgment by default, for want of a plea to the action; which was overruled, and the issue raised by the defendant's affidavit was then tried by a jury, and upon their finding, the said attachment was dissolved, and the suit abated and was dismissed.

The questions presented for our consideration, under the assignment of errors on the appeal taken in this case, are, whether the court below committed error in overruling the plaintiff's motion for a judgment by default, and in dismissing said suit?

It is contended by counsel for appellant that the reading of the writ of attachment, by the Sheriff, to the defendant, was a sufficient notice to the latter of the institution of the suit, and consequently that the court below erred in determining that the defendant was not legally in court, so that a judgment by default could be rendered against him. Whether there be error in the judgment of the court below or not, as to the sufficiency of this notice, is altogether immaterial to the decision of this case; for the judgment of the court in dismissing the suit, upon the finding of the jury, is in no wise affected, whether the defendant was legally served with notice of the suit, or voluntarily appeared for the purpose of moving a dissolution of the at-
459 tachment. A defendant in attachment, under our statute, has at all times, up to the trial of the suit upon its merits, the right to traverse the allegations in the plaintiff's affidavit, either as to the debt demanded, or as to the special cause assigned for suing out the attachment; and for the purpose of securing this right, and rendering it at all times an effectual remedy, the courts are, by express provision of the statute, declared to be always open for hearing and determining motions for the dissolution of attachments. Thompson's Digest, 369, § 3 Art. 3. This right is available to the defendant as well after as before plea to the action, though its effect upon the suit is different; for where the attachment is dissolved before the plea to the action, the suit abates and must be dismissed, but if the motion to dissolve be made after the defendant has appeared and pleaded to the action, the attachment alone is dissolved, and the plaintiff may still proceed in his suit and prosecute his debt or demand to final judgment. Ibid. 370, Art. 5. It is insisted, however, by counsel, that under the proviso to this section of the act, the motion to dissolve the attachment must be made at or before the first term of the court to which suit is brought, in order that a dissolution of the attachment shall operate as an abatement of the suit, and authorize the court in dismissing it. We are of a different opinion. It is very manifest that the proviso refers to the latter clause of the 5th art. of the act, having reference to causes *then* pending, and restricts the motion to dissolve not only to such causes, but to the *first* term of the court *after* the passage of the law; whereas, the first clause of the same article, providing for the dissolution of attachments before and after plea to the action, has reference exclusively to suits *"thereafter* to be commenced."

To give this statute a different construction, would be at variance with its letter and spirit, and render its provisions inconsistent and contradictory; and however much it 460
is to be regretted that this special legislation in reference to causes then pending before the courts, should have been resorted to, yet it is not the province of this court to extend the operation of the act to causes not contemplated by the Legislature.

In the case before us, there was no plea to the action, but the motion of the defendant for a dissolution of the attachment, based upon his affidavit, under the statute, did operate and was in effect a plea in abatement to the suit, and as such suspended any rights the plaintiff may have under his motion. We are of opinion, therefore, that the court below committed no error in overruling the plaintiff's motion, and in dismissing the suit upon the verdict of the jury finding the issue in favor of the defendant.

Per Curiam—Let the judgment of the court below be affirmed.

ARTHUR H. MORSE, APPELLANT, VS. ISAAC GARRISON, APPELLEE.

The prohibition contained in the 4th section of the Act of Congress entitled "An Act to provide for the Armed Occupation and Settlement of the unsettled part of the Peninsula of East Florida," approved August 4th, 1842, has reference only to contracts for the alienation of the land made before its issuing of the patent; and was not intended to protect the land after patent issued, from other contracts or debts of the occupant to the satisfaction and payment of which, lands are subjected by the laws of this State.

Any attempt by Congress to give such protection after the title had passed from the United States, would have been abortive and nugatory.

Appeal from a judgment of the Circuit Court of the Southern Circuit sitting in and for the County of Hernando, Hon. Joseph B. Lancaster, Judge.

Morse vs. Garrison.—Opinion of Court.

461 The opinion of the court contains a full and clear statement of the facts and of the principles involved in the case.

Pearson for Appellant.

No counsel for Appellee.

ANDERSON, *Chief Justice,* delivered the opinion of the Court.

This case arose on a motion to dismiss a levy under a judgment in favor of the appellant, "upon the ground that "the land levied on was donation land, and that the pa- "tent therefor issued on a day subsequent to the day of "the date of the judgment on which the execution was is- "sued under which the levy was made." The facts made apparent to the court upon the hearing of the motion, were as follows: At the April term, 1847, of the Circuit Court for Hernando, then Benton county, the appellant, Morse, recovered judgment of Garrason, the appellee, for the sum of $103 12, with costs. Execution issued on the judgment on the 1st day of May, 1847, and was received by the officer on the same day. The sheriff levied this execution on the land in question on the 19th day of March, 1851. The land thus levied on was a quarter section of land which had been patented to the defendant, Garrason, by the President of the United States in pursuance of the provisions of an act of Congress entitled "An act to provide for the Armed Occupation and Settle- "ment of the unsettled part of the Peninsula of East Flo- "rida," approved August 4th, 1842. The patent to Garrason bore date the — day of August, 1849.

Upon a consideration of these facts and the law of the case, his Honor, Judge Lancaster, pronounced the following judgment upon the motion to dismiss the levy:

"It is considered and adjudged by the court, that the
462 "said judgment and execution, or either of them, consti- "tute no lien upon the lands contained in said quarter sec- "tion, and that the levy of the said execution thereon is "illegal: It is therefore ordered and adjudged by the "court that the said levy be dismissed."

By a written agreement between the attorney for the plaintiff and the defendant in person, the case is submitted to this court as an appeal from the judgment of the court below on the motion to dismiss the levy. We regard the judgment of his honor as erroneous on two grounds: first, that the act of Congress does not attempt to protect the land in question, after the issuance of the patent, from a liability for debts other than such as might be incurred on contracts for the alienation of the land; and secondly, that such an attempt, if made, would have been abortive and nugatory. The 4th section of the act is the portion of it to which his Honor had reference in the judgment pronounced by him. It is in these words: "All sales, gifts, "devises, agreements, bonds or powers to sell, transfers or "liens whatsoever, private or judicial, of the lands, or any "portion thereof, acquired by this act, made at any time "before patents shall have issued for the same, shall be "utterly void and without effect to every intent and pur- "pose, whether in law or equity; and the purchaser or "obligee under any such sale, agreement, bond or power "to sell, transfer or lien, shall not be entitled to recover "back the price or consideration paid therefor, but shall "forfeit the same absolutely to such settler or his heirs."

It was one obvious intent of this provision of the act to prevent the occupants from being disturbed in the occupancy and enjoyment of their land until their title to it should be perfected by the patent. This undisturbed possession was necessary to carry out the desire of the United States Government of filling up, with a resident population, the frontier settlements exposed to danger from the 463
presence of hostile Indians, who had been permitted to remain in Florida.

The possession of the land was, therefore, assured to them for five years until, by the issuance of a patent, they might be in a situation to receive the full value of the property, if they then chose to sell, or if the laws of the land should then subject the property to the satisfaction of their judgment debts.

It was also a further object of this section to protect the settler from the consequences of improvident contracts, made while his title was yet incomplete, and when, perhaps, his necessities, in a new and exposed country, might be pressing.

With this view, all sales or alienations, under whatever guise, whether private or judicial, before the issuance of the patent, are prohibited and made void, and without effect, and the party dealing with the occupant is subjected to the penalty of forfeiting the consideration he may have paid. This last provision satisfies us as to the meaning and intent of the terms, "liens, whether private or judicial," which seems to have led the court below into error. It was clearly intended that the prohibition of sales and other alienations of the inchoate title should not be evaded by a collusive judgment and execution obtained in a court of law; and if it had appeared to this court that the judgment now before us, were of this collusive character, we would feel bound to give effect to the salutary guard thrown around the occupant to shield him from oppression, and to pronounce the judgment void and without effect.

There is no evidence or even allegation of any collusion in this case. The judgment must be taken to have been fairly obtained, upon a *bona fide* debt justly due to the plaintiff by the defendant, on some other contract than for the sale of the land, and being such, it does not come with- 464
in the reason of the provisions contained in the fourth section of the Armed Occupation Act. As this judgment is not, then, within the prohibition of the act, the general law of the State of Florida gives to the judgment creditor the right to satisfy his judgment out of the real estate of the defendant. Act Feb. 12, 1834, § 1; and the lien of the judgment attached upon after acquired property from the date of the acquisition.

To this conclusion the court have come, upon the consideration of the act of August 4th, 1842. Such we deem to be a fair construction of the meaning of Congress in the prohibitions embraced in the fourth section; but as we have already intimated, we should be constrained to regard the prohibition as abortive and nugatory if the intention had been, as understood by his Honor below, to have placed the patented land beyond the reach of all pre-existing creditors, no matter what might be the nature of the claim, or how distinct it might be from any contract for the land itself. While the Government of the United States retained the title in itself, it might properly impose prohibitions upon the prospective alienation of the title by the armed occupant before he received it from that Government, and all contracts *in relation to it* may properly be declared void, but it would be a very different thing for that Government to convey a complete and perfect title to lands in this State, and at the same time to assume to exempt such lands from the operation of the general laws of this State regulating the collection of debts, or the alienation of property.

If this might be done in favor of the armed occupant, it might be done in favor of all purchasers of the national domain, and a privileged class be thus created, entitled to exemptions denied to other citizens. The same principle

465 would imply the right of congress to exempt the lands sold by the United States from taxation, and thus to exempt their occupants from contributing to the support of the State Government.

We conclude, then, that the prohibition contained in the fourth section of the Armed Occupation Act, has reference only to contracts for the alienation of the land, made before the issuing of the patent, and was not intended to protect the land after patent issued from other contracts or debts of the occupant, and since the judgment now under consideration by us is not of the former class, it does not come within the prohibition, and should be satisfied, as in other cases, out of the property of the defendant.

The judgment of the court below dismissing the levy must be reversed, and the levy re-instated, with directions to the proper officer to proceed therewith according to law.

WILLIAM SANDERS, APPELLANT, VS. MARSHAL PEPOON AND ROBERT OLCOTT, APPELLEES.

The act of 1846, Ch. 81 §1, Thomp. Dig. 342, refers only to such instruments as are duly proved before the recording officer, or some judicial officer, and recorded in compliance with law.

An acknowledgement by one of two grantors or bargainors of the execution of an instrument required by law to be recorded, is not sufficient to entitle it to be recorded, and if recorded informally, it is not entitled to be regarded or treated as a registered instrument; nor will the fact that the grantors or bargainors were partners in trade make any difference.

By the law of this State, no mortgage of personal property shall be effectual or valid to any purpose, unless the mortgaged property be delivered within twenty days to the mortgagee, and shall in good faith remain in his pos-
466 session, or unless the mortgage be recorded in the County in which the mortgaged property is at the time of the execution of the mortgage. The transfer of the possession is actual notice, and the registration of the mortgage constructive notice of the transaction.

Where the latter is resorted to, the forms and requirements of the registration act must be strictly pursued.

An absolute bill of sale of personal property need not be recorded, and therefore, when such an instrument is recorded, even though it may be proved with all the forms and solemnities required by law, in the case of conveyances of real estate, yet, if the possession continues with the bargainor, the conveyance is inoperative and void, as against creditors and subsequent purchasers.

This was an action of assumpsit for money had and received, brought by the appellees in the Circuit Court of Monroe County against the appellant. The suit was instituted to recover from the defendant, in the court below, the amount of a note made and executed by one John H. Geiger in favor of Ashley & Hovey, merchants at Key West, and endorsed by them to said defendant. The claim of the plaintiffs was based on a mortgage, the nature and character of which are fully set out in the opinion of the court. The mortgage or instrument upon which the claim was founded, bore date July 7, 1848, and purported to be a deed of conveyance of goods, wares, merchandise, notes, &c., belonging to the said Ashley & Hovey, including debts to become due, until a note for $800, alleged to have been executed by them in favor of the plaintiffs below, should be paid. In the year 1849, John H. Geiger executed the note in question, payable to Ashley & Hovey, the maker, some time in 1849 or 1850.

The question was as to the right of the appellees to recover, under their alleged mortgage, the amount of the note so paid to appellant.

King for appellant.

THOMPSON, *Justice*, delivered the opinion of the 467 Court.

The respondents, who were plaintiffs in the court below, founded their right to recover in this case upon an instrument of writing which is called a mortgage. This instrument bears date on the 7th July, 1848, and was recorded in the office of the Clerk of the Circuit Court of Monroe county, on the 17th January, 1849, upon the acknowledgement of one of the alleged mortgagors only. It is executed by Sydney J. Ashley and James B. Hovey, who are described as partners in trade at Key West, under the style and firm of Ashley & Hovey, and professes, n consideration of the sum of eight hundred dollars to them in hand well and truly paid by the respondents, to bargain, sell and convey to the said respondents, their executors, administrators and assigns, "all the goods, wares "and merchandise in the schedule marked A., and all other "goods of every description in our store or place of business "at Key West, together with the book debts in said schedu-"ule named, and all book debts, notes and accounts due "and owing to us, and we do also grant and convey to the "said parties aforesaid, all goods, wares, merchandise and "property which shall at any time be contained in our "said store, and all debts and accounts which shall accrue "to us, until the said money shall be re-paid to the said "parties, and do authorize and empower the said parties "themselves, or their agents, at any time to take possession "of the books belonging to the said firm, for the purpose "of collecting the said debts, and to collect the same for their "benefit, as well as to take possession of the other proper-"ty in said store."

The *habendum* of the conveyance or instrument, conveys the premises to the respondents, their executors, administrators and assigns forever.

There is no clause of defeasance, nor indeed any evi- 468 dence whatever that the instrument, which is absolute in its terms, was intended as a mortgage, unless it may be collected from the clause in the premises above recited, which states as among the rights and interests intended to be conveyed the "future acquisition of goods, wares and "merchandise, and the subsequent accrual of debts and "accounts to the grantors until the said money shall be re-"paid to the said parties."

The schedule which is referred to in the bill of sale, is scarcely more definite than the description of the property intended to be conveyed, as it is set forth in the premises of the instrument. It is as follows, viz:

"SCHEDULE A., *referred to in the annexed bill of sale*:

"Groceries to the value of . . .	$400 00
"Hats and Caps, value, . . .	50 00
"Stationery, value, . . .	50 00
"Dry Goods, value, . . .	200 00
"Clothing, value, . . .	200 00
"Book accounts, about, . . .	500 00
"Goods shipped on board the brig Na-"poleon, destined for our store at Key "West, ...	252 80"

It would seem from the evidence that Ashley & Hovey continued their business from the date of the bill of sale as they had before done, up to the close of the year 1849, when they finally closed their store, and that during this time one John H. Geiger became indebted to them for supplies furnished his vessels, and settled by giving his three notes, one of which for the sum of one hundred and fifty dollars, at six months date, by the acknowledgment of the appellant, was transferred to him by said Ashley & Hovey, in payment for a bill of goods which they had

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469 bought of him; and it was further proved that the note so transferred had been paid by Geiger to the appellant.

Upon the trial, various exceptions were taken to the ruling of the judge upon the admission of testimony, as well as the refusal to instruct the jury, as prayed for by the appellant, and to the instructions actually given.

The bill of sale or mortgage, as it is termed in the bill of exceptions, was offered in evidence, without other proof of its execution, than the acknowledgment made before the recording officer by Ashly, one of the grantors, and it was admitted by the court against the objection of the appellant. The rule of the common law is perfectly clear that every species of writing, as well as deeds, when offered as evidence, must be proved by the subscribing witnesses, if there be any; or at least by one of them; (1 Greenl. on Ev. 569,) but the application of the act of 1846, Ch. 81, section 1, Thomp. Dig. 343, is by no means free from difficulty. The statute gives to certified copies of any instrument of writing required, or authorized by law to be filed or recorded in any public office of the State the same force and effect as evidence, in all cases and in all courts and places as the original has, providing however that the court or judge may, when the same shall be deemed necessary for the attainment of justice, require the party to produce or account for the absence of the original; and it would seem very like an absurdity to make a certified copy from the records of an instrument of writing evidence without other proof of execution than the acknowledgment made preparatory to its registration, while it would deny the same effect to the original instrument, with the original certificate of the recording officer of the proof or acknowledgement thereof attached thereto. But we do not express any opinion as to the extent to which a correct interpretation of this statute would lead, as there is some di-
470 versity of opinion in the court upon the point, and because we all agree that the statute, whether it is to be confined to its letter or should be extended to all cases which may fall within its reason and spirit, can, and does only, refer to such instruments as are duly proved before the recording officer, or some judicial officer, and recorded in compliance with law.

Instruments of writing providing for the transfer of personal property, before being admitted to record, are required to be proved before the recording officer, or some judicial officer of the State, in the same manner as is prescribed for conveyance of real estate, with the exception that where there is no subscribing witness, the handwriting of the mortgagor or bargainor may be proved by witnesses. Thomp. Dig. 183. To this instrument of writing, there is a subscribing witness, and therefore by the 4th section of the act of 1828, (Thomp. Dig. 180,) proof of the execution should have been made by the acknowledgment of the parties executing the same, or by the oath of the subscribing witness. One of the parties only appeared before the Clerk of the Circuit Court, and made the acknowledgment; it was not competent for him to acknowledge for the other grantor or bargainor, although the relation of partners in trade subsisted between them, and the instrument therefore was not only not proved so as to entitle it to record, or being recorded informally, to the character and effect of a registered instrument. We are very clearly of opinion that the act of 1846 did not apply; and it was error in the court below to admit the instrument in evidence without common law proof of its execution.

Having ascertained the commission of this error by the court below in the progress of the trial of this cause, we might pause here and pronounce a judgment of reversal, but as we view the infirmity of the case upon the merits too manifest to warrant an award of a *venire facias de* 471 *novo*, we proceed to its further consideration.

The instrument of writing seems to have been treated and considered in the court below as a mortgage, although, as we have before remarked, the instrument *ex facie* is an absolute conveyance, containing no recital of a debt due, save the very vague expression before quoted, that the instrument was to operate on the future acquisitions of goods and merchandise and the future accrual of debts, &c., "until the *said* money shall be repaid," when there is no previous mention made of any money due, or loaned, and containing no clause of defeasance. We find no parol evidence in the record giving to the instrument the character of a conditional conveyance or mortgage, or connecting with it the note of Ashley & Hovey to the respondents for eight hundred dollars, bearing date the 6th day of July, 1848, which was offered in evidence in the court below, and which from all we can see was wholly irrelevant.

But whether the instrument be regarded as a mortgage or as an absolute bill of sale, the infirmity of the case of the plaintiff below is equally apparent. Viewed as a mortgage, it is inoperative for want of the record provided by the 5th section of the act of November 15, 1828, (Thomp. Dig. 183,) as necessary to its validity.

We have seen that the acknowledgment of the execution of the instrument being by one grantor only, it was not duly proved for record; and although transcribed upon the record books of the County of Monroe, such act of transcribing did not give to it the force and effect of a record in contemplation of the statute.

The act of the Legislature declares that no mortgage of personal property shall be effectual or valid to any purpose whatever, unless the mortgage property be delivered within twenty days to the mortgagee, and shall remain 472 thereafter in good faith in his possession, or unless the mortgage be recorded in the county in which the mortgaged property shall be at the time of the execution of the conveyance. The object of the statute is that notice of such a transfer shall be given, in order to prevent frauds and injury to the community. Possession of personalty is indicative of ownership, and the change of the possession from the mortgagor to the mortgagee, and its continuance in the control of the latter, would give to the transaction such notoriety as would amount to actual notice. When, however, the possession remain with the mortgagor, and the alternative of registration is resorted to, the notice is but constructive, and the courts have ever held that, to make such constructive notice effectual, the forms and requirements of the registration acts must be strictly pursued. It is never extended to all deeds and conveyances which *may* be registered, but to such only as are authorized and required by law to be recorded, and are duly registered in compliance with law.

Considering the instrument as an absolute bill of sale, it was not required by law to be recorded, and therefore the registration was a vain and futile act: it was not constructive notice of its existence, even if its execution had been proved with all the forms and solemnities required by law for the proof of execution of conveyances of real estate; and the possession continuing with the bargainors, the conveyance was inoperative and void as against creditors and subsequent purchasers, as we have heretofore ruled in Gibson vs. Love, 4 Fla. R. 217. According to the testimony, the appellant acquired the promissory note in question in payment for a bill of goods which he had sold to Ashley & Hovey. Now whether the transfer of the note was simultaneous with the delivery of the goods, and

might be considered as a purchase of the promissory note with the goods so delivered, or the note was received by the appellant in discharge of a precedent debt due him for goods sold and delivered to the said parties, is equally immaterial, for as to either character of subsequent purchaser for value or creditor, the conveyance was null and void, because the possession of Ashley and Hovey was inconsistent with the conveyance.

These considerations show most clearly that the respondents, by the conveyance exhibited, acquired no right to, or lien upon, the promissory note in question, or the debt which it was given in liquidation of, and therefore the respondents were not entitled to recover; and the court below should have so ruled. We do not deem it necessary to examine particularly the propriety of the refusal by the court below to give to the jury the instructions prayed by the appellant, or those which the court did give, as the view we have taken covers the whole merits of the case.

Some considerations have suggested themselves to us springing out of the form of the conveyance, and the vague and uncertain description of the property *in esse* intended to be conveyed, as well as to its peculiar and transitory character; and also the propriety of giving effect to transfers and mortgages of property, and of rights or things in action subsequently to be acquired by the mortgagor, but as the examination of the points is not necessary to a disposition of the cause. we forbear to notice them.

The judgment of the court below must be reversed, with costs; and inasmuch as it appears by the record. that the amount of the judgment and costs has been paid by the appellant, let a writ of restitution of the amount so paid issue from this court, upon the application of the appellant or his counsel.

SUPREME COURT

TERM AT MARIANNA.

WESTERN DIVISION.

REUBEN KENT, PLAINTIFF IN ERROR, vs. R. F. LYON, GUARDIAN OF A. M. LOTT, DEFENDANT IN ERROR.

Where a man makes a deed of gift of slaves or other property which as against creditors is conceded to be void, and dies in possession of the property granted, it is assets in the hands of his administrator, and the deed of gift, in reference to the creditors, is to be considered as if it had never been made.

If the fraudulent donee has gone into possession of the property in the life time of the donor, he is not liable to the donor's representative either for the property or its value, but is responsible to the creditors for the value.

Error to the Circuit Court for Jackson county.

A sufficient statement of the case will be found in the opinion of the court.

Yonge for Plaintiff in Error.

Campbell for Defendant in Error.

ANDERSON, *Chief Justice*, delivered the opinion of the Court.

This was a case of a claim interposed under the statute, by the defendant in error, to a negro slave called Jenny, who had been levied on to satisfy an execution in favor of the plaintiff in error against George R. Williams, administrator of Jesse Lott, deceased. The cause was tried at the Fall Term, 1850, of the Circuit Court for Jackson county.

The slave was in the possession of Lott at the time of his
475 death, and passed with other personal property into the hands of Williams, the administrator, and passed from him to the possession of the Sheriff.

At the trial of the claim, the claimant relied upon a deed executed by Jesse Lott in his life time, by which he had conveyed to A. M. Lott, his daughter, the negro in question, and also upon a judgment which the claimant, in behalf of his ward, had obtained in trover against Williams for the value of the same slave.

The deed from Lott to his daughter seems to have been conceded on all hands to have been fraudulent as to creditors. At all events there is sufficient evidence on the record to show it was so. But the defendant in error alleging that it was good between the parties to it, and their representatives, contended that therefore the property was not assets in the hands of the administrator, and as a consequence not liable to satisfy the execution.

His Honor in the court below sustained this position of the defendant in error, and charged the jury as follows :—"If you are of opinion that Jenny is embraced in the deed "executed by Jesse Lott to his daughter, and is the one "upon whom the execution in this case is levied, you will "find her not subject to the execution." A verdict was rendered for the claimant, in accordance with this instruction.

The plaintiff in error excepted to the charge, and the case is thus presented to our consideration, involving this inquiry: If a donor, after having made a conveyance of his personal property, which is fraudulent as to his creditors, dies in possession of the property, and it goes into the hands of his administrator, is it assets for the payment of his debts ?

There is some apparent conflict among the authorities upon this question, but we think they are easily reconciled by adverting to the principles of law which regulate 476
and adjust the respective rights of the parties to this suit, and of the administrator of Jesse Lott.

Our statute of January 28th, 1823, which is a re-enactment of the statute of the 13th Elizabeth, provides, that all conveyances executed with intent to delay and defraud creditors, shall be "deemed, held and adjudged and taken to "be utterly void, frustrate and of none effect," as against such creditors. Th. Dig., 215. On the other hand, the principle is clear that a fraudulent conveyance is good between the parties and their representatives. Hawes vs. Leader Cro. Jac., 270. In that case the intestate made a grant of his goods to B., by fraud between him and B., to cheat the creditors, and he kept possession of the goods and died. B. then sued the administrator for the goods, and he pleaded this covin and fraud, and the statute of 13 Eliz., but on demurrer the plea was held bad, and judgment was rendered for the plaintiff, on the ground among others, that the deed was void only as against creditors, but that it remained good as against the party himself and his representatives.

These two principles are illustrated by the effect given to the fraudulent conveyance when tendered as evidence on the trial respectively of the two classes of conflicting claims to which we have referred.

When the contest is between a creditor and the fraudulent donee or grantee, the conveyance upon which the latter relies, if tendered as evidence, is, under the statute, "deemed, held, adjudged and taken to be utterly void, "frustrate and of none effect" as to the creditor. The title of the donee necessarily fails, for want of evidence to support it, and the creditor prevails, after having shown pre-existing title. But where the contest is between the donee and the representatives of the donor, and the donee

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477 tenders his fraudulent conveyance, the representative is estopped from impeaching the deed of his testator or intestate—there is no party to the suit against whom the deed is "frustrate and of none effect," and the donee in his action at law must necessarily prevail.

The case now before the court is precisely the one first supposed.

Kent having obtained judgment and execution against Williams, the administrator of Lott, levies his execution upon a negro woman of which Lott had died possessed, and which was found in the possession of the administrator. A claim is interposed, under the statute, by the guardian of the fraudulent donee, and to support this claim he relies mainly upon the fraudulent conveyance from Lott to his daughter. The statute having declared in effect that this deed, as against Kent, should be adjudged utterly void, the court erred in instructing the jury that it was conclusive evidence of Anna Maria Lott's title. In regard to Kent's claim, it was a nullity, and it should have been so adjudged.

It will be found, we think, that the point decided, in every case referred to in the argument, turns upon the distinction we have here made as to the effect of the fraudulent conveyance, when tendered as evidence in the two classes of controversy.

Before we proceed to the examination of the several cases, we will advert to one of the general rules deduced from them, as a further illustration of our meaning.

The fraudulent donee who goes into possession during the lifetime of the donor, when he attempts to repel the effect of this evidence by the exhibition of his fraudulent deed, he is at once arrested by the exclusion of this deed as being a nullity, in regard to the party with whom he is contending. He is without evidence of his authority to
478 intermeddle with the goods of the intestate, and necessarily becomes liable as executor of his own wrong.

The case of Backhouse's Admr. vs. Jett's Admr. *et al.*, was that of a gift of slaves and other property by a father to a son, consummated by delivery in the life time of the father. Chief Justice Marshall, on a bill filed by the creditors of the father against the donee, decided that the slaves were not assets in the hands of the administrator, but that the donee was responsible for their value to the creditors. These conclusions are in consistency with the rule we have laid down and other well settled principles. The property fraudulently conveyed was not assets, because, having passed out of the possession of the donor in his life time, his administrator, as such, could not be charged by the creditors—having no possession himself as administrator and being debarred by the policy of the law from acquiring possession by impeaching the deed of his intestate. These general conclusions were not affected by the accidental circumstance that in this case the donee and the administrator were the same person.

The property was not held to be assets, but the defendant, as fraudulent donee, was held to account to the creditors for its value.

The case of Osborne vs. Moss, 7 T. R. 161, is a mere affirmation of the point settled, in the case of Hawes vs. Leader, already referred to The principle decided is, that a grantee under a deed, fraudulent as to creditors, may nevertheless recover of the administrator of the grantor, and it is in obvious consistency with the rule.

The case of Rawles vs. Graham, 4 Monroe, 120, is a reiteration of the principle already quoted from 2 Saunders, and approved in Backhouse vs. Jett, to wit, that a fraudulent grantee is responsible to creditors as executor *de son tort* for what he received in the life time of the 479
donor.

The case of Bethel vs. Stanhope, Cro. Eliz., 810, was that of a suit by a creditor against an executor *de son tort* who pleaded no assets.

It was found upon special verdict, that the testator was possessed of divers goods, and by covin, to defraud his creditors, made a gift of them to his daughter, with a condition that, upon the payment of £20, it should be void, and died.

The defendant intermeddled with the goods, and afterwards the daughter, by this gift, took the goods, and after that, administration was committed to the defendant.

The question was, whether these goods should be assets in his hands. It was adjudged that they were, as he had intermeddled with them after the death of the intestate; but it was remarked by the court that if the goods had been taken in the life time of the intestate, they would not be assets until recovered.

The case of Shears vs. Rogers, 3 B. & Ad., 362, fully establishes all the conclusions at which we have arrived from a consideration of the general principles involved in this case. It was an action of debt against an executor, on bond given to plaintiff by John Morgan, deceased. Plea, *plene administravit praeter* certain goods—replication, assets *ultra*, upon which issue was joined.

The evidence showed a fraudulent conveyance by the testator of certain household property, he continuing in possession until his death. After his death, the executor took possession.

It will be perceived that this case, in all its essential parts, is precisely the same as the one before the court. There was judgment for the plaintiff, and several of the Justices delivered opinions.

Lord Tentenden, C. J., said: "The authorities show that 480
"whenever a man makes a gift of goods which is fraudu-
"lent and void as against creditors, and dies, he is consid-
"ered to have died in full possession, with respect to the
"claim of the creditors, and the *goods are assets in the*
"*hands of his Executor.* It is impossible to say here that
"the lease was not assets, for the defendant had it in his
"possession."

Littledale, J., said: "I am of opinion the lease was as-
"sets. The assignment was void as soon as the creditors
"claim to treat it as such, though not until then."

Taunton J., after referring to the insolvent circumstances of the testator, says: "The assignment is utterly void
"and frustrate against creditors, and the case is to be con-
"sidered as if it had never been executed. The intestate
"therefore died possessed of the lease, and it was assets in
"the hands of the Executor."

Patterson, J., concurring in the opinion of the other Justices, says: "As the statute says that the fraudulent
"deed shall be utterly void and frustrate; and as the lease
"was in the hands of the testator at the time of his death,
"it passed to the executor, and was assets in his hands."

The judgment here made and the opinion of the several Judges, completely covers every point in the case now under consideration.

The rights of creditors are fully asserted in this decision, more clearly and perhaps more broadly than in some of the older cases to which we have referred, but not more so, we think, than a consistent and a salutary construction of the statute requires. We conclude, then, in reference to the case before us, and in language warranted by the opinions just quoted, that because the deed from Lott to his daughter was fraudulent and void as against creditors, the slave, Jenny, remained the property of Lott, so far as

481 Lott's creditors were concerned, and was clearly assets in the hands of the Administrator, and that the deed of gift is to be considered, in reference to creditors, as if it had never been executed.

The first error assigned is therefore sustained. The second error assigned is, that the court erred in charging that the judgment in the case of R. F. Lyon, guardian of A. M. Lott vs. George R. Williams, [action of trover,] the record of which suit is in evidence, showed that Jenny was not assets, and was such estoppel as would compel the defendant in this suit and plaintiff in *fieri facias* to pursue the property in other modes.

This assignment is therefore sustained. The judgment in this case will be set aside, and the case remanded to the court below, a *venire de novo* awarded, and on the trial of the right of property, the jury will be instructed in accordance with the foregoing opinion.

ARCHIBALD PATTERSON AND REBECCA HIS WIFE, AND JAMES WACHOB, ADMINISTRATOR OF JOSEPH F. WACHOB, APPELLANTS, AND CHRISTOPHER C. COBB, ADMINISTRATOR DE BONIS NON OF JAMES W. EXUM, AND SUSAN A. MING, ADMINISTRATRIX OF FREDERICK L. MING, DECEASED, RESPONDENTS.

A party to the record is not a competent witness, even though before his examination he has surrendered and released all his right, title and interest, both at law and in equity, to the sums of money demanded or sued for.

An executor or administrator has no authority to bind the estate of his testator or intestate by promise to pay a debt barred by the statute of limitations.

482 To take a case out of the statute of limitations, there must be an express promise, or such an acknowledgment as will legitimately raise an implication of a promise.

According to the general principle of the common law, an executor is guilty of a *devastavit* if he applies the assets in payment of a claim he is not bound to satisfy. A debt barred by lapse of time is as much within the reason of the rule as any other claim or demand which he would not be justified in paying.

The policy of the law of Florida with respect to demands barred by lapse of time, is indicated by the provision (Sec. 3, Thomp. Dig., 444,) which requires the court before which a cause is tried against an executor or administrator, on an open account, to expunge therefrom every item which shall appear to have been due five years before the death of the testator or intestate.

This was an appeal from a decree of the Circuit Court of the county of Jackson, made at the May Term of said court, 1850—HON. GEO. S. HAWKINS, Judge.

The nature and object of the bill filed by the appellants, complainants in the court below, and the defence set up by the respondents, as well as the principles and points involved in the controversy, are succinctly stated in the opinion delivered by the court, affirming the decree of the court below.

Woodward and *Yonge* for Appellants.

Bush for Respondents.

THOMPSON, *Justice*, delivered the opinion of the court.

On the hearing of this cause in the court below, upon the bill, answer, exhibits and testimony, it was considered and ordered that the bill of the complainants, who are appellants here, should be dismissed, and the propriety of that judgment is the question before this court.

It is alleged in the bill that in year 1832, James W. Exum became indebted to the complainant's intestate on several promissory notes and receipts—that in February

1838, Exum died, leaving Frederick L. Ming, his executor. 483
In January, 1839, Joseph F. Wachob died, and in March, 1841, suit was instituted on these claims, by his personal representative, against Ming as executor of Exum, and that in October, 1847, the suit was discontinued, at the request of Ming, and upon his promise and undertaking to pay the debt claimed therein—that Ming died in the Summer or Fall of the year 1843, leaving the debt unpaid, and administration *de bonis non* of the estate of Exum having been committed to the respondent, Cobb, a suit at law for the recovery of the debt was instituted against the latter, which was pending in November, 1848, when the court house in Marianna was destroyed by fire, and the records and papers and files of the pending causes consumed therewith, and among them the files of the suit alluded to, together with the original evidence of the debt claimed.

The suit on the law side of the Circuit Court was not renewed, but the appellants sought their redress on the Equity side of the Court, founding their claim to this jurisdiction upon the fact of the destruction of the evidence of their claim, and an allegation that "a discovery as to "the condition of the estate at Exum, and the progress of "administration, is essential" to their case.

The answers of the defendants admit that the receipt, &c., set up by the complainants, did exist, but deny all knowledge that they were evidence of any debt by Exum to Wachob—that they knew nothing of any loaning of money by Wachob to Exum, but on the contrary believe that Exum was always largely in advance to Wachob, the latter being his deputy as marshal, and constantly in the receipt of sums of money due said Exum as costs. They deny all knowledge of the alleged promise by Ming to pay the sums claimed by the appellants—set up the defence of the statute of limitations, and a claim to indemnity from 484
the estate of Wachob to the estate of Exum, because of a recovery against the latter, by reason of a misfeasance or non feasance of Wachob, as the deputy of Exum in the performance of his duties in levying under executions lodged in the marshal's office.

The defendants also insist, under the statute, that the complainants' remedy, if any, is full, adequate and complete at law, and pray that they may have the same benefit of objection therefor as if they had demurred to the bill.

The first point assumed by the counsel for the complainants is, that it is competent for an executor or administrator to waive the statute of limitations by omitting to plead it *a fortiori*, upon a sufficient consideration, and such a promise by the executor or administrator will bind the estate.

Before proceeding to consider this point, it may be well to remark, that the testimony only offered to prove a promise by Ming, is the deposition of Archibald Patterson, one of the parties on the record. It is alleged by the counsel for respondents, that his objections to the competency of said witness, noted at the time of the examination, was sustained by the judge below, and one of the counsel for appellants has presented a brief upon the question of competency, but the other counsel deny here the propriety of the consideration of this question, inasmuch as it does not appear from the transcript of the record that the objection was made and decided in the court below; neither does it appear but that the objection was waived at the hearing, and the deposition read. We do not deem it of sufficient importance to send down a *certiorari* to ascertain this fact, if it could be ascertained from the record below, or to institute an inquiry whether or not this point is open to the respondents in this court, under our decision in the South-

ern Life Insurance & Trust Company vs. Cole. If the objection was taken and decided in the court below, it was correctly ruled both upon reason and authority; and there was, therefore, no evidence of any promise by Executor. Patterson is a party to the record, and although before his examination he surrendered and released to the heirs and representatives of Wachob all his right, title and interest, both at law and in equity, to the sums of money demanded, if he had any, yet it did not remove the objection; he was still a party on the record, and was liable for costs. 1 Greenlf. on Ev., 329, 330, 401, 402. Scott vs. Lloyd, 12 Peters' R. 149. Stein vs. Bowman, 13 Peters' R. 219 Bridges vs. Armour, 5 How. S. C. R. 95.

If the testimony of Patterson was read at the hearing, the question of the authority of an executor or administrator to bind the estate of his testator or intestate by promise to pay a debt barred by the statute of limitations, presents itself for consideration, and we are very clear that he has no such power. It is true that Mr. Williams, in his Treatise on Executors, (page 1110,) citing Norton vs. Frecker, 1 Atk. R. 526, says that an executor is not bound to plead the statute of limitations to an action commenced against him, by a creditor of the testator, and there are other cases which hold that he may remove the bar directly by a new promise; yet in a more recent case, cited by the same author, (Shewen vs. Vanderhurst, 1 Rus. & M. Rep. 349,) under a common decree in an administration suit, a creditor having applied to prove a debt barred by the statute, and the executor refusing to interfere, the residuary legatee was allowed to set it up.

The early English decisions, under the Stat. 21 Jac. I, c. 16, held that the statute affected the remedy only, leaving the debt still subsisting; that it created simply a presumption of payment from the lapse of time, and that any ac-
486 knowledgment which repelled this presumption, was sufficient, although it was accompanied by a denial of liability; but in A'Court vs. Cross, (3 Bing. R. 329,) the courts commenced to give a more reasonable construction to the statute, holding that if there be any thing said at the time of the acknowledgment to repel the inference of a promise, it will not be sufficient, and the defence, which before that time was looked upon with disfavor, was now regarded favorably. The courts of the United States have gone further, and have given the defence a liberal application, considering the statute as it was intended by the Legislature, a statute of repose, to quiet old and stale claims set up after the circumstances attending the transaction had passed from the memory, or the witnesses had died. They have always held, that to take a case out of the statute, there must be an express promise or such an acknowledgment as will legitimately raise an implication of a promise. Reference has been made to the courts of decisions in the English Courts, to show the leaning against this defence in the early cases, and therefore the little reliance to be placed on them as precedents.

According to the general principles of this common law, an executor is guilty of *devastavit* if he applies the assets in payment of a claim he is bound to satisfy, as if he makes disbursements in the schooling, feeding and clothing of the children of the deceased, subsequently to his decease. So, if he pays a bond founded on an *usurious* contract, or a bond *ex turpi causa*, such payment will amount to a *devastavit*, as well against legatees as creditors; so, if the testator was bound in a *joint* obligation, and he dies before the co-obligor, the executor is not liable on the instrument at law, and therefore, if he pays the sum due upon it, he will be guilty of a *devastavit*. 2 Williams on Executors, 1109.

Patterson et al., vs. Cobb et al.—Opinion of Court.

Upon what good reason the payment of a debt barred 487
by the lapse of time before the death of the testator, should be excluded from the operation of this rule, we cannot discover. Clearly the right to recover against the executor does not exist, and therefore he is under no obligation to pay—the payment under such circumstances is a palpable misapplication of assets.

In the United States the decisions on the point have not been uniform, the earlier cases following the English precedents holding that an executor was not bound to set up the bar of the statute of limitations, where he had reason to believe that the debt was originally just, and had not been paid, and that his promise to pay would remove the bar, but it is believed from a careful review of the decisions that the weight of authority is the other way—that the executor has not power to bind the estate by an acknowledgment, or a new promise. See Fisher vs. Tucker, 1 M'Cords Ch. R., 175. Peck vs. Potsford, 7 Conn. R., 180. Richmond, admr., Petitioner, 2 Pick, 560. Rogers vs. Rogers, 3 Wend. R., 517. Thompson vs. Peter 12 Wheat. R. 565. Certainly the decisions quoted seem to be based on grounds more consonant to reason and justice and the principles of law. It seems idle to assert as a principle of law that an executor cannot bind the estate by any contract, and yet permit him by a new promise to charge the estate with a debt extinct by operation of a statute.

In the case at bar, the right of action accrued in 1832, and the testator died in February, 1838; the bar therefore was complete at the time of the testator's death, and the debt must be presumed to have been paid, and was not a legal and just demand against his estate.

Our own statute, (act Nov. 10, 1828, Thomp. Dig. 444, §3, art. 1,) indicates very strongly the policy of the law of Florida on this point. It requires the court before which a cause is tried against an executor on an open account 488
against the deceased testator, to expunge from the account every item which shall appear to have been due five years before the death of the testator, and this, of course, without reference to the state of the pleadings.

It is also urged by appellants counsel that the statute of limitation does not run where there are mutual accounts and reciprocal demands. This is correct, but the case at bar is not such a case; the principle is founded on the exception in the statute in favor of such accounts as concern the trade of merchandise between merchants, and has never been extended beyond the direct concerns of trade, in cases of accounts current between the parties, in which there are reciprocal charges and credits. Here there is no account current, but the claim of the appellants rests upon matters stated and settled by written memoranda and receipts.

We are well satisfied that at the time of the death of Exum, the debt claimed by the appellants was not a subsisting debt or demand against his estate, because of the bar of the statute; that the bar has not been removed by the alleged promise of the executor for want of power to bind the estate by such promise, and that this point of defense is fatal to this cause.

It is not deemed necessary to decide any of the other points raised by the pleadings, and discussed in the argument.

Let the decree of the court below be affirmed, with cos's

REPORTS

OF

CASES ARGUED AND ADJUDGED

IN THE

Supreme Court of Florida,

AT

TERMS HELD IN 1853--1854.

By MARIANO D. PAPY, Reporter.

VOLUME V.

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ATLANTA
1927

JUDGES OF THE SUPREME COURT DURING THE PERIOD OF THESE REPORTS.

JUDGES UNTIL MAY 24, 1853.

HON. WALKER ANDERSON, CHIEF JUSTICE,
(*Resigned 24th May,* 1853.)

HON. LESLIE A. THOMPSON,
HON. ALBERT G. SEMMES,
} ASSOCIATE JUSTICES.

JUDGES DURING THE JULY TERM, 1853.

HON. BENJAMIN D. WRIGHT, CHIEF JUSTICE,
(*Appointed 24th May,* 1853, *in lieu of* C. J. ANDERSON *res'd.*)

HON. LESLIE A. THOMPSON,
HON. ALBERT G. SEMMES,
} ASSOCIATE JUSTICES.

JUDGES DURING THE YEAR 1854.

HON. THOMAS BALTZELL, CHIEF JUSTICE.

HON. CHARLES H. DUPONT,
HON. THOMAS DOUGLAS,
} ASSOCIATE JUSTICES.

(*Elected by the People* 1*st October,* 1853.)

MARIANO D. PAPY, ATTORNEY GENERAL.

JUDGES OF THE CIRCUIT COURTS.

HON. WILLIAM A. FORWARD, JUDGE EASTERN CIRCUIT,
HON. JOS. B. LANCASTER, JUDGE SOUTHERN CIRCUIT.
HON. THOMAS F. KING, JUDGE SOUTHERN CIRCUIT,
(*Elected* 1*st October,* 1853, *in lieu of Lancaster, J.*)
HON. J. WAYLES BAKER, JUDGE MIDDLE CIRCUIT,
HON. GEORGE S. HAWKINS, JUDGE WESTERN CIRCUIT,
(*Resigned* 1*st May,* 1853.)
HON. JESSE J. FINLEY, JUDGE WESTERN CIRCUIT,
(*Appointed* 1*st May,* 1853, *in lieu of Hawkins, J., resigned, and elected* 1*st October,* 1853.)

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RULES

ADOPTED BY THE SUPREME COURT

IN 1854.

Ordered, That the following rules and directions be entered and certified to the Clerks of the Circuit Courts. The Clerks of the Circuit Court in making copies of Records for the Supreme Court, in actions at law, will pursue the following directions:

First. The precipæ and summons, affidavit and bond, for attachment and other proceeding, with the writ issued thereon and return.

Second. Declaration and pleadings, stating the time of filing.

Third. Motions and orders of Court thereupon.

Fourth. Trial and judgment of Court.

Fifth. Motion for new trial, or in arrest of judgment, and order of Court thereupon.

Sixth. Bill of Exceptions. Documents, papers, &c., referred to and embraced in the Bill of Exceptions, made part of the Record. *Originals* are in no case to be sent up, without an order of the Circuit Judge or of the Supreme Court directing it. Other papers on file are not to be copied, and the Clerk is not entitled to pay for copying them into the Record.

Ordered, That no paper, document, or other instrument of writing, be copied into the Record of a Chancery cause as evidence for the Supreme Court, unless the same shall have been noted as read in evidence by the Judge or the Clerk, or as having been offered in evidence and rejected at the trial of the case. And that the attention of the Judges of the Circuit Courts, be respectfully requested to the stating of all the testimony read, or offered to be read before them.

Ordered, That decrees, whether final or interlocutory, not embracing orders, of course, shall be upon notice to the parties or their attorneys before making or pronouncing the same. And a statement by the Judge to the effect that notice has been given, shall be sufficient evidence thereof.

DECISIONS

OF THE

Supreme Court of Florida,

AT

JANUARY TERM, 1853.

HELD AT TALLAHASSEE.

DAVID BARROW, APPELLANT, vs. WILLIAM BAILEY, ADMINISTRATOR DE BONIS NON OF JOHN BELLAMY, DECEASED, RESPONDENT.

1. If a creditor seeks the aid of a Court of Equity against the real estate of his debtor, he must show a judgment at law creating a lien upon such estate; and if he seeks such aid in regard to personal property, he must show an execution, sued out and pursued to every available extent.

2. Upon a proceeding in *scire facias quare executionem non*, two writs successively issued and returned *nihil*, are equivalent to one writ returned *scire feci*, and the court may, upon such returns of *nihil*, proceed to award execution.

3. When such writ of execution is awarded upon a return of *scire feci*, the defendant is concluded by the judgment; but when it is awarded upon two returns of *nihil*, the defendant may afterwards present his defence by *audita querela*, or upon motion to the court, and may have the full benefit thereof.

4. Inadequacy of price, in a sale of property where the vendor is greatly indebted, is a mark or badge of fraud, and, when associated with other circumstances of suspicion, may be conclusive. Where, therefore, a vendor who was largely indebted, and embarrassed by the pressure of his creditors, sold his entire estate, real and personal, to a friend and relative whom he summoned from a distance to make the purchase, at a price considerably less than the fair market value of the property, and less than the sum of his
10 debts, the conferences between the vendor and purchaser during the negotiations being secret, and no appraisement by or reference to any third person on the question of values, and the avowed intention being to prevent the property from being sacrificed by creditors at sales under legal process; it was held, that fraud might and ought to be inferred therefrom, and that the conveyance, in equity, should be considered valid only as to the consideration paid by the purchaser which was actually applied to the payment of the debts of the vendor, and that the overplus or residue should be held by such purchaser as a trust fund, for the benefit of the creditors of the vendor.

This cause was brought up by appeal from a decree of the Circuit Court of Jefferson county, made at November Term, 1852, by the Hon. J. Wayles Baker, Judge, sitting in Chancery.

William Bailey, as administrator *de bonis non* of John Bellamy, deceased, filed his bill against Henry Doggett and David Barrow, to set aside a sale made by Doggett to Barrow, as fraudulent and void as to creditors.

Doggett being largely indebted to the intestate of complainant, and being in embarrassed circumstances, in April, 1845, sold and conveyed to David Barrow all his property in Florida of every description, consisting of large tracts of land, plantation implements, crops, provisions, cattle, horses, and other stock, and one hundred and seventy-eight slaves, for the consideration of forty-five thousand dollars, and an annuity of five hundred dollars during the life of Doggett, who was then old and infirm. Barrow, who was the brother-in-law of Doggett, was summoned to Florida by Doggett for the purpose of making the sale.

The bill alleges inadequacy of price, and other badges of fraud, and charges that the sale was made with the intent to hinder, delay and defraud creditors.

The answer of Barrow admits his knowledge of the debt in favor of complainant's intestate, the sale to him, and his possession of the property, but denies that there was any fraud in the transaction. He avers that to prevent a
11 sacrifice of the property, in connection with his esteem and friendship for Doggett, he was induced to make the purchase.

The material facts in the case will be found in the opinion of the court, to which reference is made.

James T. Archer and *M. A. Long* for appellant.

A. E. Maxwell and *M. D. Papy* for appellee.

THOMPSON, *Justice,* delivered the opinion of the court.

William Bailey, as administrator *de bonis non* of the estate of John Bellamy, deceased, brought his bill of complaint on the equity side of the Circuit Court against the appellant, David Barrow, and one Henry Doggett, for the purpose of setting aside an alleged sale and conveyance by the latter to the former, of all the grantor's real and personal property in Florida, as fraudulent and void as against creditors. The court below made a decree in favor of the complainant, which will be hereafter noticed, from which the defendant, Barrow, has appealed to this court. To a correct understanding of the merits of the present controversy, it seems important to advert to the history of the debt claimed by the respondent here to be due to the estate of his intestate; and also to the facts and circumstances which preceded and attended the sale and conveyance of the property which is complained of. It appears that in January, 1839, Doggett purchased from respondent's intestate a tract of land in Jefferson county containing 1203 acres, for the price of $20,000. payable in January, 1848, the interest on which sum, reserved at the rate of ten per centum per annum, was payable annually, commencing with the 1st of January, 1840, when the first payment of interest fell due. Doggett, however, was to have the privilege of paying said principal sum within the term of credit, provided 12
the sum was so paid in the sum not less than $5000 at any payment. A bond in the penalty of $40,000 was executed and delivered by Doggett to Bellamy, with condition to perform the said agreement; and a bond with like penalty of $40,000 was executed by said Bellamy to Doggett, with condition to convey the lands so contracted for on payment of the purchase money and interest, as stipulated. It further appears that, in the summer of 1843, no part of the principal or interest of said debt having been paid, and while Doggett was absent from the State, Bellamy, in consequence of some apprehension as to the safety of his debt, (arising, it is supposed by one of the witnesses, from some thoughtless language of a nephew of Doggett,) sued out an attachment for the amount then due, which was levied on all Doggett's slaves; and at the fall term of that year, of Jefferson Superior Court, Doggett confessed judgment for the penalty of the bond, and agreed that execution should issue thereon for $15,234.94, which sum included $5000 of the principal debt, and the annual interest on the whole sum up to 1st January, 1843.

The affairs of Doggett, some time in this year, or perhaps prior thereto, became much embarrassed. It seems he had become involved, as security and endorser for other persons, to a considerable extent, and that some sixty or seventy thousand dollars had been coerced from him by this class of creditors, which had consumed all his available cash resources, while his individual creditors had been indulgent, and their claims had now become, by the increase of interest, very formidable and onerous in his view, as they were in point of fact. The service of the attachment, it is said, added greatly to his mental distress. His embarrassments were enhanced by his infirmities, arising from his advanced age and disease, which tended to incapacitate

him from giving that attention to his property, from the issues of which only could he expect to extricate himself, if his creditors continue indulgent; and if they could not in justice to themselves, or would not, from any other cause, then only by a sale of the whole or a part of his property, according to the exigency of the case.

Early in the year 1845 John Bellamy died, and administration upon his estate was committed to his son, William Bellamy, who caused the execution awarded on the 8th of November, 1843, in favor of his intestate against Doggett, to be levied on the slaves of the defendant in the county of Leon. Three other executions were also levied on the same property, and the sale thereof was advertised for Monday, the 7th of April, 1845. Doggett, prior to that day, viz: on the 29th day of March, after, as it is said, he had made, for a year previously, various efforts to sell his property, some of which will be noticed more particularly hereafter, concluded an agreement for a sale with the appellant, his brother-in-law, and a resident of the State of Louisiana, and who had been invited by Doggett to Florida, for the purpose of extending relief to him, or of purchasing the property. The conveyance bears date on the 3d of April, and was proved and recorded in the office of record for Leon county on the 5th, and in that of Jefferson county, on the 7th of April. By this instrument, Doggett, for a pecuniary consideration specified therein, bargains and sells, and conveys to the appellant, Barrow, his heirs and assigns, &c., "the whole of the property of the said Doggett of ev-"ery kind and description whatsoever, lying, situate and "being within the State of Florida," and then proceeds to particularize under a videlicit, the plantation in Leon county, containing 2000 acres of land, known as the Home Place; sundry detached parcels of land in the same county, containing in the aggregate 480 acres; the plantation
14 in Jefferson county, known as the Partridge Lands, and one additional eighth of land, containing in the aggregate about 712 acres; all the lands of said Doggett situate lying and being in Madison county, and not otherwise or more particularly described, or the quantity in acres specified: together with all the crops of every kind and description whatever, corn, fodder, peas, oats, sugar, cane; potatoes, furniture, &c., both in the counties of Leon and Jefferson, together with all the farming implements, blacksmith and carpenter's tools; also, all the stock, consisting of horses, mules, hogs and cattle; also, one hundred and seventy-eight slaves, specified by name.

Upon the execution of this conveyance, Barrow went into possession of all the property specified therein except one servant, Hillyer, who was retained by Doggett, and, with the consent of Barrow, carried to North Carolina, where he remains in the possession of the vendor. It is this sale and conveyance which has given rise to the present controversy; but before the court proceeds to the consideration of the question arising thereon, it is deemed proper first to dispose of the last point made in the argument of the appellant's counsel.

It is contended on behalf of appellant that the respondent, Bailey, is not in a position to claim the aid of a court of equity. The general rule of equity undoubtedly is, that if a creditor seeks the aid of the court against the real estate of his debtor, he must show a judgment at law creating a lien upon such estate; and if he seeks aid in regard to personal property, he must show an execution sued out and pursued to every available extent. Brinkerhof vs. Brown, 4 John's Ch. R., 676; Shirley vs. Watts, 3 Atk. R., 200. And if respondent, Bailey, does not occupy the position of a judgment and execution creditor, he cannot have the relief he asks for, even if otherwise well entitled thereto. It will be recollected that, in 1843, judgment was 15
rendered against Henry Doggett in favor of the respondent's intestate, for $40,000, the penalty of the bond he had executed to secure the price of the land purchased, on which, by consent of parties, execution was then awarded for part of the principal debt, and the arrears of interest due up to the first of January, 1843, which was paid, as will be hereafter noticed; the judgment standing, according to the provisions of the statute 8 and 9 Will. 3, c. 11, § 8, as a security for future breaches of the condition of the obligation.

In 1848, the residue of the principal sum falling due, ($15,000,) and the installments of interest stipulated to be annually paid, remaining due and unpaid since the 1st of January, 1843, the respondent, Bailey, to whom administration *de bonis non* of John Bellamy had been committed, sued out a *scire facias* to revive the judgment of 1843, suggesting a further breach in the non-payment of the aforesaid sums, and praying an award of execution therefor, according to the directions of the statute before mentioned; which writ was returned *nihil;* a second or *alias* writ, sued out upon the return of the first, was also returned *nihil*, and thereupon, the two returns of *nihil.* being considered equivalent to a return of *scire feci,* judgment of execution was awarded for the sum of $23,859, on which the Sheriff has returned, "no property found." It is now argued that the respondent has not shown a proper judgment and execution at law—that the *fiat* on the *scire facias* was rendered without any actual notice to Doggett, and is therefore simply void.

A *scire facias* is a writ necessarily founded upon some matter of record, and must issue out of the court where that record remains. Tidd Pr. (8th Ed.,) 1139, Foster, *Sci. fa.,* 1. In some cases, the issuing of the writ is the commencement of an original action, and in which it is in the 16
nature of an original action. Co. Lit., 296, a. Burr. vs. Atwood. 1 Salk. R., 89; as where it is brought on a recognizance, or by the government to repeal letters patent, or to resume the grant of a franchise. Foster, 12. But in other cases, where the writ is founded upon the judgment of a court of record, and it is intended to bring in a new party, or to have execution upon the judgment, it is a *judicial* writ, to warn the defendant to plead any matter in bar of the execution. In these cases, it is only a *quasi continuation of the former suit,* brought merely to revive the former judgment, and may be properly called a writ of execution. 2 Tidd Pr. (8th Ed.,) 1140, Phillips vs. Brown, 6 Term R., 284. It is, however, in all cases considered in *the nature of an action,* because the defendant may plead to it in any matter in bar of the execution upon the original judgment. O'Brien vs. Ram. 3 Mod. R., 189. The *scire facias* in the present case, was, therefore, a judicial writ to continue the effect of, and have execution of the former judgment, and this is fully illustrated by the form of the judgment rendered thereon. The statute 8 and 9, Will. 3, says Sergt. Williams, does not direct any judgment to be entered for the damages assessed for the further breach, &c.; therefore it should seem there can only be one judgment, namely, the old judgment for the debt, and, 5, s., damages for the intention, and, 40, s., costs, together with the costs of increase. And in Hankins vs. Broomhead, (3 Bos. & Pul. R., 607,) it was so held in the Exchequer Chamber, and a second judgment for the damages assessed upon an inquisition, was reversed as erroneous. I Wm. Saund. R. 580. The form of the judgment upon *scire facias,* in such a case, on a return of *scire feci,* where the defendant pleaded thereto in bar of execution, is thus given in Tidd App., 515;

"Therefore it is considered, that the said plaintiff "have his execution against the said defendant of the dam- "ages aforesaid, according to the force, form, &c. And "it is also considered by the court here, that the said "plaintiff do recover against the said defendant for his "costs and charges by him laid out about his suit in this "behalf, on occasion of the said defendant having pleaded "to the said writ of *scire facias,* by the court here ad- "judged," &c.

It is upon two returns of *nihil,* then that fact is stated and the default recorded, and execution being awarded, there is no judgment for the costs of the suit and proceedings therein.

Our statute, to which allusion was made upon the argument, provides for the mode and manner of serving original process, that which commences or institutes a suit for the first time; and is silent as to the service of *mesne* process, such as a *scire facias,* which is the continuation of a suit already instituted. Resort must, therefore, be had to the common law for the rules to govern the subject; and on examination, all the books of practice inform us that two writs of *scire facias,* with returns of *nihil* to each, are deemed equivalent to one writ returned *scire feci.* See Tidd Prac., 1124, 2 Sellon Pr., 196, citing 2 inst., 472, and Andrews vs. Harper, 8 Mod. R., 227; 2 Arch. Pr., 88, citing Yelv. R., 88-122. And this principle is recognized by the courts of several of the States of the Union. In New York, in Cumming vs. Eden, 1 Cowen R., 70; in Pennsylvania, in Chambers vs. Carson, 2 Whart. R., 9; in Indiana, in Kearns vs. The State, 3 Blackf. R., 334; and in North Carolina, in Woodfork vs. Broomfield, 1 Murph. Rep., 187. In some of the States it is recognized by statute, with some modifications, as Virginia, Ohio and South Carolina. See Lee vs. Chilton, 5 Munf. R., 407
Dunlevy vs. Ross, Wright R., 287, Grimke, Ex., vs. Magrant, 2 Brev. R., 202. Upon this point, the service of the writ of *scire facias,* Mr. Sellon observes, that although the intent of the *sci. fa.* is to give the party against whom execution is about to issue, notice or warning thereof, yet by the general practice it is wholly defeated, for the defendant may be summoned or not as the party thinks fit; and indeed the usual way is to revive the judgment without giving the party any notice." 2 Sellon Pr., 199. The allowance of such a course of practice unexplained, would seem to speak a reproach upon that system of law which claims to be founded on reason and natural justice; and the explanation sems to consist in the distinctive difference between the force and effect of an award of an execution upon a return of *scire feci,* and an award upon two returns of *nihil,* in other words, without notice to the defendant. In the first case, if the defendant does not appear, but suffers judgment to go by default, he is forever concluded from any plea or defence which he might have urged. Day vs. Guilford, (1 Lev. R., 41.) But if the Sheriff returns *nihil,* on which an execution is awarded, the defendant shall have an *audita querela,* in which he may present his defence, for, not being warned, he was not bound to appear. See Fitz. Nat. Brev., 104. According to modern practice, where there has been no *scire feci,* but only two *nihils,* the court will often relieve the party upon *motion,* and not put him to an *audita querela.* Anon, 1 Salk Rep., 93, Wicker vs. Creamer, 1 Salk. R., 264, Wheaton vs. Richardson, 2 Stra. R., 1075. If any reason exists for thus allowing an award of execution upon two returns of *nihil,* it is not stated in any case or book to which the court has had access; but it is quite probable that it may have arisen from the respective principle before stated, that the *scire facias* can only issue out of the court in which the judgment was rendered, and in which the record remains; the application of which might oftentimes defeat a party of his remedy, if personal service was required in cases where the defendant had withdrawn himself and his property from the jurisdiction in which the judgment was rendered, or had secreted himself and his property within the same. At all events, the law has made such provision for permitting the defendant in such case to open the judgment and present his defence by *audita querela,* or upon motion, that the practice cannot work any injustice.

It might be questioned whether, as the judgment of November, 1843, for $40,000, the penalty of the bond, was a subsisting judgment, standing by force of the statute as a security for further breaches, if the proceedings on *scire facias* had been irregular, or if the plaintiff had sued out an execution on the judgment endorsed to levy the sum due thereon, without an effort to revive by *sci. fa.,* it would be an irregularity which the appellant here could take advantage of. In Moseley vs. Doe, *ex dem.* Edwards, (2 Fla. Rep. 429,) where an execution had been issued on a judgment, after the lapse of more than a year and a day, without revival by *sci fa.,* it was ruled by this court, that it was an irregularity only, of which the defendant in execution alone could take advantage. But here it is wholly unnecessary to pass upon the question, as the proceeding on *scire facias* was strictly regular, according to the rules of law, and consequently the writ of *fieri facias* awarded thereon, is a legal and valid process, which being returned *nulla bona* by the proper officer, the respondent in the court below was well entitled to seek the aid of a Court of Equity.

The main question in this case is upon the sale and conveyance before mentioned, which is impeached as fraudulent and void as to creditors.

The existence of any actual fraud, of any meditated or
intentional design on the part of the debtor and grantor, Henry Doggett, known to, or participated in by, the appellant, to hinder, delay or defraud creditors, is denied by the answer. Yet, without imputing any moral turpitude to either of the parties to this sale and conveyance, if those facts and circumstances are found to exist, and to have attended the transaction which virtually and indirectly operate the same mischief, and which would, in contemplation of law, be deemed badges of fraud, or presumptions of ill faith, the result is the same; the inference of fraud arises and the law pronounces the transaction, upon principles of public policy, fraudulent and void as to creditors. This is termed legal or constructive fraud. Gibson vs. Love, (4 Fla. R., 264, *et seq.,*) 1 Story Eq., § 258, 259, 349, 353, *et seq.* In Hadden vs. Spader, 20 Johns' Rep., 554, Platt, J., says:—"The defendant denies that there is "any fraudulent combination to delay or defraud creditors, "but in the same answer he admits a series of facts from "which both law and equity impute fraud." And so in Hendrick vs. Robinson, 2 John. Chancery R., 301, the Chancellor observes:—"The purchasers and vendors say "that this was an honest and bona fide sale, but do not the "facts which they all admit outweigh the declaration? "And can a mere assertion be compared to the unequivo- 'cal language of the facts and the necessary inference of "law?"

Our statute of January 28th, 1823, aginst conveyances "to delay, hinder or defraud creditors," (Thomp. Dig., 215,) is a transcript from the British statute of 13th Elizabeth, c., 5, which latter act has always received a favorable and liberal interpretation in all the courts both of law and of equity, in suppression of the fraud. It declares all fraudulent conveyances to be void; and whether a conveyance

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21 be fraudulent or not, is by the statute declared to depend upon its being made "upon good consideration and *bona fide*." Both requisites must concur, for although the conveyance be upon even a valuable consideration, it is not valid in point of law from that circumstance alone, for if it be made with intent to defraud or defeat creditors, it will be void. Cadogan vs. Kennett, Cowp. R., 432, 1 Story Eq., Jur. § 353, 369. The terms "good consideration," mentioned in the statute, have been held to include those founded upon motives of generosity, affection, or natural duty, as well as those founded upon money, marriage, or the like. Hence, family settlements and advancements to children are, under certain circumstances, good considerations as against creditors, where the settler or parent is not indebted at the time; but as against existing creditors, it is very doubtful if, in any case, any consideration which is not in law deemed valuable, will be allowed to prevail. The eminent jurist, Judge Story, after a full review of the cases upon this point, declines to express his view as to the comparative weight of the judicial opinions in relation thereto. 1 Story Eq. Jur. § 354, 365.

Proceeding to the consideration of this case, the deed of conveyance of the 3d of April, 1845, from Henry Doggett to the defendant, David Barrow, on its face is liable to no impeachment; it conveys the property specified therein absolutely to the bargainee and his heirs, and is sustained by a legal consideration expressed of $45,000, paid to the bargainor, and of an annuity of $500 for his life. If it is justly obnoxious to the charge of fraud, it must be so from those facts and circumstances which preceded and attended the transaction, as disclosed in the answer of the appellant, and established by the proofs in the cause. Let us, then, briefly advert again to those circumstances . Doggett was at the time considerably embarrassed in his af-

22 fairs, and had been in this condition several years. Although not in fact insolvent, as will be hereafter seen, yet he believed such to be his condition—at least, such is the fair conclusions from his acts and declarations. Mr. Branch states that he (Doggett) never recovered from the levy of the attachment by Bellamy in the summer of 1843, but ever afterwards regarded his affairs as irretrievable, and made various open efforts to dispose of his property to relieve himself. The expression of his fears, often repeated, that the payment of his debts would consume all his property, and leave him nothing for his future support, is well established. Executions to the amount of $16,000 had been levied on his slaves in Leon county, and the time appointed for the sale was rapidly approaching. Destitute of cash resources to meet this urgent demand, he summoned the appellant, who is his brother-in-law, and who is represented as a man of wealth residing in Louisiana, to come to his assistance. The first call was ineffectual, for the want of sufficiently precise information as to the extent and character of the relief required. A second letter puts the appellant, according to the admission of the answer, it possession of the extent of the pressing money demand, and of Doggett's desire to sell the whole property to him. These letters are not produced by the appellant, and, in their absence, it must be presumed that they contained a full and detailed exposition of the pecuniary difficulties of the writer, the amount of his liabilities, and the extent of his means, and of his hopes and fears as to his future maintenance and support. It is most natural to suppose, from the affinity between the parties, that Doggett was as full and unreserved in his communications with Barrow as he was with Mr. Branch, and the other witnesses. If it were otherwise, this would have been established by the production of the letters. Such was Doggett's condition, and such the posture of affairs on Barrow's arrival in Flor- 23 ida to negotiate for the purchase of the property.

It is charged in the bill of complaint that the appellant well knew it would be impossible for Doggett to pay his debt to the estate of Bellamy, then due and to become due, after the transwer to him (Barrow) of all the property which Doggett owned in Florida. To this allegation, the answer is as follows:—"It is not true that respondent knew, "at the time of said sale, that said Doggett would be una- "ble to pay all his debts, because said Doggett declared "that he hoped and expected that he would be able to do "so, as he owned a large estate in North Carolina, consist- "ing of lands and slaves, &c., which he declared it was "his purpose to sell to the best advantage, so soon as prac- "ticable after he should arrive in said State." It is claimed on behalf of appellant that the answer, in this particular, is not only strictly responsive to the bill, but is an unequivocal denial of the allegation. *We* cannot think so; we cannot regard it but as a qualified denial, and at best but imperfect as such. The rule with regard to the sufficiency of an answer to the allegations of a bill in equity, as stated by Ch. Kent, in Woods vs. Merrill, 1 Johns. Ch. R., 107, and recognized by this court in Hunter vs. Bradford, 3 Fla. R., 285, is as follows:—"The general rule is, that to so "much of the bill as is material and necessary for the de- "fendant to answer, he must speak directly, without eva- "sion, and not by way of negative pregnant. He must not "answer the charge merely literally, but he must confess, "or traverse the substance of each charge positively and "with certainty; and particular precise charges must be "answered particularly and precisely, and not in a gener- "al manner, even though a general answer may amount to "a full denial of the charges." See also Cowp. Eq. Pl. 313, 314, Mitf. Eq. Pl., 309, 316, Story Eq. Pl. §852. Now, it is very evident here, that the appellant's denial is 24 qualified and explained by the alleged declarations of Doggett as to "his large estate, consisting of land and slaves, in North Carolina," from the sale of which he hoped and expected to be able to pay all his debts. Conceding the fact that Doggett did make the declaration to appellant which is imputed to him, as to this ownership of property in North Carolina, (and that he did so is most likely, as it is proved that he made a similar statement to Gov. Moseley,) was it known to the appellant to be true? or, if he had no personal knowledge on the subject, did he believe it to be true? And, if so, what were the grounds of his belief?—and did he act upon it, believing it to be true? The answer is silent on these points. If he had such knowledge, or entertained such belief, and acted upon it, he should have stated it, so as to avoid the inference, which seems irresistible, that he must have seen such a result was the necessary consequence of his purchase. The purchase was of all Doggett's known property; the price agreed to be paid therefor was less than the sum of all his debts, by the amount of this debt due Bellamy's estate; from Doggett's advanced age, and infirmities from disease; there was no prospect of his becoming able, from future exertion; then how was the debt to be provided for and paid? It would seem as if the appellant felt the full force of these facts and circumstances, when he prepared his answer, and sought to escape from the conclusion by relying on the simple declaration of Doggett. Should not Barrow, as a man of ordinary prudence, have reasoned thus:—If Doggett's assertion as to other property is true, and if his hopes and expectations thereon are well founded, why should he manifest so much anxiety to secure the settlement of the small annuity of $500 for his future support? Why should the extraordinary provision be inserted, that

this annuity was to be payable to him or his order, and to no other person whatsoever? Whence the necessity of withdrawing $5000 from the sale of the Florida property, for the purpose of paying debts in North Carolina? And why should Doggett require to retain possession of the slave, Hillyard, after the sale? And if his services were necessary, in consequence of Doggett's infirmities, why not except him from the sale? The inconsistency of these things, compared with the truth of the fact asserted, must have been apparent. Was it true? If so, it was susceptible of truth; and yet, up to the time of the publication of the evidence in this cause, it rests on no stronger foundation than the unsupported declarations of Doggett. That the appellant knew of the existence of this debt due to Bellamy's estate, and that its payment was not fully provided for, is clearly admitted. He admits that it was not at all provided for in the appropriation of the proceeds of the sale; and he further admits that the land, of which the Bellamy estate still held the legal title, was an insufficient security, for he alleges, in his answer, offers to purchase it from the administrator of Bellamy's estate for a less price than the sum due; and says that it was not worth that price, but he was willing to give it because of its contiguity to the lands purchased of Doggett. The answer is insufficient to repel the inference of knowledge, from the surrounding facts and circumstances, and it must be taken that the allegation of the bill is sustained in this particular, and Barrow's purchase viewed as if he had full knowledge of the fact. But whether the appellant knew the fact or not, or whether he should have suspected and believed it to be so, is not, standing alone, of any importance; its materiality depends on other considerations; for one in failing circumstances, or even insolvent, has a right to sell or assign his property, except as against existing liens, for the purpose of paying his debts; and if he has the right to sell, of course any one has the corresponding right to purchase. The only limitation upon the exercise of these rights is, that the sale and purchase be in good faith, and for a valuable and adequate consideration. If the appellant's purchase falls within this rule—if he purchased from Doggett in good faith and for a fair price, it is perfectly immaterial whether the vendor was embarrassed, or insolvent, or otherwise; or whether this condition of his affairs was or was not known to him; and so it is, also, wholly immaterial whether, by reason of preferences given by the debtor to some creditors over others, the sale and conveyance shall operate to the prejudice of a particular creditor, for, as was ruled by this court in Gassett vs. Brown, (3 Fla. Rep., 260,) a debtor is entitled to distinguish between the claims of his creditors, and to prefer some to the entire exclusion of others. And this brings us to the question of inadequacy of price or consideration, raised by the pleadings in this case.

It is contended, on behalf of the appellant, that inadequacy of price is only objectionable, when so gross as to lead the mind to the conclusion that such a sale was not intended to be *bona fide*, but only fictitious and colorable. Such is the principle when the inequality is relied upon as the sole ground of objection; and when it is ascertained to be of this gross and manifest character, relief is given upon the ground of actual fraud, the fact being regarded as demonstrative of some gross imposition, or some undue influence. Judge Story states the principle thus:—"Mere inadequacy of price, or other inequality in the bargain, is "not understood as constituting, *per se*, a ground to avoid a "bargain, in equity; for Courts of equity, as well as Courts "of law, act upon the ground that every person who is "not, from his peculiar condition or circumstances, under "disability, is entitled to dispose of his property in such "manner and upon such terms as he chooses; and whether his bargains are wise or discreet, or profitable or unprofitable, or otherwise, are considerations not for Courts "of Justice, but for the party himself to deliberate upon. "Still, there may be such unconscionableness or inadequacy "in a bargain, as to demonstrate some gross imposition, or "some undue influence; and in such cases, Courts of "Equity ought to interfere, on the satisfactory ground of "fraud. But then, such unconscionableness, or such inadequacy, should be made out as would, (to use an expressive phrase,) shock the conscience, and amount in itself "to conclusive and decisive evidence of fraud. And "when there are other ingredients in the case, of a suspicious nature, or peculiar relations between the parties, "gross inadequacy of price must necessarily furnish the "most vehement presumption of fraud." 1 Story Eq. Jur., § 244, 246. And this, we understand, would be the rule of decision if Doggett was before the court, seeking a rescission of the sale; but here the case is different. It is the case of a creditor, who is seeking satisfaction of his debt, and who complains of the joint act of Doggett and Barrow on the ground that, by the sale and conveyance, the property of the debtor has been improperly and inequitably put beyond the reach of his legal remedies; and the inadequacy of the price paid by the vendee, is presented as one of the marks or badges of fraud. In How. vs. Weldon, it was said by the M. R.:—"By the civil law, if "half the value only of the thing had been paid, the sale "would have been a mere nullity. Our law differs from "that; but though the inadequateness of the value will not "of itself be sufficient to set aside the contract, yet it is a "very material ingredient, and, with other things, will go "a very great way towards it." 2 Vesey, Sr., R., 518 and to the same effect are the following cases; Stillwell vs. Wilkins, Jacob Ch. R., 280; Pope vs. Roots, 6 Bro. P. C., 184; Macormick vs. Malin, 5 Blackf. R., 509; Moore vs. Royal, 12 Vesey, Jr., 373; Boyd vs. Dunlap, 1 John's Ch. R., 478. Most of the cases usually cited on this subject, are those of suits between the parties to the conveyance, which always present stronger considerations to the court to support the transaction for; conveyances purely voluntary are good, between the parties. But as the intent or purpose with which every conveyance is made, which operates prejudicially to creditors, is concealed within the bosoms of the actors, and the court can only infer the motives and intents, from the outward acts of the parties thereto, when creditors complain of the invasion of their rights as such, and the disappointment of their just expectations, the courts have scrutinized the transactions more closely, and have never required proof of the same extraordinary, gross and manifest disparity between the value of the property claimed to be sold, and the price paid as the consideration of the sale, as they have in the former case. In the case of Prosser vs. Henderson, (11 Ala., R., 484,) it is laid down by the court, that, to justify an inference of fraud, from the price given for a slave purchased from an insolvent man, it should be clearly inadequate, evidently below the market price. And in the case of Borland vs. Mayo, (8 Ala. R., 104, 117,) which has been cited by both parties, the court says:—"Inadequacy of "consideration, where the vendor is greatly indebted, is "recognized as a mark of fraud. True, it might not be "sufficient, *per se*, to authorize a sale to be annulled, unless the disparity between the true value of the property "and the price paid, or agreed to be paid, was so great as "to strike the understanding at once with the conviction "that such a sale could never have been made *bona fide*.

29 "But it may be a mark of fraud, where the difference is "not so great; and when other circumstances are associa- "ted with it, they may be conclusive." See also Bozeman vs. Draughan, 3 Stew. R., 243; McCaskle vs. Amarine, 12 Ala. R., 181. This ruling is, on its face, consistent with reason and with justice. In Partridge vs. Gopp, 2 Amb. R., 588, Ld. Ch. Northington says:—"I think no man has "such a power over his own property, to dispose of it so "as to defeat his creditors, unless for consideration." The term consideration, must, of course, be intended to mean a fair and adequate price; for if any consideration, which is valuable in its nature, though inadequate compared with the value of the property, be sufficient to sustain a sale by one greatly indebted, and especially when the sale is of all his known or visible property, it must be apparent that little has been accomplished, by statute, or by the adjudications of Courts of Law or Equity, towards the protection of the rights of creditors. ' But understanding the rule to be very correctly laid down in Borland vs. Mayo, as the result of all the authorities upon the point, we proceed to the examination of the fact of inadequacy. It is charged in the bill that the price stated to have been paid by the appellant, as the consideration for the property conveyed to him by Doggett, was and is wholly and entirely inadequate and insufficient; and it is worthy of remark, that the answer of the appellant does not directly assert that the price was full and adequate. On this point, the answer states, that he, the appellant, "did not regard the sale [*qu.* purchase?] as a profitable one, at the time, situated as he was, and considering the condition of the property;" and after stating matters in depreciation of the value, arising from negligent husbandry and previous ill-treatment of the slaves, he concludes thus:—"It may be true, that "said property, injured and out of repair as it was, might 30 "have been worth more to some person residing upon the "same, and possessed of unemployed means to invest in "its purchase, than the sum which respondent agreed to "pay for the same; but when the uncertain sum to which "an annuity might ultimately amount, during the natural "life of said Doggett, the difficulty and expense of respon- "dent's raising money, and his remote residence from the "property, are properly considered, he contends that it "will appear that he agreed to pay a full, fair and ade- "quate price." This averment, so cautiously qualified, cannot be considered as meeting the allegation of the bill of complaint. Whether, under the circumstances in which he stood, the purchase was advantageous to him or not, he being under no obligation to purchase, is not the question; the gravamen of the complaint is, that the price at which he purchased, compared with the fair market value of the property, was wholly and entirely inadequate and insufficient; and clearly it is no answer to this allegation to say that, placed as he was, he could not, prudently, or advantageously to his interest, afford to pay a larger price than he did pay. The tenor of the answer, in this respect, would seem to imply a doubt on the mind of the appellant himself, whether he occupied, on this point of the case, any very strong position.

In ascertaining the value of the property, as well as the price or consideration paid, the court has reason to complain of the poverty of the proofs. This defect, however, is common to both parties, and but for the admissions of counsel upon the argument, in aid of the data furnished by the record, we would have found no little difficulty in coming to a satisfactory conclusion. Of the property conveyed, there were one hundred and seventy-eight slaves; the value of those on the plantation in Jefferson county, one hundred and sixteen in number, is estimated by one witness, (Teat,) at the average price of $300 each. Another 31 witness, speaking of the general price of slaves, and disclaiming all particular knowledge of those in question, fixes the market price at an average of $275. It is true that Dr. Elliott, who claims to have a personal knowledge of these slaves, speaks in very disparaging terms of them; he describes them as sickly, feeble, &c., the result of ill-treatment, and insufficient feeding and clothing; but the testimony of Teat, who was the overseer of Jefferson County plantation for the years 1843 and 1844, and whose term of service expired just three months before the sale, is in direct and positive contradiction to the statement of Elliott. And Mr. N. Thompson, a near neighbor of Doggett, and who was a frequent visitor at his house, examined by appellant, must be considered as confirming and fortifying the evidence of Teat. He is asked—"Do you or "not, know the condition of the plantation and negroes, "and other property, sold by the defendant, Doggett, to "said Barrow, at the time of the sale? Were the planta- "tions in good repair, or greatly dilapidated Were the "said negroes in good health, or were they sickly, feeble, "badly fed and badly clothed?" And he answers, "that "the general appearance of the plantation, negroes, &c., "was about the same as the neighboring plantations." The testimony of Mr. Branch has been relied on as supporting the testimony of Dr. Elliott; but this evidence is very uncertain and indefinite; he says he had no personal knowledge of the property, or its condition—that Doggett's negroes "were said to be an unusually sorry lot." This is not stated even to have been general reputation; nor does he say from whom he received the information. It may have been from the appellant, or from Dr. Elliott, in which case it would not add to the value of the statement of either. It would rather seem, from the deposition, that he was simply echoing the allegations of Barrow, for he adds, 32 "and Barrow urged these as reasons for not desiring to purchase, except on favorable terms." The court is disposed to take the average given by Gov. Moseley, $275, as the fair average value of Doggett's slaves, especially as it is asserted in the answer that there were but few small children in the gangs. This will give, as the value of the slaves the sum of $48,950

The plantation in Jefferson county is proved by Gov. Moseley to be worth from $6 to $7 per acre; it contained, including the adjacent eighth of land, 712 acres. Taking a price between the two sums given, say $6.50 per acre, the value will be $4,628

The other personal property, consisting of 42 horses and mules; 4000 bushels of corn; 22,000 lbs. of bacon, and other provisions; stocks of cattle and hogs; wagons, and other plantation tools and utensils, &c., &c., taking the valuation of Teat as to that on the Lake plantation, less the excess of 4000 bushels of corn, and estimating that on the Home place on the same basis, it will amount to the sum of $7,178

The aggregate of which amounts to . . $60,756
which are all the values proved by the witnesses.

To the sum so found, may be added the value of the Home place, containing 2000 acres, which is not at all proved, but which counsel for appellant estimate at the price or value of $2.50 per acre, which certainly must be a low estimate for a plantation on which was kept a gang of 62 slaves, and a team of twenty horses and mules for its cultivation; this will amount to the further sum

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33 of $5,000
Adding also the several detached tracts of land in the vicinity of the Home place, described in the deed, and containing, from description, 480 acres, the specific value of which, although not proved, is now estimated at the same price, $2.50 per acre, making $1,200

and the aggregate of these sums, . . . $6,200 added to the former aggregate, will make the value of the whole property, so far as proved and estimated, the sum of $65,756. The court cannot but think that the value of the home place is greatly under-rated in the estimate put upon it; and that if proper care had been exercised in the preparation of the cause for the hearing, the fact would have been demonstrated, and the aggregate of values considerably increased. The deed conveys other lands, by the general description of "all the lands of said Doggett lying and being in the county of Madison;" and the same remissness is found in regard to this property. There is no proof of quantity, quality or value. And so also the answer of the appellant admits that, although he declined to accept from Doggett a transfer of his contract for the purchase of the 1203 acres of land, and states that the same was designedly omitted to be inserted in the conveyance, yet he went into possession of it, under Doggett, and occupied and cultivated 500 acres from the time of the purchase, and at the time of his answer, was still in possession. This use and occupation of 500 acres of land, so acquired in right of Doggett, was of some value, and may be fairly considered, as it is very plain, from the answer, the appellant considered it, an acquisition consequent upon the purchase of the estate, to a part of which it was contiguous.

34 Having thus ascertained the value of the property sold, it now remains to look to the price or consideration paid therefor. Upon the argument, much stress was laid upon the allegation in the answer of the appellant, that he "gave more than any of the creditors would offer;" and upon the fact that the property had been offered for sale to sundry persons, without success. As to the allegation of the answer, it cannot, on any just principle, form the criterion of value. The proofs show that Doggett offered all his property for the consideration of the payment of all his debts, and the settlement upon himself of an annuity of five or six hundred dollars per year, during the term of his natural life. The offer was made to Messrs. Branch and Noah L. Thompson, and John W. Cotten. Did any of them refuse to accept the offer because the property was not worth that price? No such ground of refusal was assigned by either. Mr. Branch states that his brother declined accepting the offer because "they had no money to "pay for it, and were unwilling to incur so large a debt "for an uncertain chance of even a good speculation." Mr. Thompson assigns no reason for the refusal of the offer by himself and John W. Cotten; and if resort is to be had to conjecture, as to what the cause probably was, it may with as much propriety, be supposed that they were deterred by the same prudential consideration, as to suppose they declined because the price demanded exceeded the true value. These offers and refusals are not sufficient to furnish any indication as to the fair market price. And so with the offer said to have been subsequently made by the appellant, Dr. Mitchell, to take the bargain off his hands. There is no doubt but that the offer spoken of by Mr. Branch is the same which is mentioned in the answer of appellant, and reference will be had to the latter, as being the most precise statement of the occurrence. The offer is there stated to be, that he would transfer the pur- 35
chase to any one who would refund to him his expenses, and pay a reasonable remuneration for his labor, time and trouble, in visiting Florida, and making all the arrangements and examinations which were previously recited in the answer. It does not appear what was the amount alluded to as expenses, and reasonable remuneration for labor, time, and trouble; and whether, if stated, any one would concur with the appellant, on the subject of the reasonableness of the amount; nor why Dr. Mitchell rejected the offer. In fine, it proves nothing; not even Dr. Mitchell's opinion as to the value, for it is impossible to say what was the motive of his refusal. It may have been that he foresaw a troublesome litigation in the future, and was not willing to pay a premium for the right to participate in it.

The consideration of the purchase stated on the face of the deed, is the sum of forty-five thousand dollars, paid at or before the execution of the instrument, and an annuity of $500 during the life of the vendor. The original answer, filed on the 20th April, 1849, responding to the discovery prayed for in the bill, states that "the manner and times "of paying the said sum of $45,000, was not set down spe- "cifically in writing, but was verbally agreed upon," as follows, viz: $15,234.94 to be paid to Bellamy's estate, and the sum of $2,395.98 to be paid to Noah Teat, which sums were to be paid in satisfaction of executions then levied, and were so paid; the further sum of $5,000 was to be paid to Doggett, to be applied to the discharge of debts alleged to be due in North Carolina, and was so paid to him; and the residue, amounting to $22,379.78, was to remain in the purchaser's hands, without interest, until the same could be applied, under the direction of Doggett, to the discharge of certain other debts, the amount of which could not then be ascertained, and one of which was in lit- 36
igation.

These debts are stated as follows: To Holbrook, Nelson & Co., of New York, about $2,550; to J. & L. Branch, $1,250; to Long & Walker, $1000; to John B. Doggett, about $250; to William D. Moseley, $1,261.24; to the Union Bank, stock bond and mortgages amounting to $16,800; and sundry other debts, amounting to $12,263.87; and to indemnify John W. Cotten, in whole or in part, against a note for about $15,000, due to Dr. Mitchell, and on which Cotten was security for said Doggett. But in no event were the payments made, and to be made, to exceed the sum of $45,000, specified in the deed; and if the obligation could be discharged with a less sum, the appellant was to be entitled to the residue, as a compensation for his trouble and personal expense in superintending the adjustment thereof. But by a supplemental answer, filed on or about the 20th of October, 1850, it is alleged by the appellant that there was a written agreement, exhibiting the terms of the said sale and purchase, and the manner and times of paying the said purchase money, which agreement had been, at the time, left in the custody of Mr. Branch, one of his solicitors, who was absent when the original answer was prepared, and the existence of the paper was utterly forgotten by the appellant, until found by Mr. Branch, and returned to his possession. By this agreement, the sum of $45,000 was to be thus paid: In cash, $20,500; to Dr. J. W. Mitchell, a note on which Cotten is security, for between $15,000 and $16,000; and lastly, to pay a sum not exceeding $10,000, in discharge of the debts due the Union Bank.

The answer also corrected various errors in the payments alleged by the original answer to have been made to creditors. It is certainly extraordinary that the fact of

37 the existence of this paper, which was the only evidence of the appellant's obligation to pay a large sum of money, as well as the mode and manner of payment which is prescribed, should have passed so completely from his memory; for it will be observed, on comparison of the two statements, that there is a material difference between them. But the explanation given in the supplemental answer, amounting for the excess of the cash payment beyond that stipulated for ($26,871 having been paid, instead of $20,500,) presents a still more strange state of the case. It is stated, that "this excess of payment arose from various "causes; in the first place, respondent acted upon the hy- "pothesis that the argument was as is stated in the orig- "inal answer, the written agreement aforesaid, owing "probably, *to subsequent verbal conversations and agree- "ments,* having been entirely lost sight of." This allegation raises a well founded doubt whether the court is yet in possession of the actual agreement, or that on which the minds of the contracting parties finally settled; a circumstance in itself which tends to negative the good faith of the transaction. It does not appear from the evidence, or any admission in the pleadings, that any one was present during the negotiation between the parties, which resulted in this sale; although the fact that such negotiation was pending, seems to have been known to several of the witnesses who have been examined. Nothing, therefore, can be known of what transpired during their interviews, save what they may think proper to disclose and make public. Nor does there appear to have been any reference to mutual friends or neighbors on the question of value. The advice given by Ld. Coke, grounded on the resolution of the Judges in Twyne's Case, (3 Co. R., 80,) to creditors who are about to accept satisfaction of their demands by a transfer of property from their debtor, to "let it be made
38 in a public manner, and before the neighbors, and not in private," &c.; and "to let the goods and chattels be appraised by good people to the very value, &c.," would seem to be peculiarly appropriate to a case like the present, where the sale of the whole estate of a debtor greatly embarrassed, for the price contemplated, would be likely to produce insolvency. For, besides the ready reference to the witnesses to prove the good faith of the transaction, if impeached, such a course would be well calculated to disarm suspicion, even in the minds of creditors whose claims are prejudiced thereby. We do not wish to be understood as holding that such a course of conduct is necessary, but merely that the adoption or omission of such cautionary measure would not be without influence on the question of fraud or no fraud, in connection with other circumstances.

Proceeding in the examination as to the manner in which this consideration or price was actually paid: it appears that the following sums were in discharge of the executions levied upon the slaves, and which constituted a lien thereon:

To Bellamy's administrator, for principal, interest and costs,	$13,696.84
To Teat, for same,	195.98
To Willis, for same,	1,203.58
To Murphy, for same,	463.51
Making	$15,559.91
And there was paid to Henry Doggett, to be applied to the payment of alleged debts due in North Carolina,	$5,000

Certain other payments are claimed in the original answer to have been made, but at what time is not stated; neither are they stated otherwise than from memory, the vouchers being in the possession of absent agents, and 39 which were to be subsequently produced; but which are not found in the record, nor any evidence in relation thereto, save that found in the testimony of Mr. Branch, who proves the payment to himself and brother of $1,250, and Long and Walker of $750. But as the fact of these payments has not been controverted in the argument, they will be assumed to have been made at or about the same time, viz:

To Messrs. Holbrook, Nelson & Co.,	$2,550.00
To Messrs. J. & L. Branch,	1,250.00
To Messrs. Long & Walker,	1,000.00
To the Sheriff, for John B. Doggett, about	250.00
To William D. Moseley,	1,261.24
	$6,311.24

And showing the entire cash payment to amount to $26,871.15.

It is contended, on behalf of the respondent, that this sum was all that Barrow really paid for the property; that the estate, being large, must have yielded a large annual income; and having had possession of the property for five years before any other payment was made, the subsequent payments were made out of the issues and profits made by him. The position is certainly plausible; but the payment of the Mitchell debt, as well as the sum to the Union Bank, being secured by the written contract, it is sufficient to give him the character of a purchaser for value to that extent. (Seward vs. Jackson, 8 Cow. R., 454.) In addition to this, the Union Bank debt was due, by mortgage, on a portion of the property conveyed. But the payments so made are not to be computed as of their full amount, in ascertaining the value or amount of the consideration paid. The payment to Mitchell of the sum of $15,955 having been deferred for the period of four years, 11 months and 40 10 days, for the purpose of this investigation, the court must ascertain the value of that sum, so deferred, at the time of the transaction, viz: the 3d of April, 1845. Assuming the value of money to be worth an interest of 8 per cent. per annum, the value of the sum of $15,955, deferred for the time specified, at compound interest, is $10,903.58, and at simple interest, is $11,432.71. Taking the latter sum as the most favorable to the appellant, the aggregate of consideration, as of the 3d of April, 1845, is increased thereby to the sum of $38,303.77.

It was also stated on the argument, by appellant's counsel, that at some period of time, intermediate the filing of the supplemental answer and the hearing of the cause in the Circuit Court, Mr. Barrow had discharged the debt due the Union Bank, by the payment of the sum of $8,500. Assuming this payment to have been made six years after the sale, and computing the value of that sum, so deferred, in the same manner, interest being calculated at 8 per cent. per annum, it will be found to be, at compound interest, $5,356.44, and at simple interest, $5,743.24. Taking the latter sum, and adding it to the former aggregate, it will make the sum of $44,047.01, which is the consideration price paid by Barrow to Doggett for the property conveyed, excluding the annuity, computed as cash, on the 3d of April, 1845.

To ascertain the entire consideration, the annuity is to be added; and here, again, the court must complain of the want of sufficient data on which to form an accurate judgment as to the value.

The only information is that furnished by the answer of the appellant, in which Doggett is described as "diseased, old, infirm, and unable to superintend" his business; and, again, in another paragraph, "as an aged and infirm

41 man." The market value of an annuity, it is true, as ar gued by one of the appellant's counsel, is a matter capable of ascertainment by calculation, and, in older settled communities than this, annuities are a frequent subject of sale and purchase. The calculations of value, however, are all based on the probable duration of life at the various ages of man; to ascertain which, tables have been constructed, founded upon observations made in various parts of the civilized world, as to the decrement of human life. The evidence is deficient here in failing to furnish the court with the age of the annuitant, and also of the nature or character of the disease, so that it might be ascertained if it be one which is considered as tending to shorten or render precarious the probable average duration of his life. The court must make a guess, however, and give the appellant the benefit of it. Assuming that Doggett was sixty-five years of age, an annuity for five hundred dollars for his life, might have been purchased for about the sum of $3,700. This is a liberal calculation; for an annuity for a man of that age, in good health, is not worth more tha. seven or eight years purchase, and Doggett is represented as being exceedingly infirm, from disease. This sum added to the former aggregate, will make the whole price, money and annuity, amount to the sum of $47,747, a sum, less than the value of the property, as proved and estimated, by the sum of $19,009.

Upon the argument on this point, it was urged that, by the terms of the agreement between Doggett and Barrow, the latter was to pay, if necessary, to the Union Bank, a sum exceeding that actually paid of $1,500; and also that Mitchell claimed from Doggett a much larger sum that he recovered, and which Barrow had good reason to believe might have been recovered, and which he would, in such case, have been bound to pay; and therefore, this contin-
42 gency should be taken into the account, and these sums being added to those actually paid, the aggregate thereof should be regarded as the true sum agreed to be paid. Concede this, together with the accuracy of the calculation made by the counsel for the appellant, and while it affords no aid to the appellant's case, (Ardglasse vs. Muschamp, 1 Vern. R., 237,) it furnishes proof that the property was in fact worth more than the estimate now put upon it; for no one can suppose, from the evidence in this record, that Barrow even contemplated paying more for the property than he considered it worth; and yet the argument is, that he did agree to pay more than he actually paid, if certain contingencies happened. But as the contingencies did not happen, and no more was paid than has been before stated what is to become of the excess, or overplus? It is claimed, in the original answer, that it is to enure to the benefit of Barrow, as a compensation for his "trouble and personal expense in managing the affairs of the said Doggett, "and superintending the defence of the litigation with "Mitchell, and other suits." There is no proof of any such agreement between Doggett and himself; and if there was, if it did not amount to the offence of champerty, it would savor so strongly of it, that the appellant would not be permitted to set up the agreement in any court.

There is no rule in our law as to what disparity between the real value of the property and the consideration paid, will, in any case, constitute inadequacy of price; but the court must ascertain this from the facts and circumstances of each particular case. We fully appreciate the difficulty of passing upon this question of inadequacy, and feel the force of the remarks of Ld. Ch. Baron Eyre, in Griffith vs. Spratly, (1 Cox R., 383,) that the value of a thing is what it will produce, and admits of no precise standard; that it must be, in its nature, fluctuating and dependent on many and various circumstances; and we 43 would not undertake to pass upon the question, where the sale had been at public outcry, unless the price was such as would shock the conscience, or there was proof of conduct calculated to chill bidders, or other fraudulent intervention; nor in any case, even where the sale was by private contract, would we be disposed to "weigh the comparative values with golden scales." Adverting, however, briefly to the prominent facts and circumstances of the case, we find that the complainant in the court below is a creditor whose debt is secured by a judgment of record, in favor of his intestate, before the sale and conveyance complained of. We find the debtor deeply embarrassed, yet possessing property more than sufficient to satisfy the demands against him, estimating the value at a fair market price; of advanced age and infirm from disease; harrassed by the apprehension that, when his property shall have been applied to the payment of his debts, he will be left in the evening of his life, a pensioner upon the charity of others; expressing anxiety, it is true, to make provision for the payment of his debts, yet evidently more anxious to provide for his future support and maintenance; finally, disposing of his estate to a friend and relative, whom he had summoned from a distance to make the purchase, at a price considerably less than the market value, and less than the sum of all his debts, yet securing an annuity for his future support. Turning to the purchaser, the court finds him fully apprised of the condition of his vendor's pecuniary affairs, and with notice of the existence of the debt due to Bellamy's estate, purchasing the entire estate, real and personal, of his debtor, for a sum in gross considerably below the market value, knowing that this debt was not fully provided for, and having no just reason to believe the debtor to be otherwise able to provide for its liquidation. Couple with these facts the other circumstances, namely: that, al- 44 though it was known that a negotiation was pending between these parties for a sale and purchase of property yet that the conference between them was secret; that there was no appraisement, or estimate of value, by any disinterested third person; the doubt, raised by the supplemental answer of the appellant, whether the court is yet in possession of the last and final understanding and agreement of the parties in relation to the consideration of the sale; the avowal of the design by the purchaser, to prevent the property from being sacrificed by creditors, and the retention of the possession of one of the slaves which the deed professes to sell and convey; and then, if the disparity between the value of the property and the price agreed to be paid therefor, as the consideration of the sale, be insufficient to "shock the conscience," or to furnish, of itself, conclusive evidence of fraud; if it would be wholly insufficient to enable the court to grant relief to the vendor himself, if he were here asking for it, yet the court cannot doubt but that the inequality is gross and manifest enough, combined with the other circumstances mentioned, to make the transaction, as against creditors, fraudulent, by construction of law; nor can we hesitate to declare it so.

It will be recollected that, in the computation of values, by which the disparity of $19,000 was ascertained, there was included, in the calculation of the consideration paid, the value of the annuity settled upon Doggett, amounting to $3,700; and there was also included therein the further sum of $5,000, which was paid to Doggett upon the sale, to be used, as it is said, for the payment of debts in North Carolina, but of the application of which, or even of the existence of any debts in that State, on which a presumption of such application might be founded, there is no evi-

dence. The aggregate of these two sums, added to the deficiency before mentioned, will make $27,700; and the effect of this transaction, as thus shown, was to withdraw that sum from the just claims of creditors, out of an estate of the value of $66,700. This conduct is wholly irreconcilable with that of one who is desirous to pay all his debts, and can only be accounted for upon the hypothesis of a design to hinder and defraud creditors.

From the facts and circumstances before alluded to, the purchaser must be taken to be privy to the intent, and so far as the payment of $5,000, and the payment for the annuity for four years, mentioned in the answer, should be postponed, if necessary, in favor of the complaining creditor. In Hawkins vs. Moffat, (10 B. Monr. R. 81,) where a man greatly embarrassed sold all his interest in an estate, worth $1,169, for the consideration of $465, in discharge of debts, and ten years board, and clothing for five years, to be enjoyed after the sale, it was held to be manifestly fraudulent, and was declared void as against creditors. The transaction, in that respect, presented no stronger marks or badges of fraud than are to be found in this case.

The decree remains to be considered. At law, upon the question of the validity of a deed, or other conveyance, the court can hold no middle course; it must be decided on the single point of validity, and held to be either wholly good or wholly bad. If it is found to be fraudulent, the creditor comes in and avoids it all, without repayment of the consideration money; but in equity such is not the rule, except where actual fraud and covin are found to exist. Boyd vs. Dunlap, 1 John. Ch. R., 478; Sands vs. Codwise, 4 John. Ch. R., 536, 598. In equity, where a security or conveyance is found to be constructively fraudulent, it is upheld in favor of one not guilty of any actual fraud, to
46 the extent of the actual consideration, and is vacated only as to the excess; and so, when the property is of greater value than the consideration, the conveyance may be impeached as being voluntary, to a partial extent, and, if there be no actual fraud, will be sustained to the extent of the consideration, and vacated as to the residue, or the grantee be decreed to be, as to such residue, a trustee for creditors. Wright & Cooke vs. Stanard, 2 Brock. R., 314; McMeckin vs. Edmonds, 1 Hill Ch. R., 294; Boyd vs. Dunlap, 1 John. Ch. R., 478; Wickes vs. Clarke; 8 Paige R., 161, 172; Herne vs. Meeres, 1 Vern. R., 465; Grove vs. Watt, 2 Sch. & Lef. R., 492; How vs. Weldon, 2 Ves. Sr., 516; Sandford vs. Wheeler, 3 Conn. R., 165. Chancellor Kent, in Boyd vs. Dunlap, expresses his approbation of this principle of limited interference, by allowing the deed to stand as a security for any sum really due, or paid by the grantee, and observes that, "Nothing can be more equitable "than this mode of dealing with these conveyances, of "such indecisive and dubious aspect that they cannot either "be entirely suppressed or entirely supported, with satis-"faction and safety."

The decree pronounced in this cause, in the Circuit Court, seems to present an inconsistency in its several clauses. The first clause directs the arrears of the annuity secured to Doggett under the deed of the 3d of April, 1845, to be paid the creditor, William Bailey, to be applied towards the satisfaction of the debt due to the estate of his intestate, which would appear to be a proper direction, upon the assumption of the entire validity of the conveyance; while the second clause declares the same conveyance to be fraudulent and void as against the complaining creditor, and the property specified therein, and conveyed thereby, to be liable to his execution, and directs a sale of the whole or such part thereof, under the

writ, as shall be sufficient to satisfy it. It is clearly erro- 47
neous, on the principle heretofore laid down, and must be reversed and set aside, and the proper decree entered in this court.

The following judgment was entered in this cause:

The court having maturely considered the transcript of the records of the proceedings of this cause, and the arguments of counsel, and now being fully advised of his judgment, to be given in the premises, it seems to the court here that the decree of the Circuit Court of the Middle Circuit, sitting as a Court of Equity, in and for the County of Jefferson, rendered in this cause, is erroneous, and should be reversed.

Therefore, it is considered by the court here that the said decree be reversed and set aside.

And the court here, proceeding to render such decree as the court below ought to have rendered, for the reasons, and upon the considerations set forth in the opinion delivered herein, doth think fit and proper, and so orders and decrees, that the said deed of conveyance from Henry Doggett to the appellant, mentioned and specified in the bill of complaint, and other proceedings in this cause, and exhibited therewith, bearing date of the 3d day of April, 1845, is in construction of law deemed, and is hereby declared, fraudulent as to the rights of the complaining creditor, William Bailey, administrator *de bonis non* of John Bellamy, deceased. And that, as against his claim, the said deed of conveyance be set aside as an absolute conveyance but to be valid as to the extent of all such sums of money as have been in good faith advanced and paid, by the said David Barrow, on account of said purchase, and to stand, remain and enure as a security, to the said David Barrow, 48
for the same.

And the court doth further order, that said David Barrow, as to the property, real and personal, conveyed in and by said deed to him, be, and he is hereby declared a trustee for the benefit of himself and the said William Bailey, administrator as aforesaid; first, to reserve and receive for himself reimbursements for the sums of money advanced and paid by him as aforesaid; and secondly, to pay, satisfy and discharge such sum as may be found due for principal and interest, and costs, upon the execution awarded by the said Circuit Court in Jefferson County, upon *scire facias*, on the 27th of November, 1848, in favor of said William Bailey, administrator as aforesaid, against Henry Doggett, after applying the nett proceeds of the sale of the land, made under the interlocutory decree of the said Circuit Court, passed in this cause on the 16th October, 1849; and lastly retaining any overplus which may then remain for his own use and benefit.

And the said court doth think it further fit to order and decree, that it shall be at the election of the said David Barrow to pay, or cause to be paid, to the said William Bailey, administrator as aforesaid, or to his solicitor in this cause, the amount of his said debt and claim; principal, interest, and costs, on or before the first day of the next term of the Circuit Court of the Middle Circuit, to be held in and for the County of Jefferson, or to account before the said Circuit Court for the said property, and the issues thereof, as a trustee thereof, for the uses and purposes, and for the trust hereinbefore specified.

And this court doth further order and direct, that if the said Barrow shall not pay or cause to be paid, to the said William Bailey, administrator, or his solicitor, the said debt aforesaid, on or before the expiration of the time lim-

ited as aforesaid, then and in that case, he shall be held, deemed and taken, to have elected to account for said property, and the issues thereof, as trustee, before said court. And thereupon the said Circuit Court shall take effectual order by decree, according to the usual course and practice of equity proceedings, that said David Barrow on account as such trustee, and that the said property, real and personal, specified in and conveyed by said deed, be applied to the purposes of said trust, as herein declared. And the said accounting, and said application of the trust fund, be made according to the following principles, to-wit: First, that said David Barrow be charged with the value of the personal property other than the slaves, computing interest thereon from the 3d day of April, 1845; that he be charged with a fair annual rent for the lands, and fair annual hire for the slaves, with interest thereon from the expiration of each and every year. Secondly, that he be credited and allowed for all payments and advancements by him made, for and on account of said purchase, with interest on each item, from the time of advancement and payment thereof as aforesaid. Thirdly, that the said lands and slaves, specified and mentioned in, and conveyed by, said deed of the 3d of April, 1845, with the issue and increase of the female slaves, be sold by and under the direction of the proper officer of said court, at such time and in such manner, and upon such terms, as the said court shall, by its decree, ascertain, direct and appoint; and that the proceeds thereof be thus applied: First, to pay, satisfy and discharge the costs and charges of said sale, and of this cause, to be taxed and allowed according to the usual course of the court. Secondly, to pay, satisfy and discharge the balance, or residue, found due upon the account, to the said David Barrow for his advances and payments on account of said purchase, as aforesaid. And
50 thirdly, to pay, satisfy and discharge, the debt which shall be found due to the said William Bailey, administrator as aforesaid, upon his execution aforesaid, against the said Henry Doggett. And lastly, to render and pay the surplus, if any, to the said David Barrow; *Provided, however,* That if the proceeds of said sale be found insufficient to pay the said debt or claim of the said William Bailey, administrator as aforesaid, as well as all the balance found due to the said David Barrow, as aforesaid, then and in that case, the payment made by the said David Barrow to the said Henry Doggett, of $5,000, on the 6th of April, 1845, and all payments made by him to said Doggett on account of said annuity, secured in and by said deed, be deferred, and postponed in favor of the debt, or claim of said William Bailey, administrator as aforesaid.

And this court doth further order that this cause be remanded to the said Circuit Court of the Middle Circuit, sitting in and for the County of Jefferson, and that this decree be certified to the said court, and be entered on the record as the decree in this cause, and that such further directions, orders, and decrees, be made by said Circuit Court in this cause, as may be requisite and necessary to carry out and make effectual the decree rendered herein: and also such other and further proceedings be had in this cause as may be consistent with the opinion and decree of this court, and in conformity with the usual course of proceedings in equity.

And this court doth further order and decree, that in this court, each party pay his own costs, to be taxed by the clerk.

SARAH A. LINES, APPELLANT, *vs.* HENRY D. DARDEN, AND ELOIZA DARDEN, HIS WIFE, APPELLEES. 51

1. In the construction of a will, the intention of the testator, as therein expressed, shall prevail over all other considerations, if consistent with the principles of law. To this first and great rule in the exposition of wills, all others must bend.

2. Courts allow of no rule of construction of mere words to control the intention, but the whole instrument is to be considered, and if possible, effect given to every part of it.

3. The relative situation of the parties, the ties and affections subsisting between them, besides the motives which would naturally influence the mind of the testator, are proper to be considered in expounding the import of doubtful words.

4. The words "will and desire," when addressed to an Executor, are imperative, and it is his duty to carry out the wishes of his testator, if possible and when consistent with the will; but these words are not, in all cases, necessarily addressed to the Executor.

5. Where a testator, by one clause of his will, gives and bequeaths to his "beloved and only daughter," all of his estate, both real and personal, during her natural life, and at her death directs the property to be equally divided between the children of the tenant for life: and by another clause expresses his "will and desire" to be, that should either of his grand-sons arrive at the age of twenty-one, or any of his grand-daughters marry, previous to the time of final distribution, then that such grand-son, or such grand-daughter, shall receive *a portion* of the estate as a loan, to have the management and receive the benefit of the same until the final distribution shall take place, when the property thus loaned shall return to the estate to be equally divided: HELD, that the will did not create a trust for the benefit of the grand-children, but merely vested a power in the daughter (the tenant for life) to be exercised at her discretion.

6. To constitute a trust, three circumstances must concur: sufficient words to raise it—a definite subject—and a certain and ascertained object. No commendatory terms of a will expressing a "wish," "will," or "desire," &c., are sufficient, unless there be certainty as to the parties *who* are to take, and *what* they are to take.

7. Whenever the subject to be administered as trust property, and the objects 52
for whose benefit it is to be administered, are to be found in a will, not expressly creating a trust, the indefinite nature and *quantum* of the subject, as well as the indefinite character of the objects, are always used by courts as evidence that the mind of the testator was not to create a trust.
8. The words "will and desire," are not necessarily mandatory. They would be sufficient to raise a trust, if not coupled with the words inconsistent with such construction.

9. The statute of distributions affords no rule to determine the extent of a legatee's interest.

10. A Court of Equity will aid a defective execution of a mere power, unless it is inequitable to others; but in its non-execution, it assumes no jurisdiction.

11. A party who seeks the aid of a Court of Equity in executing a power, must show in himself some superior equity to him against whom it is asked. Where the equities are equal, the court will not compel the donee to do that which he will not do for himself, but will remain passive.

12. Equity will not even aid a defective execution of a power to the disinheritance of the heir at law.

13. The soundness of the doctrine of illusory appointments, as connected with discretionary powers, questioned.

This cause was brought up by appeal from a decree of the Circuit Court for Gadsden County, sitting in Chancery.

Henry D. Darden and Eloiza Darden, his wife, appellees in this court, and complainants in the court below, filed their bill against Sarah A. Lines, Benjamin S. Hawley, and Elizabeth, his wife, John W. Goldwire, and Sarah Jane, his wife, John W. Poindexter, and Harriet, his wife, J. Lawrence Lines, and Joseph R. Lines, claiming that by the last will and testament of Jonathan Robinson, deceased, a trust was created for their benefit, which the appellant, Sarah A. Lines, failed to execute, and asking the court to compel the execution of the trust thus created. The will, upon the provisions of which this claim is based, is in the following words, viz:

In the name of God, amen. I, Jonathan Robinson, of the County of Gadsden, and Territory of Florida, being of sound mind, but weak and feeble in body, knowing the

53 uncertainty of life, and impressed with the solemn duty which is incumbent upon us, of settling our earthly affairs previous to the great change from time to eternity, do make and ordain this my last will and testament, hereby revoking and annulling all others.

Imprimis.—I desire the whole of my estate, with the exceptions, if any, hereinafter mentioned, to be kept together until all my just debts be paid, out of the proceeds and profits thereof.

Item.—I give and bequeath to my beloved and only daughter, Sarah Ann Lines, all of my estate, both real and personal, during her natural life, with the exceptions and restrictions hereinafter mentioned, and at her death, I hereby direct the same to be equally divided among her children, share and share alike. Provided, however, nevertheless, that if my said daughter, Sarah Ann Lines, shall intermarry, subsequent to my death, then, in that case, I devise all my estate, both real and personal, originally devised to her, with the exceptions and restrictions hereinafter mentioned as aforesaid, unto Joseph Austin, his heirs, &c., in trust and for the use and behoof of my daughter, Sarah Ann Lines, and her heirs, to her own, sole, separate and exclusive use, free from the power and control of her husband, and not liable to his debts, in any manner or form whatsoever.

Item.—Should either of my grand-sons arrive at the age of twenty-one years, or any of my grand-daughters marry previous to the time of final distribution, viz: before the death of my daughter, Sarah Ann Lines, then, in that case, my will and desire is, that such grand-son so arriving at the age of twenty-one years, or such grand-daughter so marrying as aforesaid, shall receive a portion of the estate as a loan, to have the management, and receive the benefit of the same, until the final distribution shall take place,
54 and then to return the same to be equally divided with the rest of my estate.

Item.—I do give and bequeath unto Miss Sarah Lowther the sum of ten thousand dollars, and do hereby authorize my executors to pay over the same to her, or her authorized agent.

Item.—My desire is, that at my death my executors will collect or cause to be collected all my stock of cattle and dispose of the same to the best advantage.

Item.—My will and desire is, that my boy George, the carpenter, shall be allowed to choose his own employer, annually, during his lifetime, such employer, paying the sum of one dollar to my executors.

Item.—I give and bequeath to my grand-daughter, Elizabeth Hills, my negro boy Liberty, about five years old, over and above her share of my estate.

Item.—I do hereby appoint my daughter Sarah Ann Lines, and Joseph Austin, my executrix and executor, of this my last will and testament.

In testimony of all which, I have hereunto set my hand and seal, this 19th day of September, Anno Domini 1838.

JONA ROBINSON, [Seal.]

Signed, sealed and published by testator, as his last will and testament, before us who have signed it in his presence, and in the presence of each other.

JOHN W. MALONE,
ARTHUR J. FORMAN,
HEZEKIAH HAWLEY,
S. B. STEVENS.

Eloiza Darden is a daughter of Mrs. Sarah A. Lines, as are also Elizabeth Hawley, Sarah Jane Goldwire, and Harriet Poindexter. J. Lawrence Lines, and Joseph R. Lines are her sons. Goldwire and wife, and Poindexter

and wife, in their answers to the bill, insisted upon the 55
construction of the will claimed by Darden and wife. Sarah H. Lines, and the rest of the defendants, denied this construction, and insisted that the testator vested a mere power in Mrs. Lines, to be exercised at her discretion.

The court below, rendered a decree in favor of complainants, from which the appellant appealed.

J. T. Archer, (with whom was *John E. Ward Esq.,* of Savannah, and *P. Woodson White,*) for appellant.

The devise in question, created, either:

1. *A power* in Mrs. Lines to loan a portion of the estate of the testator to each of her children during the term of her life, commencing at the time of the happening of the events specified—or,

2. A trust estate in Mrs. Lines, to apportion the estate, or some indefinite portion of it during the term of her life, to those appointed to take the same property in remainder.

I. If it is a mere power in Mrs. Lines, uncoupled with any trust, the non-execution of the power cannot be remedied in this court. Lewis on Trusts, 574. 1 Story Eq. Juris., § 169. Tollet v. Tollet, 2 P. Wms., 489. Brown v. Higgs, 8 Vesey, Jr., 561.

It is contended, however, that equity will relieve against *the defective execution of a power;* and as Mrs. Lines has given, or rather loaned to each of those in remainder who have arrived at the age of twenty-one, or married, some portion of the personalty, which they contend is not enough, it may be considered as a defective execution of the power, which may be supplied in this court.

But the principle does not apply to such a case as this. The defective execution of a power which the books treat of is—1. When the defect arises from an informal instrument, not within the scope of the power; and, 2. When the defect arises from the improper execution of the appro- 56
priate instrument. Se 1 Story Eq. Juris., Sec. 172, 173, 174, and authorities cited. Cockerill vs. Cholmley, 1 Russ. & M., 418.

Where there is a *defect of substance,* in the execution of a power, as the want of co-operation of all the proper parties in the act, equity will not aid the defect. 1 Story Eq. Juris., Sec. 175.

So, equity will not supply a surrender, or aid the defective execution of a power to the disinheritance of the heir at law. 1 Story Eq. Juris., Sec. 177.

It will be recollected that Mrs. Lines occupied the position of heir at law, and but for the will would be entitled to the estate in fee.

Nor, if this is a power, does the doctrine of *illusory appointments,* apply to the case.

All the cases referred to by Story, Hovenden, and other writers, are cases of such gross *inequality* in the division of an estate, under a power of appointment, as almost amounts to a fraud. See 1 Story Eq. Juris., Sec. 255, and the instances and authorities cited.

There is no pretence here, that the inequality of the different portions loaned to her children by Mrs. Lines, is so grossly unequal in amount as to amount to a fraud, but the complaint is, that under an authority to land *"a portion,"* she has not lent enough; she has not surrendered enough to all.

In Butcher vs. Butcher, an appointment of £200 out of a fund of £18,000, to one of five children, was held *not illusory.* 9 Vesey, Jr., 381.

In Fronty vs. Fronty, the court in South Carolina objects to the doctrine, and says, that undertaking to say an appointment is illusory, is substituting the discretion of

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57 the court, for that of the person in whom it is confided. Bailey Eq. R., 530.

Upon a full view of the circumstances, and the relative position of the parties, it is evident that the intention of the testator was, that a *discretion* should be vested in and exercised by Mrs. Lines, in this particular. And for obvious reasons, it is thus referred. Mrs. Lines, the daughter of the intestate, and the primary object of the bounty intended, is to be supported; she, is therefore, and as a matter of course, to retain so much of the estate given her as will yield an income adequate to that end. Again, in the distribution of the portions, she is to be regulated by the condition of her children, at the time the contingencies happen, upon which she is to lend them "a portion" of the estate. One may marry a wealthy man, and not require any, or so much aid and assistance as another, who may marry a man of inferior property or wealth. One may be unfortunate, and may, from time to time, require more aid, —another may be improvident, &c. Of all these contingencies, she is constituted the judge, and her discretion, the rule.

If the clause under consideration does constitute a power, then it is a general one, and in its exercise, there can be no rule but the discretion of the party to whom it is confided. The discretion of the court is not to be substituted for the discretion of the party. Fronty vs. Fronty, Bailey Eq. R., 529, *et seq.* Bax. vs. Whitbread, 16 Vesey, Jr., 24. Wollen vs. Tanner 5 Vesey, Jr., 218. Long vs. Long, 5 Vesey, Jr., 445.

II. Does the third clause of the will create a trust which the courts will compel the execution of?

It is not claimed to be a direct trust but an indirect and constructive one, and that by force of the terms "will and desire."

58 While we concede, that at one time the Courts of England had gone great lengths in construing precatory and recommendatory words into creations of trusts, yet it will be perceived from the latter cases, that it is a subject of much regret that the doctrine was ever established; and the tendency of the court at the present day is not only to restrict the application of the doctrine, but to retrace as far as possible, the course of decision. 2 Story Eq. Juris., Sec. 1069-1070.

In Sale vs. Moore, the vice chancellor said, that the first case that construed words of recommendation into a command, made a will for the testator, &c. The current of decision, he adds, has of late years been against converting the legatee into a trustee. 2 Cond. Eng. R., 270.

Precatory words, such as, "I will," "I desire," have sometimes been held to create a trust, but these alone, are not sufficient. To constitute a valid trust, these circumstances must occur: 1. Sufficient words to raise it. 2. A definite subject to be conveyed; and, 3. A certain or ascertained object. Per Sir Wm. Grant, M. R., in the case of Cruwys vs. Coleman, 9 Vesey, Jr., 323. Meredith vs. Heneage, 2 Cond. Eng. Ch., 282. Lewin, on Trusts, 76.

1. Sufficient words to raise the trust.

The words may be imperative, yet are not necessarily so.

The *subject matter*, the *situation of the parties*, what was the *probable intention*, must be considered. Per Lord Loughborough, in the case of Meggison vs. Moore, 2 Vesey, Jr., 633. Malim vs. Keighly, 2 Vesey, Jr., 531.

Where there is a gift of the absolute ownership, a devise over in whatever terms conceived, is void. Malim vs. Keighly, 2 Vesey, Jr., 531.

In Brunson vs. Hunter, Chancellor Johnson says: Although the words, "it is my wish," are frequently held to import a direct devise or bequest, or to create a trust, and would generally so operate where the will contained noth 59
ing inconsistent with it, yet the rule is not so imperative as to compel us to do violence to the general intent in giving them that effect. And in the decision, the other members of the Court concurred. 2 Hill's Chy. R., 490.

And here again we invoke all the circumstances, the respective situation of the parties, the moral duty of the testator toward Mrs. Lines, an "only and beloved daughter," the life estate devised to her,—and we deny that the terms of the 3d clause of the will can be considered as importing a direct devise or bequest to, or as creating a trust in favor of the children of Mrs. Lines, as to the life estate devised to her; or that it was so intended.

The whole taken together, shows the intention of the testator to have been, to confer upon his daughter, Mrs. Lines, a life interest in the residuum of his estate, giving the remainder in fee to her children, combined with the expression of a desire, that in the exercise of a parental discretion, she might, on the happening of certain events, accelerate the enjoyment of the use of such portions of the property by the children respectively, as she might think fit, right, and proper to lend to them. It never could have been the intention of the testator to pass over his "only and beloved daughter," and make her children and the husbands of her daughters, the primary and principal objects of his bounty; giving to his "beloved" daughter but a fleeting interest, a *proedia volantia*, to subsist and continue, and the estate to be preserved until her sons should attain their majorities, and her daughters marry; then to turn over the property subject to an account for rents, issues, and profits, leaving her from thenceforth, to be a dependent upon her children, and the husbands of her daughters, for the common necessaries of life. It seems to be a libel on human nature to assert it, and yet such is the claim set 60
up in a Court of conscience, by a child against her parent!

But complainant's counsel say they do not ask all—they but seek that the estate shall be divided between the mother and her children, each taking an equal part, with an account from the mother's part of the rents, issues and profits from the marriage of the daughters respectively. And what will probably be left for the mother's portion after the account? In the argument, however, was the first indication of the amount of the share claimed; the bill is as indefinite as the will. But where is the authority for this partition? How are these proportions arrived at? From the opinions of the equity of the case formed by the complainants, or their counsel? Of one thing we are very certain—it is not found in the will of Jonathan Robinson. No rule of division can be predicated upon anything therein contained. If the position be true that she takes but a trust estate under the will of her father, then Mrs. Lines is not entitled to anything; for she is only to hold the legal title, for the use and benefit of her children.

On the contrary, we contend that the testator in the performance of a *moral* duty, as well as the gratification of his pleasure, to provide for his only child, intended to do so for the full period of her life; and the object of so framing the precatory or recommendatory clause, was to keep her children and the husbands of her daughters always dutiful during her life, by making the portion indefinite, and terming it a *loan*, to indicate that, if she complied with the wish, the *title*, which was vested in her for her life, should not be divested, but that she should always be in a position to exercise supervision and control over it. See Ld. Ch. Hardwicke's judgment in the case of Marlborough vs. Godolphin, 2 Vesey, Sen., 73.

The argument for the complainants is that the testator

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61 intended to make the *children independent* of their mother; on the contrary, we think the reverse was the intention of the testator, and that our opinion is the only one fairly and rationally to be deduced from the peculiar provision. In seems as if it was to insure the continuance of a proper respect, that they were made dependent upon the mother's discretion.

2. But such construction of precatory or recommendatory words, (i. e. the creation of a trust,)) will not prevail, where either the objects intended to be benefited are imperfectly described, or *the amount of property* to which the trust should attach is *not sufficiently defined;* for the difficulty that would attend the execution of such imperfects trusts, is converted by the Court into an argument that no trust was really intended. Lewin on Trusts, 78. 1 Jarman on Wills, 338. Uncertainty of amount, Lechmere vs. Lavie, 7 Eng., Chy. R., 331. Sale vs. Moore, 2 Eng. Chy. R., 270. Tibbitts vs. Tibbitts, 19 Vesey, 664. Abraham vs. Allman, 1 Russell, 515. Wright vs. Atkins, 11 Eng. Chy. R., 83. Gilbert vs. Chapin, 19 Conn. R., 342-5.

The indefinite nature and quantum of the subject, and the indefinite nature of the objects, *are always used by the Court* as evidence that the mind of the testator was not to create a trust. Per Lord Eldon. Morice vs. Bp. of Durham, 10 Vesey R., 536. Pope vs. Pope, 10 Simons R., 1.

A wife, having a discretion given her, was held to take an absolute estate for life, without any binding trust in favor of the children. Thorp. vs. Owen, 2 Hare R., 607, cited in 2 Crabb on real property, Sec. 1773.

None of the cases where precatory words were held to be a trust, are like the case before the Court; they are all with respect to some estate to be enjoyed after the death of the person to whom the power is confided. There is not
62 one where a child, who is the heir at law, has been held a trustee for remoter kindred as to the estate devised. None where grand-children who are to take in remainder have been allowed to take a lion's share out of the life estate devised to the heir at law.

The *quantum* of property to be loaned is indefinite; the provision is, "shall receive a portion." Nothing can be more indefinite and uncertain, and it seems to illustrate most forcibly the principle of equity stated by Lord Eldon. It is evidence of the intention of the testator that he did not intend to create a trust, but confided entirely to the discretion of his daughter.

As to the cases of uncertainty and indefiniteness in the subject matter of a disposition by devise or bequest, see collection of them in 1 Jarman on Wills, 315, *et seq.* See also Lechmere vs. Lavie, 7 Eng. Chy. R., 331. Stubbs vs. Sargon, 2 Keen's R., 255-274. Ommauney vs. Butcher, 11 Eng. Chy. R., 144. Fowler vs. Garlike, 4 Eng. Chy. R., 403.

In Henry vs. Hancock, there was a devise to a female and if she married a man with less fortune than the property devised, then over to another so far as the deficiency existed. It was held that the devise over was void for uncertainty, 2 Dow's Parlm. Cases, 145-191.

In Peck vs. Halsey, a bequest of "some of my best linen" was held void for uncertainty. 3 P. Wms. R., 387.

In Bull vs. Kingston, a bequest of personal property to a trustee for the use of a married woman, with power to dispose of the same by will, and if no disposition, then as to what should be left over to others; held void for uncertainty. 1 Merivale R. 314.

In Wynne vs. Hawkins, a bequest to the wife of all testator's property, *not doubting* but that she will *dispose of what should be left at her death to two grand-children,* held *uncertain* what property was to be given, and there- 63
fore no trust raised. 1 Brown Ch. C., 179.

In Jubber vs. Jubber, a bequest of "a handsome gratuity" to the executor held void for uncertainty. 9 Simons R., 509. 9 Humphries, 302.

Those cases which were cited by the Counsel for complainant in the argument below, of seemingly very uncertain amounts, or values of property which had been supported as trusts, are clearly distinguishable from the case at bar. Here there is not only uncertainty in the description of *"a portion,"* but there is nothing in the will by which it may be rendered certain. There is no rule given to govern the loan, nor is there any state of facts by which the portion is to be or can be measured, and therefore the Court cannot "look with the eyes of trustees," and substitute its judgment for that of the individual.

For instance, in the case of Hewitt vs. Hewitt, cited in Lewin on Trusts, from 2 Eden's R., 332, was upon the subject of a fall of Timber by tenant for life, subject to the approval of certain trustees; there the Court substituted its officer in the place of the trustees, because this matter of cutting timber is, in England, reduced to a certain rule, being held to extend only to timber which was *mature,* and therefore fit to cut. The interposition of the trustees was to prevent waste by the tenant cutting such as were unfit.

In Maberly vs. Turton, cited from 14 Vesey, 499, the *maintenance* of the children was the question; a fact which could be ascertained, and therefore was referred to the master, to report upon the propriety of the application.

The principal authority on the subject, is said to be Gower vs. Mainwaring, and is cited in Lewin on Trusts, p. 578, and in which Ld. Hardwicke lays down the rule in these terms:—"Where trustees have power to distribute *"generally,* according to their discretion, *without any* 64
"object pointed out, or rule laid down, the court inter- "poses *not,* unless in case of a charity, which is differ- "ent," &c. In that case, there was a rule given to the trustees; they were to distribute among the settler's relations *"where they should see most necessity." &c.*

The case of Knight vs. Yarborough, cited from 1 Gilmer's Va. Reports, 27 was a question of *illusory appointment,* by will, by tenant for life disposing of the fee in the property, under a power, and is wholly inapplicable to the case at bar. So also Hudson vs. Hudson, cited from 6 Munf., 352, 356. A widow holding a life estate, with power of appointment after its determination of the fee among the testator's children, it was held that she could not exclude one of them. Neither is all applicable to the question involved herein.

The only analogous case which we have been able to bring to the notice of the court, is that of Burdett vs. Young. There the testator gave the residuum of his estate to his wife for her life. By a subsequent clause, he gave £1,000 each to two grand-children, on their attaining the age of twenty-one years, or marrying. The grand-children having married, brought their bill to obtain the legacies. Baron Price, who heard the cause, decreed that the legacies were payable only on the death of the tenant for life this decree was reversed by the Lord Chancellor on appeal, but his decree was reversed in the House of Lords, and the decree of Baron Price affirmed. See 3 Brown's Parliament Cases, 45.

W. G. M. Davis for appellees.

1. The language of the third clause of the will is imperative, and is addressed to the executor and executrix as such.

65 The bill of Robinson, the testator, should be construed as the will of the parent, he having put himself in *loco parentis* to the children. Story Eq., Vol. 2, Sec. 1111 and 1114.

The words used are such as have always been held to create a trust, unless controlled by the general intent. Harding vs. Glynn, 1 Atkins, 469; Eeles *et ux.* vs. England *et ux.*, 2 Vernon, 466; 5 Iredell (1844) p. 422, 454; 3 Merivale, 437.

Technical words, or others which have received a legal definition, will be taken in the legal sense, unless, from the contents of the will, it plainly appear that the testator intended them in a different sense. Lovelass on Wills, 276.

The court will abide by the *prima facie* intention, the settled meaning of the words, unless driven out by strong, solid and rational interpretation, and plain inference drawn from the rest of the will. Dean vs. Test, 9, Vesey, Jr., 152, 154; Jones vs. Colbeck, 8 Vesey Jr., 42

The language is addressed to the executor and executrix as an express direction, and not to the legatee or devisee, Sarah A. Lines, and is not within the authorities cited as to bequests. 9 Pick., 395, 401; 10 Smede & Mar., 466; 1 Richardson S. C. Eq. R., 324; Lott vs. Meacham, Flor. R. '51, p. 144; 6 Mass., 37; 2 Story Eq., 976.

2. A totally different rule exists in cases where the testator addresses a direction as to his estate to an Executor, from that which prevails in cases of recommendations, requests &c., addressed to a person to whom a previous absolute estate has been given. Pierson vs. Garnett, 2 Brown C. C., 226; Cloudesly vs. Pelham, 1 Vernon, 411; Nolligan vs. Nolligan, 1 Brown C. Cases, 491; Remarks of Sir William Grant in case 8 Vesey, 22; Ericcson vs. Willard, 1 N. Hamp., 217; Burrough vs. Philcox, cited at page 345,
66 Part 2, Vol. 2, Tudor's Leading Cases; Foley vs. Parry, 2 Mylne & Keene, 299.

In case of a bequest addressed in terms to an executor, nothing short of an impossibility of ascertaining the intention of a testator, will induce a court to declare a bequest void. Pierson vs. Garnett, 2 Brown Ch. C., 38; Liley vs. Key, 23 Eng Ch., 581; 3 Harrison, 41; 5 Vesey Jr., 504; Gower vs. Mainwaring, 2 Vesey, 87; Jarman on Wills, 318, 319; Broad vs. Beavan, 1 Russell, 511; 10 Gill & Johnson, 159; Raikes vs. Ward, 23 Eng. Ch. 445; Thorpe vs. Owen, 24 Eng. Ch., 608; 6 Peters R., 68.

3. But where the relations subsisting between the parties are such as existed here, the courts assume the execution of the trust, notwithstanding the indefinite character of the language, because of the presumed intention that the object of the testator was to provide a benefit. See the opinion in Raikes vs. Ward and Thorpe vs. Owen, 23 E. Ch. R., 447; 5 Iredell, 452.

4. The undivided "portion" in the will, interpreted by the context and situation of the parties, evidently was meant for the share given to each grand-child, and the direction was that such a grand-child should have the use of the share, in marriage or majority, but not as absolute property, and therefore it is loaned.

Words may be inserted or changed to affect the intention, especially when the word in the will is in common use to express the same thing. Jarman on Wills, 441; 6 Peters' Rep., 68.

Insert the word "his" or "her share," in place of the word "portion," and the intent would be plain that the testator meant what I have just declared.

But as the intention of the testator was to give an advancement to the grand-children, on their coming of age or marriage, and is so admitted in the answer, then a rule

is furnished by which the extent of the bounty intended 67
can be measured.

5. The ratio of distribution adopted was correct. The court adopted the statute of distributions as a good rule to go by, to prevent the bequest being void for uncertainty. 8 Vesey, 570.

M. A. Long on the same side.

John E. Ward, for appellant, concluded.

SEMMES, *Justice,* delivered the opinion of the court.

The question presented in the argument on the demurrer, and on that part of the decree granting relief to two of the defendants, Goldwire and Poindexter, it is unnecessary to consider, inasmuch as they will be disposed of by one decision on the merits of the case.

The whole controversy arises out of a construction of the will of Jonathan Robinson, deceased; and in the consideration of this question, it is scarcely possible to travel through the numerous authorities commented on by counsel, and which have been pressed upon this court with great ability.

We must content ourselves with a reference to a few of the leading cases, in support of the conclusions at which we have arrived, after a careful review of them all. The second clause of the will is in the following words:—"I "give and bequeath to my beloved and only daughter, Sarah "Ann Lines, all by estate, both real and personal, during "her natural life, with the exceptions and restrictions here- "inafter mentioned; and at her death, I hereby direct the "same to be equally divided among her children, share "and share alike." Then follows a devise of this estate, in the event his daughter's marrying, unto Joseph Austin, "in trust for her own sole, separate and exclusive use."

The third clause, and under which the complainants 68
claim, is as follows:—"Should either of my grand-sons ar- "rive at the age of twenty-one years, or any of my grand- "daughters marry previous to the time of final distribu- "tion, viz: before the death of my daughter, Sarah Ann "Lines, then, in that case, my will and desire is, that such "grand-son so arriving at the age of twenty-one years, or "such grand-daughter so marrying, as aforesaid, shall re- "ceive a portion of the estate as a loan, to have the man- "agement, and receive the benefit of the same, until the "final distribution shall take place, and then to return the "same to be equally divided with the rest of my estate."

In behalf of the complainant, it is contended that the life estate created by the will in favor of Mrs. Lines, was subject to a trust in favor of the grand-children, to be executed respectively on the daughters marrying or the sons arriving at age; that the language of the will creating this trust is addressed to the executrix, and is imperative, and that complainant, Darden, in right of his wife, by reason of her marriage, is entitled to one-seventh part of said life estate, to be held by him until the final distribution provided for under the will. On the other hand, it is contended that an absolute life estate was created in Mrs. Lines, without restriction, and that the third clause of the will vested in her a mere power, to be exercised at her discretion.

In the construction of the will before us, we can but reaffirm, without adding to the doctrine, recognized by all legal writers, that the intention of the testator, as expressed in his will, shall prevail over all other considerations, if consistent with the principles of law. The intention is every thing; and to this first and great rule, in the exposition of wills, all others must bend. With an anxious desire to secure this leading object, the courts allow no

69 rule of construction of mere words, to control the intention, but the whole instrument is to be considered, and if possible, effect given to every part of it. The relative situation of the parties, the ties and affections subsisting between them, besides the motive which would naturally influence the mind of the testator, are proper to be considered, in expounding the import of doubtful words. 6 Peters, S. C. R., 68.

With these well settled principles to guide us, we have had but little difficulty in arriving at what we conceive to be the true interpretation of this will.

It is too manifest to admit of doubt, that the first and leading object of the testator, was to make ample provision, during life, for his daughter, and who it is reasonable to infer, was his only child.

To accomplish this purpose, and prompted in the discharge of a high moral duty, by the love and confidence which he felt for this his "only and beloved daughter," he bequeathed to her for life, his entire estate, with certain "exceptions and restrictions." And to guard against every contingency which might impair this provision, he secures the property in the event of her marriage, by the intervention of a trustee, for her sole, separate and exclusive use. This accomplished, he next provides for his grand-children, by securing to them, on the death of their mother, an equal share of the same property.

Such being the manifest design, and controlling motive, of the testator, in the testamentary disposition of his property, the power of this court is invoked, so to construe the third clause of the will, as to encumber the life estate with a trust, which must defeat the former, and leave the tenant for life with a bare pittance for her maintenance and support. In other words, we are called upon to execute a supposed trust, which, with but a nominal reservation, will

70 invest the remaindermen with the entire estate, they will be entitled to on the death of the tenant for life. Such could never have been the intention of a father to his child, much less the design of one who clothes his very bequest to her, in language eloquent with feeling and affection. If the intention of the testator was to create a life estate, and by the same instrument, and in the same breath to impair it, as the tenant for life, took the estate *cum onere*, with the restriction, we would feel bound to carry it out and execute the trust, though a libel on humanity. But we think it is very clear, that in the liberal bequests made to his daughter and her children, the testator never contemplated a preference of the latter, to the detriment and prejudice of the former.

It is contended by counsel, that the words "exceptions" and "restrictions," twice repeated in the second clause of the will, afford evidence from which the court is bound to infer that it was in the contemplation of the testator to impose a limitation or restraint on the life estate; and that this restriction is the trust, in favor of the children. If there was a trust, the argument of counsel, and his construction of the will as to the latter word, would undoubtedly be true. There is, however, some reason for believing that both words, certainly the former, have reference to the special bequests, and the direction of the testator, contained in the subsequent clauses of the will. For, in the first item, all the estate, both real and personal, with the exceptions and restrictions thereinafter mentioned, is given to his daughter, and then follows these words, "at her death, I hereby direct the *same*," that is, all the estate, with the same exceptions and restrictions, to be equally divided, &c., evidently showing that at the final distribution, the whole estate was still subject to the same exceptions and restrictions as the life interest of Mrs. Lines. We are rather disposed, however, to apply the word "restric- 71
tions," to the third clause of the will; for if the loan therein provided, was a mere power to be exercised or not, at the pleasure of the donee, yet, when exercised, the son or daughter receiving the property, would have the exclusive management, and receive the benefit of it, until the final distribution. And this exclusive use and control, may, without doing any violence in the construction of words, be considered as a restriction on the estate for life. Be all this as it may, it is sufficient, that if there are to be found no other restrictions in fact, upon the life estate, it is not for the court to conjecture a trust, in order to make the application.

We come now to consider the question, whether a trust is in fact created by the will? The words "will and desire," when addressed to an executor, are as contended, imperative, and it is his duty to carry out the wishes of his testator, if possible, and when consistent with the will. The words are not necessarily addressed to the executor. The object to be performed will usually afford a safe guide, in determning to whom they are addressed. And when a trust is raised, either by a declaration of the testator, or by intendment or implication of law, and no trustee is appointed, equity will follow the legal estate, and decree the person in whom it is vested, to execute the trust. 2 Story Eq. §976.

In this case, the legal title is not in Mrs. Lines, as executrix; for, after the payment of the debts, and the special bequests, her duties as the representative of the testator, had been accomplished, and the legal estate vested in her as the tenant for life. The possession of the property, and the legal title being in her, as legatee, the words of the will are addressed to her as such. Still, if a trust is raised, she is bound to execute it: if but a power, she can exercise it 72
at her pleasure.

If there be a trust, she is bound to give to each child an equal share of the estate, for equality would be equity. There is no rule by which she would be entitled, in her own right, to any part of it. The rule to be adopted, must be inflexible in its application, and it is manifest, if she be allowed anything, it would be as a gratuity, not as a right. The very construction of the will, which would allow her anything, would allow her all; and the converse of the rule would be equally true. If we say a trust is created by the will, we are bound to say it is without restriction in favor of the children. There is no possibility of escaping this conviction, for she holds the life estate for her own use, or for the exclusive use of these children.

To constitute a valid trust, three circumstances must concur; Sufficient words to raise it; a definite subject; and a certain and ascertained object. 9 Vesey, 323. No commendatory terms of a will expressing a "wish," "will," "desire," &c., are sufficient to create a trust, unless there be certainty, as to the parties who are to take, and what they are to take. Gilbert vs. Chapin, 19 Conn.. 342; 1 Russ. R., 509; 1 Simons, 542; 9 do., 320.

In the case of Gilbert vs. Chapin, the court adopts the doctrine assumed in 9 Simon's that the proportion which each child was to take, must first be ascertained. And this would seem to follow from the principle, that a trustee has no right, upon his own discretion, to make a distribution.

In Morice vs. the Bishop of Durham, 10 Vesey Ch. R., 520, one of the leading cases, the Lord Chancellor says, if neither the objects nor the subject are certain, then the words of request do not create a trust, and the property being uncertain and indefinite, it may be conceded the

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73 testator meant to leave it entirely to the will and pleasure of the legatee, whether he would take upon himself that which is technically called a trust. Whenever the subject to be administered as trust property, and the objects for whose benefit it is to be administered, are to be found in a will, not expressly creating a trust, the indefinite nature and quantum of the subject, as well as the indefinite nature of the objects, are always used by the court as evidence that the mind of the testator was not to create a trust. And the difficulty that would be imposed upon the court to say what should be so applied, or to what objects, has been the foundation of the argument that no trust was intended.

It is upon the same well recognized principle—that where the intended subject matter of disposition consists of an indefinite part or quantity, the bequest fails for uncertainty—that gifts of a "handsome gratuity," "some of my best linen," "a part of my land," and numerous other gifts of similar import, have been held void. 9 Hump. R. 302; 1 Term., 130; 2 P. W., 874; Jarm. on Wills, 317. The words "will and desire," are not necessarily mandatory, nor does the question turn upon their grammatical construction. They would be sufficient to raise a trust, if they were not coupled with words inconsistent with such construction. Their import and signification depend not so much as to whom they are addressed, as the intention of the party using them, the act to be performed, and the certainty of the subject matter.

If in this case, (the object and the fund being certain,) the portion each grand-child was to take was clearly defined, the court could act on the desire expressed, and then it would be that the words would become imperative on the person to whom they were addressed, or the court whose duty it is to expound the will. But can we supply
74 by conjecture what the testator has failed to indicate in his will? It is true, that mere words of recomendation have been held by the English courts to create a trust in the immediate legatee, and, by some of the earlier decisions, such terms were construed to raise a trust where the persons who were to take and the property devised were doubtful. See 1 Vesey R., 336; 19 do., 29. In these cases, the court lost sight of the rule of construing the will by the instrument itself, and adopted a principle as uncertain in its application as the subject they were dealing with. The effect of these decisions was to substitute the court in the place of the testator; to raise a trust where none was contemplated, and to dispose of the estate without giving effect to the will.

Judge Story says the doctrine of thus construing expressions of recommendation, "wish" and "desire," into positive and peremptory commands, is not a little difficult to be maintained, upon sound principles of interpretation of the actual intention of the testator. It can scarcely be presumed that he should not clearly understand the difference between such expressions and words of positive command, and that in using the one and omitting the other, he should not have had a determinate end in view. 2 Story's Eq. Juris., § 1069.

The first case, it is said, that construed words of recommendation, &c., into a command, made a will for the testator. The current of decisions of late years, has been against coverting the legatee into a trustee; and the English courts have manifested a strong disposition to retrace their steps, and restrict the doctrine of recommendatory trusts by giving to the words of a will their ordinary sense, unless it is clear they were designed to be used as peremptory, (Jarm. on Wills, 338,) in which case, though precatory in form, they become imperative in fact.

There can be no doubt but that words of recommenda- 75
tion will create a trust, provided all the requisites are to be found in the will concurring for that purpose. They are held in many cases to import an imperative devise, and will so operate, if there is nothing in the will inconsistent with such a construction. The true question, in every case, is, whether the intention of the testator is manifest and mandatory in favor of the object of the bounty, or is merely suggestive and advisatory to the first taker? If the testator in this case designed to determine the specific amount which his daughter should loan to her children, why should he not have said so in his will? Why leave a matter of such importance to speculation and inference, and that, too, of the most doubtful character?

By the terms of the will, a *portion* of the estate is to be loaned the children, but it cannot be ascertained in the will what that interest is. We have no means of defining the extent, and we know of no rule by which it can be estimated. It is insisted that the statute of distributions should be adopted as a *rule,* by which the specific interest of each grand-child can be ascertained; and this, we understand, is the basis on which the decree of the court below rests, and by which one-seventh of the estate was allotted to each child. If this rule which is invoked be adopted to ascertain the *portion* a *child* would take, then *dehors* the will, Mrs. Lines would be entitled to the whole estate. If we force the application of the rule to the portion the grand-children are to take, then its effect is to disinherit the daughter, the heir at law.

But we believe no case can be found where the statute of distribution has been adopted as a *rule* to determine the extent of a legatee's interest. In cases which have arisen in the English Courts, where bequests have been made to the *testator's family,* or relations, the statute has been adopted to determine the object of the bounty, nev- 76
er the extent of the subject matter.

The cases relied on by complainant's counsel, do not support his argument. In the case of Pierson vs. Garnett, 2 Brown C. R., 38, and which created great interest at the time, the difficulty was *who* were the descendants, and how they were to take, in case of no disposition. Lord Kenyon was of opinion it was a power to distribute in such manner as the party thought fit; likewise a power to give, which the court could not control; but if he *did not give at all,* the court would give for him, to *such* descendants as should be entitled. In the case of Brown vs. Higgs, 8 Vesey, 573, the question was, who were the relations of the testator? The court refers with approbation to the cases of Pierson vs. Garnett and Harding vs. Glyn, 1 Atk., 479; and, in adopting the statutes of distribution, says it is a safe rule to go by; and, as equality is a principle of equity, the estate shall go to such of the testator's next of kin as were alive at the death of his wife, who held the trust estate.

The cases referred to in 1 Russ, R., 59, 23 Eng. Ch. R., 445, 34 Eng. Ch., 608, 617, are not in conflict with the doctrines we have adopted. They were cases of maintenance, and the court has ever held that a direction in a will to provide maintenance, support or education for children, created a trust for the objects; and the fund out of which the provison was to come being defined, the extent of the bounty could be easily ascertained, by reference. *Certum est quod certum reddi potest.* If a reference was made in the case, the master could adopt no rule in aid of his judgment, unless an arbitrary one, and there would be no guide to his discretion.

There is a numerous class of cases where no trust existed, and where there could be no distinction between the

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77 force of peremptory and precatory words, but where the contemplated testamentary benefit was *direct,* the object certain, and the intention of the testator to give manifest from the will; and yet the bequest failed for want of certainty in the subject matter. One case will serve to illustrate the principle. In Jones and others vs. Hancock, 4 Dow's Parlm. R., 145, an estate was given to a daughter, on conditions, with a devise over. The specific portion or share so giving over not appearing on the face of the will, and there being no means of ascertaining it, the House of Lords, concurring in the unanimous opinion of the Judges, held the devise over void for uncertainty. In that case, the intervention of a trustee would have been unavailing, for, however, mandatory the words, the interest was too indefinite for the operation of a trust.

The authority relied on by one of the counsel for complainant, in the case of Malin vs. Keighby, 2 Vesey, Jr., 334, is clearly misapprehended. The Master of the Rolls says, that to create a trust, the will should point out the object, the property, and the way it should go. Applying this authority to the case before us, it is insisted that the property is clearly pointed out in the will of Robinson. But it is not the property or fund out of which the portion is to be carved, but the extent of the portion itself, to which the court refers; otherwise, it would be at variance with every other authority on the subject.

The fact of leaving the interest indefinite, is strong evidence from which it may reasonably be inferred that the testator designed to leave the extent of the loan, if not the loan itself, to the discretion of his daughter, limiting the exercise of it to the contingencies provided for in the will. The words themselves, independent of the context, imply a mere power, as contradistinguished from a declaration of trust. This construction derives additional weight when
78 the situations of the parties, and the relationship, is considered. She was the mother of these children, and whatever solicitude he may have felt for their welfare, during her life, he could not have entrusted his power in safer hands, or had a more sure guarantee for her good faith and fidelity. To her maternal care was confined the education and maintenance of these children; and it is not to be presumed that their change of position in after life, would sever the ties which subsisted between them. Upon her affection for her own children the testator could safely rely, and in her judgment and discretion he was willing to confide.

We do not feel the force of the argument in reference to the trust estate being in Joseph Austin. It is true, that upon the marriage of Mrs. Lines, the legal title, by the will, passed to him, but in trust for the use of the *cestue que trust,* and for the purpose of protecting her life interest from the debts of her husband. It is equally true that, upon her divorce from her husband, the temporary purpose of the trust having been accomplished, the estate reverted back to her. 1 Kelly Geo. R., 390. But independent of the divorce, (and that of itself should not affect the merit of the argument,) the trust created in Austin was a limited one, and for a special object, restricted to the *exclusive* use and enjoyment of the estate by Mrs. Lines. The trust could not affect the construction of the will, or enlarge or modify its terms, by which she became the tenant for life, and during the term the absolute owner, and as a consequence, no change could be created on the life estate by the operation of the trust.

This being a power vested in Mrs. Lines, the question now recurs, how far its exercise can be controlled by this court?

But little need be said upon this subject; for if a mere power, and which seems to result from what we have said, the question gives its own answer, and that answer is con- 79
clusive. There is a clear distinction between aiding a power, and compelling its execution. The one assists, the other controls, the discretion of the donee, and in doing that, overthrows the intention of the party creating the power. In the non-execution of a power, a Court of Equity assumes no jurisdiction and should never interfere. But it will aid a defective execution, unless it be inequitable to other persons. Before the aid of a court can be extended in any case, the party who seeks relief must show, in himself, some superior equity to him against whom it is asked. If the equities are equal, the court will not compel the donee to do that which he will not do for himself, but will remain silent and passive. And for this reason, equity will not even aid a defective execution of a power to the disinheritance of the heir at law. 1 Story's Eq., § 176-7. The utmost limit to which a court can consistently go in its construction of a mere power, is to execute what the donee wished to do, but failed to accomplish. In the case of Brown vs. Higgs, 8 Vesey R., 574, the Lord Chancellor says, that where there is a mere power of disposing, and that power is not exercised, a court cannot interfere. If it be true, as contended, that the testator Robinson, placed himself in *loco parentis* towards his grand children, no presumption can be drawn from the fact, to the prejudice of his daughter, for there was a higher obligation on his part, and a paramount equity in her favor.

The case of Withers vs. Yeadon, Adm'r., 1 Rich. Eq. R. 325, is relied on as a recent case, in support of the argument for complainant. The opinion of the court, it is true, has some strong expressions in regard to the execution of powers, and if they were intended to apply to powers in general, they are subject to many qualifications. It is to be presumed, however, that their application was designed to be restricted to cases similiar to the one before the court; 80
otherwise there would be no distinction between a mere power of appointment, and a power coupled with a trust. By the will in that case, the testator gave to his son his estate, *upon the special trust,* for the benefit of his family, &c., and that he would devise the same *"to all, or any child,* or children of his," &c., as he might see fit. The legatee died without making the appointment. It cannot be doubted, that though there was an express trust, yet the power of selection, as to the objects, was left to the discretion of the legatee, and in the exercise of his undoubted discretion, had he left the estate to one child, the devise would have been good, and no court could have disturbed it. It would have been within the principle recognized in Kemp vs. Kemp, 5 Vesey, 856; Thomas vs. Thomas, 2 Vern., 443; 1 P. Wm., 149; 1 Ttk., 389; 5 My. & Cr., 72. The court, by its decree, distributed the estate equally *among* the children, upon the principle (it is to be supposed) laid down in the above authorities, that when there appears a general intention in favor of a class, and a particular intention in favor of individuals of a class, to be selected by another person, and the particular intention fails from that selection not being made, the court will carry into effect the general intention in favor of the class. § 2 White & T. Lead Cases, 345. Nothing can be extracted from this case which we have been induced to notice, beyond a mere *obitur dictum* of the Chancellor, in favor of complainant.

But it is contended by one of the counsel, that the portion of the estate loaned by Mrs. Lines to complainant, is *illusory,* and that it being an improper execution of the power, the court will control it. The leading cases relied on in support of this position, are Kemp vs. Kemp, 5 Vesey, 556, and Gower vs. Mainwarning, 2 Vesey R., 87. If

this estate was given to Mrs. Lines for life, with the power to "devise it to her children as she should think proper," as in the first case, and the question was, as to the exercise of this power, it would present a very different case from the one before us. The devise would be mandatory according to the English Courts, and we might feel bound to consider it a trust, for the benefit of all the children, and a gift to one, and a normal amount, would be *illusory*. They would be entitled to a substantial, if not an equal share; first, because there would be no counter equity, to repel such a disposition, but a superior equity in favor of it; second, the devise should be executed in good faith, with equity and good conscience, and in that case equity would be equality. It is upon this principle that the execution of powers, when coupled with a trust, as in both the cases referred to, as well as Knight vs. Yarborough, 1 Gilmer's Va. R., 27, have been held by the courts to be *illusory*. But in all these cases, the execution of the power was suspended by a life estate. While in the case before us, the power to be exercised is to take effect, if at all, during the existence of the life estate, and to its destruction.

It cannot be denied, but that the English courts have assumed jurisdiction even over discretionary powers. And in this view, there is nothing in this doctrine of *illusory* apopintment, which commends itself to the favorable consideration of this court, and we feel but little disposition to adopt a rule which is never mentioned, but with distrust, as to its soundness, and regret that it ever was established. Butcher & Gooday vs. Butcher, 9 Vese R., 381-391. It is a mistake, that the doctrine flows from a trust, or is connected with it. In the case of discretionary powers, there is no principle to guide a court, in determining when an appointment is illusory, and when it is not. The rule itself is founded upon no principle. It is
82 an arbitrary one, subject to no restraint or limitation. It is going too far, to say that the exercise of the power, which a testator has reposed in the honesty, good faith, and discretion of another, shall be controlled by the court. It is fair to conclude that the testator had no fixed purpose of his own, and to control the judgment of the donee, is to do violence to the intention of the testator, and leave the execution of the power, to the discretion of the court who tries the case; and that of itself, is a sufficient answer to the soundness of the doctrine. See Fronty vs. Fronty, Bai. Eq. R., 517.

The court cannot shut its eyes to the fact, that in the exercise of this power, Mrs. Lines has loaned property to the complainant and wife, and offered to extend to them additional aid. This was declined by the complainant in the first instance, because he did not require it. When he became embarrassed, and the offer was renewed, he refused all assistance less than his full portion, but which he did not define, claiming as a right, what he was entitled to as a favor.

In every aspect of the case, we are satisfied the decree of the court below is erroneous, and that the testator intended to repose in his daughter a discretionary power, as to any advancement to be made to her children—that they are bound by an exercise of that discretion, and that this court cannot control it.

Per curiam. Let the decree of the court below be reversed, and the bill be dismissed.

NOTE—A petition for a rehearing was filed by the appellees in this cause, but because of the incompetency of one of the Judges to sit on the motion, it was continued until the next term.

ELLEN A. BROCKENBROUGH, ADMINISTRATRIX OF WILLIAM 83
H. BROCKENBROUGH, DECEASED, APPELLANT, VS. ANN W. CAMPBELL, ADMINISTRATRIX OF JOHN W. CAMPBELL, DECEASED, APPELLEE.

1. The statute of limitations of five years is not a good plea in bar to an action under the statute 30 Car. 2 c., 7, (explained and made perpetual by the St. 4 Wm. & Ma., c. 24, s. 12,) against the executor, or administrator of an executor or administrator, for a *devastavit* committed by the latter in the administration of the estate of the first testator or intestate; such actions not being grounded on any contract, or lending; and being founded on the statute aforesaid, which is a specialty.

2. In actions under the statute aforesaid for a *devastavit*, it is not necessary that a judgment should be previously obtained against the executor or administrator who has committed the waste, ascertaining assets in hand applicable to the plaintiff's debt; and therein such action differs from the action for *devastavit* at common law against executor or administrator for waste committed by himself.

This cause was brought up by appeal from a judgment of the Circuit Court of Leon county, Hon. J. WAYLES BAKER presiding.

Ann W. Campbell, administratrix of John W. Campbell, deceased, brought an action of debt against Ellen A. Brockenbrough, administratrix of William A. Brockenbrough, deceased, on a judgment recovered in 1840, in the Superior Court of Franklin County, against William H. Brockenbrough, as executor of Samuel Simpson, deceased. The declaration sets forth the judgment, and alleges a devastavit committed by William H. Brockenbrough, as executor of Simpson.

The defendant in the court below pleaded, 1st, Non detinet; 2d, That her intestate had, in his life time, fully administered the assets which were of Samuel Simpson, 84
deceased; 3d, Plene administravit by defendant of the assets of William H. Brockenbrough, deceased; and 4th The statute of limitations. The plaintiff took issue on the first plea, traversed the second and third pleas, and replied to the fourth, that when the cause of action accrued, and until the institution of this suit, her intestate, and she after the death of her intestate, were out of the county and beyond the State, to-wit: in the State of Alabama.

To this replication, the defendant demurred, and the court overruled the demurrer, adjudging the said plea of the statute of limitations to be insufficient. The cause was submitted to a jury, who finding the issues in favor of the plaintiff, judgment was rendered against the defendant, upon the verdict returned by the jury. The Supreme Court was asked to review the judgment of the Circuit Court on the demurrer to the replication to the fourth plea.

Forward & Towle, for appellants.

T. Baltzell and *A. L. Woodward,* for appellee.

THOMPSON, Justice, delivered the opinion of the court.

The first point presented for the consideration and decision of the court, is, the propriety of the judgment of the Circuit Court, in overruling the plea of the statute of limitation, of five years, pleaded by the plaintiff in error, in that court.

The provisions of the act of limitations, of Nov. 10, 1828, which is claimed to be applicable to this case, and on which the plea is based, is in the following terms, that "all ac-"tions of assumpsit or debt, grounded upon any lending "or contract without specialty, &c., shall be commenced "and sued within the time and limitation of five years:"

Brockenbrough's Adm'x. vs. Campbell's Adm'x.—Opinion of Court.

and the present action was brought against the plaintiff in error, for a devastavit, alleged to have been committed by her intestate, in the administration of the estate of one Simpson, of which he was the executor. This provision of our statute is identical with that of the British statute of 21 Jac., 1 c. ib., under which it has been correctly held, that such cases only are within the provision thereof, as are grounded upon a contract in fact, and without specialty. Hodsden vs. Harridge, 2 Wms. Saund. R., 65-67. In the case cited, which was an action of debt upon an award of arbitrators, the court held, that it was not founded upon any lending or contract, but was a debt *ex quasi contractu,* according to the civilians, for which the law gives an action of debt, although there is no contract between the parties. See also Pearce vs. Howard, 14 Johns. R., 479.

It is urged with some earnestness, that the evidence of a contract is to be found in the oath required by law, of executors, on obtaining letters testamentary, faithfully to administer the estate committed to their charge, and to pay the debts thereof, so far as the assets will extend; and that this is to be considered as having been made with all the creditors of such estate. It must, however, be obvious, that although by this oath, the executor assumes an obligation, under the most solemn sanction, to apply the assets of his testator, in a due course of administration, yet highly artificial must be the reasoning which can deduce this to be a contract, within the letter or spirit of the statute, if, indeed, it be possible to do so, without wresting the language of the statute, from its fair and legitimate meaning. In the case of Hodsden vs. Harridge, before cited, where the parties had by express agreement, each with the other, submitted the matters in difference between them to the award of an arbitrator, yet an action of debt upon the award was not considered within the statute, the debt being simply *quasi ex contractu.*. The existence of a contract in fact, in the case cited, might have been contended for with much more show of reason than in the case before the court.

The citation of Bathurst's case, 2 Vent. R, 40, and other authorities to the same effect, do not decide that the devastavit is a simple contract debt, in point of fact, but merely that it is *in the nature* of a simple contract debt; and that in the order of payment of debts of a decedent, its grade or rank is not of any higher dignity. But if it were capable of perfect demonstration, that the action was founded upon a contract in fact, and therefore within the class to which the limintation is to be applied, yet it would not avail the plaintiff in error, unless it was without specialty, for specialties are in terms excepted from the operation of the statute. As in debt for arrearages of rent, if upon a parol demise, it is barred by the limitation of five years; but if it is reserved by deed, which is a specialty, it is not. See 2 Wms. Saund. R., 64; 2 Keb. R., 464.

Conceding that in the present action, the judgment declared on, is but matter of inducement, and that the devastavit alleged, is the foundation of the action, yet the action is grounded on a specialty, viz: statute law. By the rules of the common law, a devastavit committed by an executor or administrator, was a personal tort, and came within the maxim of *actio personalis moritur cum persona,* and the creditor was without remedy. But by the statute 30 Car., 2 c. 7, explained and made perpetual by the 4 & 5 Wm. & Mary, c. 24, § 12, the executors and administrators, whether rightful, or of their own wrong, who shall waste or convert to their own use, the estate of their testator or intestate, shall be liable and chargeable, in the same manner as their testator or intestate would have been, if they had been living. Thus, this action is grounded upon statute law, which is a specialty, and so excepted by the express terms of the statute of limitations.

This view of the case is in perfect analogy with that of the action of d[illegible] for an escape. At common law, the remedy for an escape out of execution, was an action on the case, in which the creditor recovered such damages as a jury might be inclined to give. But the statutes Westm. 2 c. 11, and 1 Ric. 2, c. 12, gave an action of debt against the sheriff or goaler, to recover at once the sum for which the prisoner was charged in execution. In Jones vs. Pope, 1 Wms. Saund. R., 37, (which was an action of debt for such an escape out of execution, upon the plea of the statute of limitations,) it was held that the statute giving the action was a specialty, upon which the action is grounded, and therefore, clearly out of the words and intention of the statute of limitations.

The same principle of decision was applied by Judge Story to an action of debt against a stockholder of a bank, under the provision of the charter imposing a personal responsibility upon the shareholders for the bills or notes of the corporation, in case they should be dishonored. Upon the plea of the statute of limitations, he held that the New Hampshire act, (which in this respect, like that of Florida, is a transcript of the 21 Jac., 1 c. 16) did not apply as a bar to an action of debt upon such statutable provision; for it is not a lending or contract, and only by the utmost straining, can it be asserted that it is a case arising *quasi ex contractu.* He further held, that the action was founded on a statute, which the law deems for this purpose a specialty, and for this reason also, the plea was bad. Bullard vs. Bell, 1 Mason's Rep., 288-9.

The only reported case found, after a careful examination, in which the question, whether an executor or administrator can set up the statute of limitations as a defence to an action against him for a devastavit, has been directly presented and decided, is that of Williams vs. Freeman, in 7 Watt & Serg. R., 359. The statute of Pennsylvania, like that of Florida, is in this particular a transcript from the British statute of 21 Jac. 1 c. 16, and in the case cited, it was determined that there was no bar, because the action was not grounded upon any lending or contract, and because it was founded on the judgment, which was a specialty. The action, however, was against the administrator, for his own waste, and upon a judgment against him for assets in his hand.

This court is satisfied that the fourth plea of the plaintiff in error, and the matters and things therein contained, presented no sufficient bar to the action of the plaintiff below, and that the judgment of the Circuit Court thereon was correct.

Upon the question made and argued at the bar, whether the judgment set forth in the declaration, is one ascertaining assets in the hands of the executor of Simpson, or is a judgment for assets *in futuro,* the court does not in this case, find it necessary to decide. The judgment entry declares that the sum recovered is "to be levied of the goods and chattels, lands and tenements of said deceased, *that may or have come,* into the hands of the said executor to be administered;" and to say the least, is sadly deficient in that certainty and precision which should characterize a common law judgment. It would seem as if it were designed to amalgamate and embody into one judgment, the effect of two distinct legal judgments upon the same cause of action;—to secure the assets in hand, and at the same time to reach over and cover those which may be acquired *in futuro.* This may be done where the assets in hand are not co-extensive with the debt recovered, the

amount in hand, being previously ascertained, and a judgment for that sum awarded, and for the residue *quando acciderint;* but in this entry there is no precise sum ascertained, and if it is to be regarded as a judgment of assets, it must cover the amount of the debt recovered, while at the same time, and to the same extent, it claims to look to assets thereafter to be received, which it is considered presents an incongruity.

There is a very wide distinction between the legal effect of these two classes of judgements; in the one case, it is conclusive evidence of assets in possession to satisfy the amount of the sum recovered; and in the other case, it is equally conclusive upon the creditor, that the executor or the administrator has, up to the time of the judgment, fully administered the estate in his hands. The parties have, however, by common consent, it seems, considered it as a judgment for future assets; the plaintiff below has substantially, so counted upon it in the declaration, and the defendant pleaded thereto, that her intestate, in his lifetime, had fully administered the estate of Simpson, on which issue was joined, and submitted to the jury; a plea which would have been altogether inadmissible, if the judgment had been one for assets in hand, and so counted upon. 2 Wms, on Ex'rs., 1224, (Phil. Ed., 1832.) Notwitstanding any doubt which might exist in satisfactorily ascertaining the character of this judgment, if the question had been material to the decision of this case, the court would have been strongly inclined to adopt the interpretation put upon it by the parties, as expressed in the pleadings and held it to be a judgment of assets *quando acciderint;* for, to consider it otherwise, might be productive of great injustice in cutting off the inquiry as to the administration of the assets of the estate of the first testator, and thus tend to fix a *devastavit* upon the executor conclusively, when it is questionable if the judgment entry was designed to have such effect; and because this action arises *ex maleficio,* the proof to convict the party should be at least free from doubt.

If the action had been against Mr. Brockenbrough, the executor of Simpson, in his lifetime, for a devastavit committed by himself, then the question of the charter of this judgment would have been most material; the action could not have been sustained, unless the judgment had ascertained assets in his hands; and the cause of action laid in the declaration, would have been fatally defective unless such a judgment should have been alleged. But in an action against the executor, or administrator of an executor or administrator, under the statute of 30 Car., 2 c. 7, as explained and made perpetual by the 4 Wm. & Mary, c. 24, §12, for a devastavit committed by the first executor or administrator, such as this is, such allegation and proof is wholly unnecessary. The distinctions between these two actions are thus summed up by Serg. Williams, in his note (8) to the case of Wheatley vs. Lane, 1 Wms. Saund. R., 219 e: "By what has been said, it appears that there are "these distinctions between an action against the executor "himself upon a judgment suggesting a *devastavit* by him, "and one against the executor of an executor, suggesting "a devastavit by the former executor. 1. In the former "case, the action is in the *debet et detinet,* and the judg- "ment is *de bonis propriis,* but in the other, the action is in "the *detinet* only, and the judgment is *de bonis testatoris.* "2. The former action can only be brought upon a judg- "ment previously obtained against the executor *de bonis "testatoris,* or where he is made a party to a judgment "against a testator by *scire facias;* but in the other, an "action may be brought in every case, where the execu- "tor, in his lifetime, was in any way guilty of any act "which amounts in law to a *devastavit,* such as exhausting "the assets by payment of debts of an inferior degree be- "fore those of a superior, or the like. And lastly, in the "former case, the executor cannot plead *plene administra- "vit,* but in the latter case such plea is proper." See also, opinion of this court, in Gregory vs. Harrison, 4 Florida Rep., 78-79; Sibley vs. Williams, 3 Gill & John. R., 52. In this case, therefore, the character of the judgment was only important as evidence; as a judgment of assets in hand, it was evidence that the executor of Simpson had assets at the time, which could not be contradicted; as a judgment of assets *in furturo* it was evidence only of the debt due by the estate of Simpson, and that there was then nothing in hand to pay and discharge it. As there was a plea that the executor of Simpson had fully administered that estate in his life time, and an issue thereon submitted to the jury, and no bill of exceptions showing what evidence was offered under such issue, we must presume that the verdict thereon was founded on sufficient and proper *evidence.*

Another ground of error has been assigned, viz: that the declaration is defective, but as no specific error has been pointed out, and the court, upon examination, has not been able to discover any, we conclude it is sufficient. There is no error in the record of the judgment and proceedings of the Circuit Court, and the judgment therein must be affirmed with costs.

Judgment affirmed.

FARISH CARTER, PLAINTIFF IN ERROR, VS. ARCHIBALD T. BENNETT, DEFENDANT IN ERROR.

1. The Supreme Court of the United States has, under the laws of Congress appellate jurisdiction over the certain decisions of the State Courts.
2. A writ of error to the Supreme Court of a State has the same effect as if the judgment or decree complained of had been rendered or passed in a Circuit Court of the United States.

3. A writ of error to a State Court, if sued out within the time and with the formalities required in cases of writs of error to the Circuit Courts of the United States, operates in like manner as a supersedeas, and stay of execution.

This was a rule *nisi* on the Clerk, to shew cause why he should not be required to issue execution on the judgment rendered in this cause. The answer of the Clerk is embraced in the opinion of the court.

W. G. M. Davis, for the motion.

J. T. Archer, contra.

ANDERSON, Chief Justice, delivered the opinion of the court.

To a rule to *nisi* shew cause why said rule should not be made absolute, requiring the clerk to issue execution on the judgment heretofore rendered in this case, the clerk has responded as follows:

In answer to the rule *nisi* granted in this cause on the 5th day of January, A. D. 1853, requiring the clerk of this court to shew cause why a rule absolute should not be granted commanding him to issue execution in this cause, I, John P. K. Savage, shew as follows:

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93 That on the 29th day of January, 1852, and within two days (Sunday exclusive) after the pronouncing of the said judgment in the above entitled case, the said Farish Carter sued out a writ of error to the Supreme Court of the United States, under the 25th section of the Judiciary act of Congress of 1789, for the purpose of removing said cause to said Supreme Court, on the allegation of certain errors in the judgment and proceedings of this court, and that on the 30th day of the same month of January, and within ten days (Sunday exclusive) after pronouncing said judgment in the court, filed a copy of the said writ of error in my office.

And on the 3d day of February, A. D. 1852, the said Farish Carter tendered to the Hon. Walker Anderson, Chief Justice of this court, his bond, with sureties, in the penalty of fifty thousand dollars, conditioned to prosecute said writ of error to effect, and to answer all damages and costs in case he should fail to make good his plea. Which said bond was on the 5th day of the last mentioned month of February, approved by the Honorable Walker Anderson, Chief Justice, as good and sufficient; who thereupon directed said bond to be filed in this office, and allowed and signed a citation, as provided by law. And this respondent, deeming said proceedings in error to operate as a supersedeas upon the further execution of the judgment of this court, did not issue execution thereon.

JOHN P. K. SAVAGE,
Clerk of the Supreme Court.

Upon this state of facts, the court is required to decide whether the writ of error sued out by the defendant in execution, in the manner stated by the clerk, shall operate as a supersedeas. We do not understand that any doubt is expressed as to the right of the plaintiff in error to have his writ, or that the appellate jurisdiction of the Supreme
94 Court of the United States over the decisions of the State Court, (restricted as it is to the examination of a few specified questions) extends to the case before us.

It seems to be conceded, that this case involves one of the questions reserved by the Constitution and laws of the United States, for the revisory jurisdiction of its own Supreme Court. But it is contended that the writ of error, though sued out in conformity to the acts of Congress, and accompanied by the circumstances set forth in the answer of the clerk, cannot have the effect of arresting the final process of this court upon its own judgment.

The constitutionality of the 25th section of the Judiciary Act of 1789, which gives to the Supreme Court of the United States, the right to re-examine the judgments and decrees of the State Courts, in certain specified cases, was at an early day strenuously contested. In Martin vs. Hanan early day strenuously contested. In Martin vs. Hunter, 1 Wheaton, 304, the counsel for defendant in error, contended that the appellate jurisdiction of the Supreme Court was limited by a true construction of the Constitution to proceedings in the interior *national* judicatories. But the validity of the law was ably indicated and fully maintained by the Supreme Court. In a subsequent case —that of Cohens vs. the State of Virginia, 6 Wheaton, 264— the decision was amply and explicitly confirmed, and the appellate jurisdiction of the court in this form, has been repeatedly exercised and is now regarded as indefinitely settled.

The appellate jurisdiction of the Supreme Court over certain decisions of the State Courts, being thus rightfully derived from the laws of the United States, we must necessarily look exclusively to those laws for the *mode* of its *exercise*, as well as its extent. The right to re-examine, necessarily implies authority to regulate the mode in which the right shall be exercised. And to solve the question presented to us, we have, therefore, but to look to the laws 95
of the United States, which regulate the mode in which writs of error shall be sued out, and which define their operation and effect.

The 25th section of the Judiciary Act of 1789, which gives the writ of error from the State courts, provided that a final judgment or decree in such courts in certain specified cases, "may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon a "writ of error, the citation being signed by the Chief Justice, or Judge, or Chancellor of the Court, rendering or "passing the decree or judgment complained of, or by a "Justice of the Supreme Court of the United States, in "the same manner and under the same regulations, and "*the writ of error shall have the same effect,* as if the "judgment or decree complained of had been rendered or "passed in a Circuit Court."

If this law is in consistency with the Constitution, as has been repeatedly decided by the Supreme Court, and as is acknowledged by the universal acquiescence of the State Courts, it only remains for us to inquire, what effect a writ of error sued out of a Circuit Court, in the mode, and with the circumstances set forth in the clerk's answer, would have upon the judgment or decree complained of?

The 22d section of the Judiciary Act prescribes the *mode* in which a writ of error shall be sued out of a Circuit Court, and the 23d section defines its *effect*. The 22d section requires that there shall be annexed to, and returned with the writ of error, "an authenticated transcript of the record, and assignment of errors, and prayer for reversal, with a citation to the adverse party." The citation which is thus made a necessary part of the writ, shall not be signed by the Judge or Justice until he has taken good and sufficient security that the plaintiff in error shall prosecute his 96
writ.

The 23d section, which defines the effect of a writ of error, enacts "that a writ of error as aforesaid, shall be a "supersedeas and stay of execution, in cases only where "the writ of error is served by a copy thereof being lodged "for the adverse party in the clerk's office where the rec"ord remains, within ten days (Sundays exclusive) after "rendering the judgment or passing the decree com"plained of."

The 25th section declares, that a writ of error from the State Courts, shall have the same effect upon the judgments and decrees of those courts, as it would have upon the judgments and degrees of the Circuit Court, if sued out from that court, and the 23d section declares, that in this latter court, it shall be a supersedeas and stay of execution, if sued out within a certain time and with certain formalities, and therefore, by virtue of the 25th section, the writ, if sued out in like manner from the State Courts, shall be in like manner a supersedeas and stay of execution there. This conclusion is inevitable from the language used in the respective sections of this act. That we have not been led aside from the true intent and purpose of these provisions by an adherence to the literal terms of the act, is apparent from a consideration of the duty imposed upon the Chief Justice of a State Court when he is called upon a sign the citation. As "the *same regulations*" are prescribed by the act for writs of error from the State Courts, as for those from the Circuit Courts, it follows, that the Chief Justice of the State Court, in signing the citation, must abide by the regulations or rules laid down for the Judges of the National Courts. Now, these latter are required in terms by the act of 1789, upon signing a citation, "to take good and sufficient security, that the plaintiff in

97 "error shall prosecute his writ," &c. A subsequent act, approved December, 1794, enacts, "that the security to be "required and taken, on the signing of a citation on any "writ of error, which shall not be a supersedeas and stay "of execution, shall be only to such an amount, as in the "opinion of the Justice or Judge taking the same, shall be "sufficient to answer all such costs as upon an affirmance "of their judgment or decree, may be judged or decreed "to the respondent in error."

We might justly infer from this provision, that in other cases, the security to be required and taken should be of a larger amount, but we are not left to uncertain conjecture upon this point. The Supreme Court, in adjusting the duty of Judges in this particular, said in an early case, (9 Wheat., 553,) "when the writ of error is sued out and served within ten days (Sundays exclusive) after judgment, so as to make it a supersedeas, the penalty of the bond must be in a sufficient sum to secure the amount depending upon the decision of the Appellate Court."

We learn in this case from the return of the clerk, that the Chief Justice of this Court, adopting, as we have no doubt it was his duty to do under the provisions of the 25th section of the Judiciary Act, the rules and regulations prescribed for the Judges of the National Courts, did require and take from the plaintiff in error, a bond for more than double the amount of the sum for which judgment had been rendered. Why was this required of him, if the writ of error was not to operate as a supersedeas? There can be but one reply to this inquiry, and that is, that as the writ was to be sued out in the two judicatories, *in the same manner and under the same regulations,* so it was to have the same effect in both.

The conclusions at which we have arrived are so obviously deducible from the terms of the Judiciary Act, and
98 are so well fortified by the reason and purposes for which writs of error are given in all courts, and are so strongly sanctioned by analogies found in the practice of our courts, that we would not have argued them at length, had not this motion been pressed with great zeal by the counsel for the respondent in error, and had not the views which he endeavored to impress upon the court been to some extent sustained by the opinion of an eminent lawyer lately deceased, as expressed in a manuscript letter read to the court.

It was evident, we think, that the opinion thus expressed, was given upon first impressions, without an examination of the question, and at all events our minds have been led irresistibly to an opposite conclusion, in spite of the authority of his great name.

It appearing to the court, from the answer of the clerk, that the plaintiff in error has fully complied with the requirement of the 23d section of the Judiciary Act, to make his writ a supersedeas and stay of execution, it is the judgment of this court, that the motion to make the rule upon the clerk absolute, be denied.

LOWELL HOLBROOK, APPELLANT, vs. T. LANE BETTON, AND 99
JOHN F. HIGGS, APPELLEES

1. A purchaser under an executory contract, in possession of the premises, has an interest, which is the subject of mortgage or sale, and which is devisable and descendible as his real estate.

2. H., a vendor, and L., a vendee, agreed to rescind a contract of sale, the former paying to the latter the value of the property over and above the amount remaining due, and the latter surrendering the contract. L., prior to this agreement, being in possession, executed a mortgage on his equity, to B. which had been duly recorded, and was outstanding at the time; of which however, H. had no actual notice. HELD, that this recision did not affect or impair the rights of B., the mortgagee, and that he was entitled to a foreclosure and a sale of the property in the possession of H. HELD, further, that H. should be considered in the light of a subsequent purchaser, and that as a consequence, the record of the mortgage to B., was sufficient notice to him of its existence.

3. In such a case, where the first note secured by the mortgage to B. was paid by, and assigned to H., it would be fruitless to apply the proceeds of property which he owned, to the satisfaction of the note thus paid, unless the property was inadequate to pay more than this note and the amount due under the contract of purchase at the time of its recision.

This is an appeal from a decree of the Circuit Court for Leon county, Hon. J. Wayles Baker, presiding.

The appellees, Betton & Higgs, filed their bill in the court below, for the foreclosure of a mortgage given to them by Walter F. Lloyd, on a certain lot and premises in the city of Tallahassee.

In 1843, Walter F. Lloyd entered into a contract with Call & Walker, for the purchase of the lot in question, the latter agreeing to make a good title to the premises when the former should complete the payments of the purchase money.

Prior to this contract, Call and Walker had executed a 100
mortgage on the premises, which was outstanding at the time of the agreement with Lloyd. Early in the year 1844, Holbrook, by an arrangement with Call & Walker, and with the consent of Lloyd, acquired a transfer of the mortgage referred to, and received a conveyance of the equity of redemption from Call & Walker, agreeing to perfect the contract which had been entered into between Call & Walker and Lloyd. At the Spring term, 1844, of the Superior Court for Leon county, Holbrook, on a proceeding instituted against Call & Walker, on the mortgage, obtained, by consent, a decree of strict foreclosure, and on a statement of the account between Call & Walker and Lloyd, then made, there was found to be due by Lloyd, under his contract, aforesaid, the sum of $2,428.31. It was then agreed between Holbrook and Lloyd, that on the payment of this sum, with interest, in three annual installments, on the first days of January of the years 1845, 1846, and 1847, the decree of foreclosure aforesaid, should be transferred to Lloyd, so as to vest in him all the title held by Holbrook. In February, 1846, Lloyd mortgaged the lot to the appellees to secure the payment of two promissory notes, each for the sum of $1,156.95, with interest from date at eight per cent. per annum, one payable eighteen months and the other three years after date. In February, 1847, after the mortgage to appellees had been executed and delivered, and recorded in the office appointed by law for the registration of deeds and mortgages, it being ascertained that Lloyd was in arrear to Holbrook, and owing for principal and interest upon said contract of purchase, the sum of $1150.76, and being unable to pay this balance, it was then agreed between them, that Lloyd should "value on the house of Holbrook in New York," for the value of the lot and improvements, over and above the amount

101 due thereon for the purchase money, and should surrender or cancel his contract of purchase. Accordingly, Lloyd surrendered said contract and drew on Holbrook & Nelson of New York, to the amount of $3143 50, which drafts were honored and paid by Holbrook. In August, following, Higgs, one of the appellees, being in New York, applied to Holbrook to cash the note given by Lloyd, as aforesaid, payable eighteen months after date, and informed him for the first time, that he held the mortgage referred to. Holbrook, after some hesitation, advanced the amount due on the note, and took it with an assignment endorsed thereon to Holbrook, Nelson & Co., without recourse. This, it is alleged, was the first time that Holbrook knew or heard of the mortgage to appellees.

It further appears that the property conveyed in the mortgage to appellees, is described "as all that part of lot "number one hundred and seventy-one in the original plan "of the city of Tallahassee upon which the brick building "occupied by Lloyd is situated, fronting twenty-five feet "on Monroe street, more or less, and running back sixty-"five feet," which description covered by its terms only a portion of the premises included within the terms of the original contract of purchase by Lloyd. The contract of purchase, includes within its terms, twenty-two feet of lot number one hundred and seventy, fronting on Monroe street, and only *eight feet of lot one hundred and seventy-one.*

The second note due by Lloyd to appellees being unpaid, this proceeding was instituted, and the court below decreed a foreclosure of the mortgage, and directed a sale of the property to pay the amount due. From this decree Holbrook appealed.

102 *D. P. Hogue* and *M. D. Papy,* for appellant.

1. The appellant, Holbrook, was the legal owner of the premises in controversy, by obtaining the transfer of the mortgage held by the Union Bank, and a conveyance of the equity of redemption by Call & Walker, the mortgagors.

2. Holbrook was the legal owner by the decree of strict foreclosure in the case instituted by him on the mortgage given to the bank, which decree was entered by consent of the mortgagors, and the property received in full satisfaction of the debt secured by the mortgage. 4 Stewart & Port, 138.

3. The record of a mortgage is no notice to a prior incumbrancer, but only to a subsequent purchaser. Therefore the record of the mortgage from Lloyd to Higgs was no notice to Holbrook. 1 Sanford, 419; 3 ib., 193; 2 Barbour, 151; 7 Cranch, 34.

4. If Higgs desired to influence the action of Holbrook, the holder of the legal title, in his subsequent transactions with Lloyd, by which the contract of purchase was surrendered, he should have given to Holbrook *actual* notice of the existence of his mortgage. 1 Sanford, 419; 3 ib., 193; 2 Barbour, 151; Law Rep., 445.

5. In the absence of actual notice, the prior incumbrancer or person holding the legal title, is not bound to act in reference to the rights or equities which may exist in favor of a subsequent incumbrancer.

6. Where the answer of a defendant is responsive to the bill, it must be taken as true, unless contradicted or disproved by two witnesses, or one witness with corroborating circumstances. The answer of Holbrook, therefore, in those parts which are responsive to the bill, must be

taken as true, because it is uncontradicted by competent 103
and sufficient testimony. 1 Paige, 239; 3 Wend., 532.

7. The testimony of Lloyd is incompetent to disprove the statements in Holbrook's answer. 1. Because he is a party to the suit. 2. Because he is directly interested in the decree to be rendered in this cause. 3 Paige, 368; 2 Wheat., 380; 4 Florida, 481.

8. The mortgage to Higgs only covered eight feet of the ground upon which the store mentioned in the pleadings, stands. It cannot be supposed to include more than its terms import. If Holbrook is considered in the light of a purchaser of Lloyd's equity, which is contrary to the facts, then the registry of Higgs' mortgage is notice to the extent of its contents, and no more. 1 John. Ch. 299; 18 John. Rep., 544.

9. The payment to Higgs by Holbrook, in August, 1847, was the full value of his lien upon so much of the premises as is covered by his mortgage.

10. The assignment of the note to Holbrook carried with it the mortgage given to secure it, and therefore Higgs cannot set up the mortgage in favor of the note still in his hands, until the property embraced in the mortgage is applied to the payment of the note assigned to Holbrook, and then only for such balance as may remain after such application. 2 Florida, 27.

J. T. Archer, for appellees.

SEMMES, J.:

The true point upon which the merits of this case rests, is as to the effect of the rescision of the contract of purchase, and the subsequent payments or advances made by Holbrook to Lloyd, in consequence of that rescision.

The complainants rest their case upon the following state 104
of facts:—In 1843, the defendant, Lloyd, went into the possession of certain real estate in Tallahassee, under a contract of purchase from Call and Walker, they having previously mortgaged the property to Hackley, who assigned it to the Union Bank. The notes given by Lloyd were subsequently assigned to defendant, Holbrook, in exchange for certain securities he held against Walker; and for the purpose of securing to Holbrook the payment of those notes, Call and Walker conveyed to him their equity of redemption, and induced the Union Bank to assign to him the mortgage deed. In 1846, Lloyd being still in the possession of the property, under the contract of purchase, executed the mortgage under which the complainants claim, and which was duly recorded.

Whatever may have been the character or extent of Lloyd's equity, previous to the assignment of Call and Walker's mortgage to Holbrook, it is unnecessary to consider. It is, however, clear that after the assignment, and when Holbrook had united in himself the legal and equitable title, and assumed the execution of the contract of purchase, he became, for all legal purposes, the vendor of Lloyd.

At the time Lloyd executed his mortgage, he was not only in possession of the premises, free of rent, but, under the contract of purchase, had an interest in the land, the subject of mortgage or sale; an interest which was devisable and descendible as his real estate. Craig vs. Leslie, 3 Wheat., 577.

It is insisted that the contract of purchase is to be considered as a simple executory agreement, creating no charge on the land, or attaching to it in any manner as an incident. This is undobtedly true at law, but equity considers the contract in a different and more favorable light, and for many purposes, treats it as specifically executed. The vendee is regarded as the equitable owner of the prop-

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105 erty, and, as land, it passes by descent to his heirs. 1 Fonbl. Eq., Ch. 6, Sec. 9; 2 Story's Eq. Juris, Sec. 790. Holbrook, as the vendor of Lloyd, was bound to a specific performance of the contract. For his security, he had a paramount claim on the land, by virtue of the vendor's equitable lien, and which would bind the estate, not only in the hands of the vendee, but his heirs, and those claiming under him. From the time that Holbrook became the owner of the legal title, he held the same for the benefit of the purchaser, the trust attaching to the land. Green vs. Smith, 1 Atk. R., 572; 6 John C. R., 402. And it is in view of his character as trustee, that he would be compelled to surrender the title on the payment of the purchase money. Lloyd's right, therefore, to mortgage this property, or convey it in any other mode, cannot be questioned.

Undue importance, we think, has been given by counsel to the decree of strict foreclosure rendered by the Circuit Court, in 1847, against Call and Walker. The relative position of Lloyd and Holbrook, as to their respective rights and liabilities, was not affected by this decree. Lloyd was no party to this proceeding, though the party in interest. In possession, and asserting his claim to the property by virtue of his contract with Holbrook, his equity was paramount to any rights growing out of the mortgage debt, for had Holbrook obtained a decree for the sale of this property, in satisfaction of the debt, a Court of Equity would not have hesitated to enjoin the sale, upon the application of Lloyd. The bill for foreclosure was against Call and Walker alone, and the decree could only vest the title as against the party to the suit; but they had previously conveyed their equity of redemption, and had no longer any interest in the property; and their consent, entered of record, surrendering the property in satisfaction of the mortgage debt, impaired no one's interest, and vested Holbrook
106 with no additional right. The mortgage in the hands of Holbrook was in no manner available, except that it secured to him the legal title to the property. His purpose in procuring, through Walker, an assignment of the mortgage, was not to keep it alive as a security for the debt, or to enforce at any time a collection of that debt, but solely with the view of obtaining the legal title, as a security for the payment of the notes given by Lloyd, under the contract of purchase, and at the same time place himself in a position to perform his part of that contract. By the assignment of the mortgage, and the purchase of mortgagor's equity of redemption, Holbrook became in fact and in law as fully invested with the legal title as he could have derived under any decree of strict foreclosure. Whether by this opinion of the legal and equitable title, the mortgage debt became extinguished, it is of no consequence to consider. It is sufficient that the property in the possession of Lloyd, was not liable for the payment of the debt, or any part of it. As to the agreement entered into between Lloyd and the attorneys of Holbrook, about the time this decree was rendered, it cannot affect the merits of this case in any way. It is not a substitution for the original contract of purchase, but is endorsed on it, and recognizes its validity. It secures to Lloyd, it is true, additional time for the payment of the purchase money, Holbrook agreeing, on his part, to assign the decree on the payment of the notes. It was a mere change in the time of payment by Lloyd, without increasing or diminishing the liability of Holbrook. Up to this time, the relative position and the rights of the parties were in no manner changed; Holbrook, holding the technical legal title in trust for his vendee;—the complainants, the mortgage of Lloyd upon his equity, while he held the naked contract of purchase. Some time after this, the contract of purchase was rescinded, and delivered up to Holbrook, in consideration of his allowing Lloyd to value, 107
on his house in New York, for the said lot and improvements, over and above the sum of $1,150, then due on account of the purchase money. In pursuance of this agreement, Holbrook honored the drafts of Lloyd to the amount of $3,143. It is insisted in argument, that Holbrook, in this transaction, is not to be considered in the character of a purchaser of Lloyd's equity, but that the payments made to Lloyd are to be regarded as advances made by Holbrook as a *prior incumbrancer;* and unless he had actual notice of the complainants incumbrance, before these advances were made, he should be protected in a court of equity.

As a general rule, it is undoubtedly true that a prior incumbrancer, or person holding the legal title, is not bound to act in reference to the rights or equities which may exist in favor of a subsequent incumbrancer; and if the defendant, Holbrook, stood in reference to this case in the light of a prior incumbrancer, with a mortgage to cover future advances, actual notice of the outstanding equity would be requisite. Shirras vs. Craig, 7 Cranch, 34; 2 Barb. C. R., 297, 303. We do not question the doctrine that a mortgage given to secure future advances, is a protection to the holder for all advances made prior to the receipt of actual notice of the intervening title; for otherwise the mortgage, to the extent of its provisions, would be a fruitless security, and it would be impossible for a prior creditor to protect himself against loss. But the reason of the doctrine shows its want of application to the case before us.

The subsequent advances are commensurate with the terms of the deed—they are based upon the faith of the deed, and are a part of the original transaction. But where these advances are not provided for in the security, they must of necessity rest upon a new agreement between the parties not growing out of the original contract, but independent of it. Aside from these considerations, the mort- 108
gage lien in this case was extinguished, and the mortgage merged in the decree of foreclosure.

We do not question the right or capacity of the parties to rescind the contract of purchase by a surrender and acceptance of the title papers, so far as their interest is involved. Between them the surrender would be good for all purposes. But where the rights of third persons founded on the contract, as in this case, are affected, the surrender whether by delivering up of the contract or a conveyance, would be a fruitless effort to defeat an outstanding equity, the evidence of which had been duly recorded. Otherwise it would be in the power of Lloyd to defeat the lien of his own mortgage by a parol agrement with his vendor. The effect of the surrender was to vest in Holbrook, the equity of Lloyd as effectually as could have been done by a deed of conveyance. It was so designed, for the agreement to pay and the actual payment of the value of the lot and improvements, by Holbrook, so far from being made in relation to any mortgage or title he held, was the consideration of the surrender by which Lloyd's remaining equity passed to Holbrook. It is true, that technically, Holbrook was not a purchaser, for there was no deed of conveyance to him. But none was necessary, for he held the legal estate and the only incumbrance upon it, in Lloyd's hands, was Holbrook's agreement to make titles on the payment of the remaining instalment of $1150.

Under this state of facts, we feel bound to consider the defendant, Holbrook, in the light of a subsequent purchaser, and as a consequence, the record of Lloyd's mortgage sufficient notice to him of that incumbrance.

The only remaining question to be disposed of is, in re-

109 ference to the first note given by Lloyd under his mortgage, amounting to $1156 48.

Holbrook, it appears, in 1847, paid this note and took an assignment of it. And he now claims the benefit of the mortgage security, and insists that the property should first be applied to the satisfaction of this note.

That it has a priority over the mortgage note, in the hands of the complainants, is true. But why apply the proceeds of property of which he is the owner, to the payment of an incumbrance from which he has relieved it? He has all the benefit of the payment by having discharged the mortgage lien to the extent of the note. If the property was inadequate to pay more than this note, and the sum of $1150, originally due from said Lloyd, under the contract of purchase, the question would present a different aspect. As it is, the only incumbrance for which the property should be chargeable, is the remaining note due the complainants.

It is therefore ordered and adjudged, that the decree of the court below be affirmed, except in such particulars as conflict with the opinion of this court. It is further ordered that this cause be remanded to the court below, with instructions to modify its decree in conformity with this opinion.

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110 THE SOUTHERN LIFE INSURANCE AND TRUST COMPANY, APPELLANT, VS. AUGUSTUS H. LANIER, APPELLEE.

1. Matters *dehors* the bill, showing a want of interest in a complainant, cannot be set up by way of demurrer, but may be raised by way of plea. The attempt to set them up in support of a demurrer, is fatal to it.

2. Where a party is made a co-plaintiff, without his privity or consent, the proper motion is, that his name be stricken out, not that the bill be dismissed, even as to him.

3. A demurrer upon the ground of misjoinder of a complainant, must be presented *in limine*. A party omitting to do so, and going into the merits of a case, waives his demurrer, and the court will not, except in a special case, allow it to prevail at the hearing.

4. Where a party voluntarily receives, as a loan, bank bills which were at a discount, and gave his note for their nominal amount payable in *money*, he cannot set up as a defence that the amount borrowed was not specie, or its equivalent.

5. Where the charter of incorporation of a Banking Company required that subscribers should, at the time of subscription, pay to the Commissioners appointed to open books for that purpose, ten per cent. on each share of stock subscribed, and directed that, so soon as the stock was taken and the ten per cent. paid, trustees were to be elected, and the company fully organized; and by an amendatory act, passed after its organization, the company was authorized to allow any stockholder to surrender his certificate of stock, and take a certificate of full stock equal to the amount actually paid in by him, which surrendered stock the company was authorized to re-issue: HELD, 1, That the company were not bound to require of the purchaser of this surrendered stock a payment of ten per cent. on each share of stock so purchased; 2. That the term of the original charter has exclusive reference to the subscribers before the corporation was organized; and 3d. That the company and not the Commissioners had the power to re-issue the surrendered stock.

6. Where, by the terms of the charter a Banking Company was authorized to sell surrendered stock for cash, and invest the amount in bonds and mortgages and instead thereof, it received the bond mortgage of an individual directly, as a consideration for the stock issued to him: HELD, That the individual stockholder could not avail himself of this conduct of the Company to avoid his bond so given. 111

7. A party cannot avoid his contract with a corporation, and thereby diminish the fund which was designed as a security for the benefit of the public, upon the pretence that there was some abuse of the corporate powers, or mismanagement on the part of the Board of Directors, in making the contract.

8. A contract with a corporation may be binding on the parties, though it be an abuse of the corporate powers, for which the corporation may be answerable to the government which created it.

9. Where a grant of power is clearly defined, and no mode is prescribed for its exercise, it is for the corporation to adopt such mode as, in its judgment, will secure the purpose contemplated.

10. As a general rule, a grant specifying the mode and manner of exercising powers, is construed as merely directory, unless there are negative words, excluding the right to adopt any other mode.

11. It is the duty of a party, upon discovering a fraud, to take immediate steps for the rescision of his contract. By his ratification of the acts of which he complains, and to which he was a willing party, he is forever estopped from setting up such a defence.

12. When a corporation becomes insolvent, the officers are trustees for creditors, and the same principles of law which would be applicable to a suit in favor of creditors, apply to a suit instituted by a corporation under such circumstances.

This cause was brought up by appeal from a decree of the Circuit Court for Gadsden county, sitting in Chancery.

In July, 1839, Augustus H. Lanier executed his bond to the Southern Life Insurance and Trust Company, in the penal sum of twenty thousand dollars, conditioned to pay the sum of ten thousand dollars, on or before the expiration of five years from the date thereof, with interest at eight per cent. per annum, payable semi-annually. On the same day he also executed a mortgage to said Bank on certain lands and slaves, to secure the payment of said bond.

On the execution and delivery of the bond and mortgage aforesaid, the Southern Life Insurance and Trust Company 112 issued to said Lanier a certificate for one hundred shares of stock in said company, which constituted him a stockholder in said institution. Afterwards Lanier, desiring to borrow money from said company, deposited with it his certificate of stock, and procured loans, for which he gave his notes; one dated 1st July, 1842, for $917 17, due six months after date, and one dated 8th February, 1843, for $6,000, payable the first of January thereafter, and agreed that his said certificate of stock should stand pledged as a security for said loans. These notes were renewals of others, the original evidences of the loans.

This bond and mortgage, with others, were, it is alleged, under the charter of the company, deposited with the Governor of the Territory of Florida, and the guaranty of said Territory of certificates for one thousand dollars each, to the amount of the mortgage debts deposited, was obtained, on the faith and pledge of said bond and mortgage. These certificates were afterwards negotiated and sold by the company, with the view of being able to make loans and discounts beyond the amount of the capital paid in by the old stockholders.

The company, in their bill, allege that out of the proceeds of the sale of the certificates guaranteed by the Territory, it made the accommodation loan to said Lanier, amounting to $6,917 17, as evidenced by the two promissory notes mentioned. The bond and mortgage being unpaid, a bill was filed by the company, to which the State of Florida was made a party complaint, to foreclose the mortgage, and for a sale of the property, and the application of the proceeds to the payment of the amount due.

The respondent, Lanier, admitted the execution of the bond and mortgage, but denied that there was any consideration for their execution and delivery. He averred that

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113 they were extorted from him by the deception and fraudulent misrepresentations of one Samuel L. Burritt, who, acting as the agent of the said company, procured the said bond and mortgage to be executed by him. He further alleged that said Burritt, in order to induce him to execute said bond and mortgage, represented that said company was a banking institution in perfectly solvent circumstances, and possessed of ample means to do a profitable business, and that the primary, and indeed only objects of the execution of the bond and mortgage were, first, to comply with the *form* required by the charter of incorporation, and secondly, to afford security for any loans of money which might be made to the stockholders upon a pledge of his stock, and that, under no circumstances, would the obligor be called upon to pay the amount of the bonds; that, as a further inducement held out by said agent to persuade defendant to execute said bond and mortgage, he represented that said banking institution would immediately resume specie payments, and would extend to its stockholders great facilities for the borrowing of money, upon simply a pledge of their certificates of stock. Defendant further alleged, that some short time after he had executed and delivered his bond and mortgage, he learned that all the inducements which had been held out to procure the execution of the said bond and mortgage, were not only groundless fictions, but the most gross and fraudulent misrepresentations; that, instead of being at that time in solvent circumstances, the said association was lately insolvent, and its insolvency was well known to the Directors who managed its business; that said Directors never intended to act in good faith, but resorted to this scheme as a means of saving from ruin those who had previously become stockholders. Defendant, Lanier, denied that he had any knowledge that the object in obtaining said bond and
114 mortgage was to obtain funds for banking purposes, and averred that if such was the object, it was carefully concealed from him, and he insisted that if funds were thus raised, it was, in fraud of the new stockholders, fraudulently misappropriated to the payment of losses which had been sustained by the old stockholders.

Lanier further presented in his answer as a defence, that there was no authority in the charter of oncorporation to secure stock, otherwise than by actual payment of cash, and as he never paid any cash, he insisted that he never was legally a stockholder in the said institution, and that the grant of the certificate of stock to him was in direct fraud of the charter. The answer further sets forth, that the loan promised to defendant at the time his bond and mortgage were executed, was to be in par funds, but that on demanding it, par funds were refused, and he was told that he could get nothing but notes of the Union Bank, which at the time were not worth more than forty or fifty cents in the dollar. He received this money and executed the notes hereinbefore mentioned, but asserted that it was with the understanding that he would be allowed to pay back the amount in funds of the like character. The answer alleges mismanagement and partiality on the part of the directors, in favor of the old stockholders, in fraud of the rights and to the great injury of the new stockholders, and concludes by setting up by way of demurrer to the bill, that the "State of Florida," who is set forth as one of the complainants, has no interest in the subject matter of the bill, either as successor to the liabilities of the late Territory of Florida for the guaranty referred to, or as assignee of defendant's bond and mortgage, or in any other capacity. That the Governor of the State had no authority to institute proceedings without the authority of the Legislature, and that the Territory of Florida had by repeated resolves of its legislative authority, declared all such guar- 115
antees as were given to this institution, to be wholly null and void.

The testimony of several witnesses establishes, that Burritt, the agent of the bank, did make generally, such representations as to the solvency of the bank, the benefits to the stockholders, &c., as are spoken of in the answer and that the mode by which the stock was obtained, was by the applicant for stock executing his bond and mortgage, and receiving a draft on New York, which draft was delivered to the bank in payment for the certificate of stock. There was no proof, however, that these representations were made to defendant. The testimony further establishes, that the funds usually loaned on a pledge of the certificate of stock, were Union Bank bills, which were at the time depreciated, or other money that was under par. Several of the witnesses testified, that the losses sustained by the company, were from engagements entered into prior to 1839, and that as far back as 1841, the company was insolvent. It was further testified that the inducements held out by Burritt, the agent, were that the stockholders would have the right to a loan in specie funds equal to three-fifths of the amount of their stock, and that, the dividends which they would receive would be equal to the interest on their loans, and finally, that the stockholders, by the payment of the amount, would relieve their property from the operation of the mortgage. One of the witnesses, who had been appointed an officer in the bank in November, 1839, testified, that the company paid specie for their notes in St. Augustine, until April or May, 1840. This witness further testified, that at the time the company opened its office in Tallahassee, viz: in the autumn of 1839, it was not embarrassed, but as near as he recollected, the effects of embarrassed circumstances first began to appear in the fall of 1840. The cause of embarrassment, was losses upon sales of land, and 116
failure to sell others, and also inability to collect debts; this cause had its origin, he thinks, subsequent to July, 1839. Another witness, who was appointed cashier, in October, 1839, stated that when the company opened its office in Tallahassee, at which place he acted, "it was not *seriously* embarrassed; it paid specie for its bills at that time," and that he found it embarrassed in the fall of 1840. He further stated, that the specific cause of the embarrassment was the non-payment by its debtors of demands due to it, but he could not say when the debts were contracted, the failure to pay which caused the embarrassment.

The defendant also introduced as evidence, a bill in chancery, filed by the complainant in 1848, against John H. Prentice and William S. Packer, in which the following allegation is made, viz: "that in or about the month of October, one thousand eight hundred and forty, and *for a long time previous thereto,* your orator has been and was greatly embarrassed in affairs, for want of money to meet its engagements, and in consequence of such embarrassment, your orator, in the *summer immediately preceding* said month of October, 1840, had suspended payments in specie, as well at their branch in the city of New York, as at their principal office in the city of Tallahassee, and had entirely or in a great measure, ceased from the transaction of business and from making new engagements."

The defendant also offered in evidence, the following circular, and extract from the minutes of the company:

Southern Life Insurance and Trust Company,
Branch, Apalachicola, May 13, 1839.

Sir:—The following information is communicated for the benefit of such as wish to subscribe to stock in this company:

Bonds and mortgages will be received upon good pro-

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117 ductive plantations, and negroes worked on the same, or upon good soil, with woodlands eligibly located in the Territory of Florida, to the amount of half the appraised cash value of such lands and negroes, and the stock of the company at par will be issued in exchange for such bonds and mortgages.

Preference will be given in case of excess of subscription, to such as offer security on improved productive plantations and negroes.

The mortgages to draw interest to the company at eight per cent. per annum, payable semi-annually on the first days of June and December, and the stock to draw dividends semi-annually to the holder.

The dividends heretofore have been five per cent. semi-annually. In connexion with the arrangements, the company made a loan upon the stock and note of the holder, to the amount of three-fifths (3-5ths) its par value, to run as long as the mortgages and bonds, interest on the same payable *semi-annually*. The mortgages can be paid in whole, or in part, (not less than five hundred dollars in any one payment,) at any time when an installment of interest shall be due, by giving six months previous notice to the company.

No mortgage will be taken or stock issued for a less sum than one thousand dollars; nor for parts of hundreds of dollars, above that sum. As the company desire to close up the subscription of one million for Middle and West Florida, with as little delay as possible, the first applicants whose property is unincumbered, or who can soonest perfect the title papers will obtain stock; certificates from the county clerks, and clerks of the Superior and county courts will in all cases be required, that the title is perfect in the mortgagor, and that there are no incumbrances on the prop-
118 erty of any description prior to the execution and record of the mortgage to the company.

Appraisers for the several counties will be furnished with appraisal blanks, and forms of bond and mortgage will be sent to most of the lawyers in Jackson, Gadsden, and Leon counties, on any of whom the applicants can call to have the paper made out, and with whom they can settle for the same. It is understood, that in all cases, the applicant is to pay the expenses of drawing and recording papers, and also the appraisal fee to the commissioner, which last item, by the charter of the company, is fixed at five dollars. A certificate according to form, from one commissioner, is sufficient in each case. The company will not take mortgages on pine land, except in very moderate quantities, connected with good hard timber, and hammock land, suitable to the growth of cotton; nor generally on negroes, unless they are located on plantations. Samuel L. Burritt, Esq., will remain in Tallahassee during June, July, and August, to attend applications from Jackson, Gadsden, Leon, Jefferson, Madison, and Columbia counties, and those who wish stock are invited to make early application to him, and that place personally, or by letter. In cases where the loan of money is perfected before, it will be made during the coming winter, the stock meanwhile is drawing to the holder, according to the dividends heretofore, two per cent. per annum, more than the mortgages draw interest to the company.

When the cash loan is made on the hypothecation of stock, the stockholder or mortgagers still draw dividends. The names of commissioners to make valuation, will be published in the Tallahassee papers.

The readiest way for applicants to complete the business, is to call on some lawyer in the county, where such applicant resides, who will attend to making out the bonds and mortgages, and forwarding them to Mr. Burritt, with de- 119
ductions of titles, clerk's certificates, &c., and receive the certificate of stock; and such attorneys as intend to aid applicants in obtaining stock, are invited to apply to the undersigned at Apalachicola, or to Mr. Burritt, at Tallahassee, for such further information as they may need.

A relinquishment of dower on the part of the wife, must in all cases accompany the mortgage.

Respectfully your obedient serv't.

State of Florida, Leon county:

I, Oscar A. Myers, Clerk of the Circuit Court for the county aforesaid, do hereby certify that the foregoing is a true copy of the original, on file in my office.

Witness my hand and the seal of said Court, this 24th day of August, A. D. 1850, and of the Inde-
[L.S.] pendence of the United States the 75th year.

OSCAR A. MYERS, *Clerk*,
By HUGH ARCHER, *D. C.*

Extract from the Minutes at St. Augustine.

"At a meeting of the Board February 8th, 1839, present, L. Clark, President, And. Anderson, Thomas Douglass, J. L. Smith, A. M. Reid, it was ordered that the Southern Life Insurance and Trust Company, having had a portion of their stock surrendered to them, in pursuance of an amendment to their charter, passed in February, 1838, are prepared to receive application for their stock at par, on the pledge of bonds and mortgages upon improved unincumbered real and personal estate, held in severalty, in Florida, to the amount of one million of dollars, at their office at Apalachicola. A loan for as long a period as the mortgage has to run, will be made upon stock, to the amount of 3-5 (three-fifths) its par value. So soon as arrangements can be made, and it can be ascertained what amount is wanted, one half the amount of 1.000,000 will be appropriated to Middle and one half to West Florida. No 120
individual will be allowed to have more than fifteen thousand dollars of stock. Proposals must be accompanied by a certificate of approval from duly appointed Commissioners, and also by evidence of title."

The court below decreed, that the bond and mortgage executed by Lanier were authorized by, and in violation of the charter of the company, and were without any legal or valid consideration, and therefore, null and void; also that the promissory notes mentioned constituted no lien on the property specified in the mortgage, so as to entitle the complainant to a decree of foreclosure, and that the bill of complaint be dismissed.

On petition filed, an order of severance from its co-complainant, for the purpose of an appeal, was granted to the Southern Life Insurance and Trust Company, and an appeal was accordingly taken from the decree of the Court below.

James A. Archer opened for the appellant.

Charles H. DuPont for appellee.

I. The first point which we make, is one which is raised in the answer, and which is, under our statute, insisted upon as if it had been raised by demurrer.

"The State of Florida," which is joined as a co-plaintiff with the "Southern Life Insurance and Trust Company," it is clear, from the face of the bill, has no interest in the suit, and the bill should therefore be dismissed.

1. The objection is good on general demurrer. 4 Russell En. Ch. Rep., 225, King of Spain vs. Machado; 4 Russell En. Ch. Rep., 242, Cuff vs. Platell; 4 Russell En. Ch. Rep., 244, Makepeace vs. Haythorne; 2 Simons En. Ch.

Rep., 237, Delondre vs. Shaw; 5 Paige R., 336, Clarkson vs. DePeyster; 4 Paige R., 510, Watertown vs. Cowen. 121

2. Or it may be set up and insisted upon in the answer; and in such case it is a ground for dismissing the bill. Mitf. Ch. Plead., [5 Lond. Ed.,] 400-1, citing 4 Law Journal, (A. S.,) 174, Goodyear vs. Robinson; 4 Paige R., 510, Watertown vs. Cowen.

II. Although the execution and delivery of the bond and mortgage exhibited with complainant's bill is admitted, yet the consideration thereof is *impeached for "fraud" and "illegality." "Fraud"* in the erroneous and false representations of the condition of the Company and the value of its shares of stock; and *"illegality"* in that the Company was not authorized by its charter to receive subscriptions to or make sale of shares of stock upon *mortgage of property,* or in any other mode than by the payment of *money,* and the transaction is thus illegal and void.

1. The transaction is void for *"illegality."*

No stock passed by the transaction, even if it were such as it was represented to be. It was in violation of the spirit, true intent and meaning, as well as against the letter of the charter of the incorporation.

"Whenever the *consideration* which is the ground of the "promise, or the *promise* which is the effect or conse-"quence of the consideration, is unlawful, the whole con-"tract is void." 2 Caine's R., 147, Belding vs. Pitkin.

How was stock to be acquired, in accordance with the provisions of the charter of this Company?

The 12th section of the charter provides that the stockholders shall, at the time of subscribing, pay *"ten dollars* on each share by him subscribed;" in six months thereafter *ten dollars* more, and the residue within three years. Vide Thomp. Dig., 313.

It is true that *"specie"* is not actually prescribed in *terms,* but the term *"ten dollars"* can have no other legal signification. If there were any doubt as to the *intention* of the Legislature in regard to this point, this doubt is dissipated by reference to the 11th section of the charter, which provides for the appointment by the Governor of a Commissioner, who is to examine into the condition of the Company, to ascertain if $200,000 in *"specie,"* or its *"equivalent,"* has been paid in; to examine the officers, on oath, that it has been paid in, as the first instalment of capital, and for no other purpose, &c., and on his report, the Governor is to issue his proclamation, &c. Vide Thomp. Dig., 313. 122

And section 19 authorizes the issue of bills and notes only to the amount of capital actually paid in. Vide Thomp. Dig., 314.

The 12th section further provides that if any shares of stock be *forfeited,* they shall be re-issued in the manner prescribed in the 9th section, which authorizes books of subscription to be opened, under the superintendence of Commissioners.

The amendatory act of 1838 provides for the surrender of shares and the consolidation of the amounts paid thereon, on the shares retained by stockholders, and the re-issue of the shares so surrendered, but introduces no *"new rule"* as to the mode of paying for the shares of stock to be re-issued; consequently, the *old rule* in regard to original subscriptions, or re-issue of *forfeited* stock, as prescribed by the 9th section, must prevail.

If the amendment of 1838, has, in its operation abolished the *old rule* for the security or purchase of stock, then any *new rule* which may be applied to the security or purchase of the *"re-issued shares"* must depend for its authority not upon any provision of the charter, but wholly upon the arbitrary and interested *will of the corporators.*

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If the amendment of 1838 has *impliedly,* (for it certainly has not *expressly,*) abolished the *old rule* in regard to the mode of paying for stock, why may not the argument apply with equal force to *every* other provision of the *original* charter? It is very certain that the application of the *new mode* of securing stock by bond and mortgage practically removes the restriction upon the amount of bills and notes to be issued, and very unwisely dispenses with the wholesome guaranty for a safe and sound circulating medium, which is provided for in the 11th section. 123

In 1839, the company appointed Samuel L. Burritt, Esq., an agent to proceed to Middle and West Florida, "to obtain mortgages for stock—to fill up stock by receiving bonds, secured by mortgages, upon real and personal property."

Under this agency, the 100 shares of stock were granted to the defendant, Augustus H. Lanier, and the bond and mortgage in question given therefor.

We contend that the corporation was not authorized, by its charter, to receive the bond and mortgage upon such consideration, and no stock or shares of stock, passed to the defendant, A. H. Lanier. 21 Wend. R., 219, Crooker vs. Crane; 5 Sm. & Mar. R., 448. King vs. Elliot; 5 Sm. & Mar. R., 539, Hayne vs. Beauchamp; 15 Maine R., 428, Merrill vs. Ball; 4 Ala. R., (N. S.) 559, Smith vs. Al. Life In. & Trust Co.; 3 Strobhart R., 245, Charlotte & S. C. R. R. Co. vs. Blakely.

Where a corporation relies upon a grant of power from the Legislature to do an act, it is as much restricted to the mode prescribed by the Statute for its exercise as to the thing allowed to be done. 5 Barb. R., 649, Farmer's Loan & Trust Co. vs. Carroll; 2 Strobh. R., 245, Charlotte & S. C. R. R. Co. vs. Blakely; 1 Peter's Con. R., 375, Head vs. In. Co.; 7 Cowan R., 465, Dawson vs North. In. Co.

The transaction contravenes the policy of the statute. 124 The policy of requiring capital to be paid in, is very correctly stated by Ch. J. Sharkey, in 5 Sm. & Mar. R., 444-445. So contravening the policy, it is an imposition on the public—it is iniquitous, therefore void.

Every contract, the consideration of which is tainted with illegality, is void. Illegality exists when the act is either expressly prohibited, or when the prohibition is implied from the nature and object of the statute. Story on Con., 104, §162; Story on Prom. Notes, 204, §189; 1 Story Eq. Ju., §296; 2 Wilson's R. 347.

It will not do to urge that the company did not intend to violate the law. Parties must be presumed to intend the natural and ordinary consequences of their acts. 9 R. & C. R., 643, Haire vs. Wilson; 5 Cowan R., 573, Mackie vs. Cairnes.

Where the fact of an actual contravention of law is established, no innocence of intent, however perfect, can avert the legal penalty. The Hoop, 1 Robs. Abdm., 216.

The law says that where a man does an act to defraud the intention of the legislature, he shall suffer all the inconveniences of his act. 6 Vesey, Jr. R., 747, Curtis vs. Perry.

In Collins vs. Blantern, L. C. J. Wilmot says, the reason why such contracts are void, is for the public good—you shall not stipulate for iniquity. 1 Smith Lead. Cases, 154.

There is something monstrous in the proposition, that a court of law will carry into effect a contract founded upon a breech of law. It is encouraging disobedience and giving to disloyalty its unhallowed fruits. 16 John. R., 486, Griswold vs. Waddington.

See also 2 Peter's R. 527, Bank U. S. vs. Owen.

Chancellor Kent, in his Commentaries, has summed up

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the law on this subject, with great force and beauty of language. "The consideration," says he, "must not only be "valuable, but it must be a lawful consideration, and not "repugnant to law or *sound policy*, or good morals; *ex "turpi contractu actio non oritur*, and no person even so "far back as the feudal ages, was permitted by law to stip- "ulate for iniquity," &c., &c. 2 Kent's Com. 466.

And again, "the courts of justice will allow the objec- "tion that the consideration of the contract was immoral "or illegal, to be made, even by the guilty party to the "contract, for the allowance is not for the sake of the par- "ty who raises the objection, but is grounded on general "principles of policy."

"A *particeps criminis* has been held to be entitled in "equity *on his own application*, to relief against his own "contract, when the contract was illegal, or against the "policy of the law, and relief became necessary to prevent "injury to others. It was no objection, that the plaintiff "himself was a party to the illegal transaction." Vide 2 Kent's Com., 467, citing numerous cases.

A similar doctrine is sustained by the following authorities: Story on Con., 103, § 159 to 162; ib., 140, §218 to 219; ib., Prom. Notes, 214; 2 Will. R., 347, Collins vs. Blanton; 2 Caines, R., 149; Belden vs. Pitkin; 12 John. R., 1 to 14, Yates vs. Foot.

If it be contended that in this case both parties are implicated, the mortgagor as well as the mortgagee, and both are equally culpable, granted; and then we invoke the maxim *"in pari delicto potior est conditio defendentis."*

NOTE.—It was contended on the trial below, that the defendant had *ratified* and *confirmed* and waived the fraud and illegality. As to the waiver of the fraud, there is no evidence in the record, and as to the ratification and confirmation of the illegality, it is not susceptible of ratifica-
126 tion or confirmation. Vide Story's Eq. Jur., §306, where the doctrine is fully laid down.

III. *As to the fraud and misrepresentation.*

Whoever would seek admission into a Court of Equity, must come with clean hands. A Court of Equity will never interfere in opposition to conscience or good faith. 5 How. S. C. R., Creath vs. Sims; Buller's N. P., 235; Greenleaf, §212.

The parties, i. e., the company by its agent, and the defendant, met the first for the purpose of selling shares in the stock of the company; the latter for the purpose of buying said shares. The *value* of the shares was dependent on the condition of the company as to its solvency, freedom from embarrassment, and prosperous state of its business, and consequently the representations as to these matters were *material* to the bargain.

The solvency of the company was a *material fact*, and whether the representation was known to be false to the vendor, or was made without knowing whether it was true or false, is wholly immaterial, for the affirmation of what one does not know to be true, is equally unjustifiable as the affirmation of what is known to be positively false.

Even if a party by *mistake* misrepresents a material fact, it is equally conclusive; for it operates as a *surprise* and *imposition* on the other party. Vide the doctrine fully laid down in 1 Story Eq. Jur., §193 *et sequiter;* 2 Kent's Com., 482, *et seq.;* 1 Story's Rep., 260, Daniel vs. Mitchell; 2 ib., 732, Doggett vs. Emmerson; 1 Woodb. & M. R., 92, Warner vs. Daniel; ib., 205, Doggett vs. Emmerson.

The condition of the company, and therefore the *value* of the stock was not only a *material fact*, but was a matter in which we are bound to believe the defendant did put a *trust* and *confidence* in the representations of the officers and agents of the company. The defendant could presume 127
that the condition of the company was better known to the officers of the company than to any one else. Certainly the defendant had not an equal opportunity with them of knowing the fact—he was bound to rely on their representations. 1 Story's Eq. Jur., § 197 *et seq.;* ib. § 202.

The defendant was misled, and to his prejudice. 1 Story's Eq. Jur., § 202-203.

The company cannot say that the agent was unauthorized to make the representations. Even in the absence of evidence of previous *express* authority, when the company adopt the fruit of their agent's negotiations, to-wit: the bond and mortgage, they are bound to take the same *cum onere*, with his representations and acts. 13 N. Hamp. R., 149, Hovey vs. Blanchard; 3 Story's R., 700-735-6, Doggett vs. Emmerson.

But there is in the record evidence of *previous express authority* given to Samuel L. Burritt, the agent. Vide printed circular.

The same circular which purports to have been issued by the company contains representations as to the business of the company, and especially as to the dividends which might be expected, and the advantage of borrowing money as to interest, &c.

These are the representations—what the reality?

The office is opened in Tallahassee in 1840. Almost immediately it is confessedly embarrassed, and finally insolvent.

See the bill filed by the company under its corporate seal against Packer, Prentiss & Co.

If the company was solvent and doing a prosperous business in 1839, whence this irremediable insolvency and ruin which so rapidly supervened?

This fact throws such suspicion on the truth and fairness of the representations which were made to the defendant 128
to induce him to execute the bond and mortgage, as to impose upon the company the *onus* of proving the good faith of the transaction.

We have not had such access to the books and transactions of the company as will enable us to demonstrate what the bank has itself asserted, viz: that in the year 1840 its stock "was not worth $20 per share in the market, if intrinsically so much." Vide Bill vs. Packer, Prentiss & Co.

A reference to the master with the books and the machinery which a Court of Equity possesses for eliciting the truth, would enable us satisfactorily to demonstrate the problem of the value of the stock of this company at the date of the execution of the bond and mortgage, set forth in complainant's bill of complaint.,

It may be referred to as a matter of history, that this company was one which owed its birth to the unsound and inflated condition of trade and monetary concerns at the time of its creation. The period of 1836-6-7, in the Northern cities and in Europe, and which in our unfortunate Territory continued to a later period, say 1840, will long be remembered.

The company had for its first shareholders citizens and residents of the Northern States, principally of New York. Its first president and cashier, indeed the successive presidents and cashiers and other officers, until its hopeless insolvency was firmly established by assignments of the entire assets, were from the Northern States.

IV. The company commenced operations in 1835 or 1836 at St. Augustine, in East Florida, with, it is presumed, the 10 per cent. required by the charter, paid in. At the session of the legislature in 1836, they apply to have the next instalment postponed one year, which is allowed. Vide Thomp. Dig., 316.

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In 1837, they apply for and are allowed a further postponement of *two* years. This is the period of the general commercial crash. Ibid.

In 1838 they apply for and are allowed to *"consolidate"* their stock, that is to say, the shareholders are permitted to *"surrender" nine* shares in every *ten,* and retain *one* as *paid in full.* Vide Thomp. Dig., 317.

Was there a reason for this desire to *"surrender"* stock, other than the very generous wish to permit the citizens of Middle and West Florida to participate in the *"semi-annual dividends of five per cent.,"* referred to in the printed circular? It requires no very great astuteness of intellect to penetrate the real motive of these Wall street speculators.

By the charter, the shareholders having subscribed for a certain number of shares, they were liable and bound to pay the remaining *ninety* per cent. if necessary to meet the obligations of the company, and might be coerced so to do by creditors. 3 Mason's C. C. R., 308, Wood vs. Dummer; 19 Johns. R., 474, Slee vs. Bloom; 16 Conn., R., 593, Ward vs. Griswoldville Co.; George R., 486, Hightower vs. Thornton; Angell & Ames on Corp.

At that period of bank insolvencies and other commercial derangements, the possession of the shares was *onerous,* and it was no doubt thought a brillant idea to escape the responsibility which menaced them, by obtaining the legislative permission to "consolidate" their payment of 10 per cent. upon a few shares, and "surrender" the balance—thus they hoped to wipe out all *"responsibility"* for any thing beyond the amount paid—they were willing to lose that, but nothing more.

There was probably a doubt about the success of this scheme as it stood, whether it was competent for the legislature thus to deprive the creditors of the bank of a fund which the law had raised for their satisfaction. An invasion of vested rights might have been thus made; but if the bank could *re-issue* the shares so "surrendered," and obtain either money or mortgages of property from the *new* stockholders, they would escape responsibility; or at least have assistance in bearing the loss of the previous operations of the company, and in paying the existing creitors.

Do not the circumstances connected with this affair warrant the conclusion above stated, viz: that the only motive which induced the company to ask for permission to surrender and re-issue their capital stock, was to escape the personal responsibility which had been incurred by the original stockholders, by shifting it to the shoulders of the unsuspecting farmers of Middle and West Florida?

The condition of the company at this time is represented as highly prosperous.—the stock yielding a dividend of 10 per cent. per annum, with flattering prospects of increasing prosperity. Nor is it reasonable to expect that holders of stock in a prosperous institution, yielding so large a dividend, shall, without consideration, surrender 9-10ths of their shares, in order that strangers may come in and participate in the profits of the enterprise, after all the trouble and risk consequent upon the organization, shall have been passed.

But it may be asked with some show of plausibility, why did the farmers of Middle Florida permit themselves to be deceived and deluded by such a flimsy exhibition of disinterested generosity? The answer is obvious—it is because they were farmers, and their deceivers the *wily* stockjobbers of Wall street.

We think that the allegation contained in the answer of defendant is fully sustained by the facts and circumstances connected with the execution and delivery of the bond and mortgage, viz: that the primary object intended to be obtained by the "surrender," "consolidation," and "re-issue," of the shares of the stock, was to entrap the unwary agriculturists of Middle and West Florida into a subscription for the stock proposed to be re-issued, and thereby to shield from pecuniary *loss* the original stockholders of the said company by saddling their responsibilities upon such citizens as might be thus imposed upon.

This is not the case of a *creditor* of the bank suing a stockholder for *contribution* to pay his debt. What assurance or guaranty have the court that the *creditors* of this bank will be benefitted by the proceeds of a decree in this cause?

M. L. Long, on the same side.

W. G. M. Davis, for appellant.

The bill was dismissed in the court below on the ground assumed in the answer, that the bond was illegal, it being given in violation of the act incorporating the appellant.

The proof in the case shows that the bond was given in consideration of a draft drawn by the Southern Life insurance and Trust Company, on its agents in New York, which draft was afterwards taken by the company in payment of one hundred shares of stock. It is not material to inquire whether any difference exists between a bond given directly for stock, or one given for a draft or note, which is afterwards discounted, and the proceeds applied to the payment for stock, and therefore I do not particularly notice the evidence for the purpose of discussing that question, although the Supreme Court of Mississippi, in the case relied on by the appellee—Hayne vs Beauchamp, 5 Sme. and Marshall, 515—found an important distinction between the two modes of paying for stock, which influenced the decision in that case. If this court, however, should give such weight to the decision, as it received in the court below, then I ask that the facts in the record in relation to the giving the draft for the bond, the subsequent discount by the bank, and the application of the proceeds to pay for the stock, all of which is particularly described in the deposition of Hammond, be compared with the facts in the case of Hayne vs. Beauchamp, to see whether there is the slightest difference in effect between the two transactions. If I could assent to the reasoning of the majority of the court in Hayne vs. Beauchamp, and did I believe that court would yield *its* assent to the position there taken, I would not hesitate to risk our case upon the entire similarity in point of legal effect, to that, and confine my argument entirely to the facts necessary to establish such identity; but confident as I am, that this court will, as other courts have, deem the dissenting opinion of Mr. Justice Clayton, in Hayne vs. Beauchamp, more satisfactory, as putting the decision on the true ground, I shall make no argument upon the evidence relating to the discount of the draft, and the check given for the proceeds in payment for the stock.

The first case decided in this country, in which any such doctrine as that put forth by the court below, was ever declared, was that of Jenkins vs. the Union Turnpike Company, decided in the Court of Errors of the State of New York, First Caine's Cases in Error, 85. To this case all subsequent decisions of a similar character have referred for authority. It then becomes material to inquire what were the reasons given for that decision, in order to see whether they apply to this case.

The following passage from the opinion of Chancellor Lansing shows the grounds upon which the Court of Errors rested its judgment:

"The acts to be performed by the Commissioners were

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133 merely preparatory to its creation. To give effect to their acts, their power must be strictly pursued. They had no discretion or latitude of action—their line of conduct was marked with the utmost precision. They were directed to exact from the persons who were to be admitted members of the corporation, both subscription and payment, as a condition precedent to their admission. If they omitted either to subscribe or pay, they did not come within the terms of admission. If so, the bare act of subscription was wholly nugatory. The subscribers who were to meet, could only constitute themselves such, within the intent of the statute, by a compliance with the terms prescribed by it. When the corporation was organized, the Directors might dispense with the exaction of the first payment."

"The power of the Commissioners was limited to a certain mode of receiving subscriptions. The power was to be strictly pursued, and they could not deviate from the requirements of the statute, and unless the requirements of the statute were pursued, there was no corporation created, and consequently no stock secured. If the contract is sought to be viewed as a promise to pay for the stock by the subscriber, in consideration of a promise to deliver the stock by the corporation, the answer is, that the contract of the subscriber is not binding, because there was no corporation in existence to be bound by the alleged agreement to deliver the stock, and consequently no consideration for the promise to pay for the subscription."

In all the subsequent cases, when similar questions arose in New York, the courts invariably held that the case in 1st Caine, just quoted, was decided upon the ground stated by Lansing, Ch. See the cases of Goshen and Minnisink Turnpike Company vs. Hustin, 9 John. R., 218; Highland Turnpike Company vs. McKean, 10 John R.,
134 154; Dutchess Manufacturing Company vs. Davis, 14 John. R., 238.

In the first case, the court expressly limit the application of the case in 1 Caine to such subscriptions for stock as are made to corporations not *in essee*. The same distinction runs through all the New York cases.

The Supreme Court of Mississippi, in the case of Lewis vs. Roberts, in 558 of 13 Smedes and Marshall, in commenting upon the case of Hayne vs. Beauchamp, 5 ibid., 515, expressly confine that case to subscriptions for the first instalment for stock, and hold as they held in King vs. Elliott, 5 Smedes and Marshall, 428, that a note given for stock bought of a corporation *in essee*, was valid.

Having thus shown that the decisions relied on to support the decree, apply only to subscriptions made to corporations about to be formed, and that the reasons assigned for holding notes given for such subscriptions void, are the want of power, in the officer, to dispense with the requisition of the law, and the consequent want of consideration, &c., it seems to me that I have only to advert to the facts in this case which show a *corporation already formed,* and a directory, competent to represent it, to convince the court of the inapplicability of the cases I have been commenting upon to the one under discussion.

But I proceed to do more perhaps than is requisite, and to prove that the weight of argument and authority is opposed *in toto* to the doctrine of those cases, and that they should not receive the approbation of this court, because they are unsound in law, and lead to consequences not to be furthered by courts of justice.

The question now before this court, has been examined and decided in Vermont, in the case of the Central Railroad Company vs. Clayes, 21 Ver. R., 31.

The defence set up was, that the note was void, &c. The Court says: "The note in suit was given for the first five 135
dollars payable on each share, which, by the terms of the charter of incorporation, was to be paid to the commissioners at the time of subscription. This, it is said, cannot constitute a sufficient consideration to sustain the note, but we think otherwise."

By the terms of the charter, each subscriber becomes a stockholder and a member of the company, and the interest thereby acquired is a sufficient consideration to support an action for the amount subscribed against the person subscribing, upon an express promise, &c. The court intimates an opinion that had the corporation been a bank, a different decision might have been made, and the rule in New York might have been adopted—but as this is but an intimation of an opinion it decides nothing—I quote the case to show that the New York doctrine was disapproved.

The same question has arisen in Alabama, and has been before the court in several cases, but was not decided until it came up in Selma and Tennessee Railroad vs. Rountree, 7 Ala. R., 670, where the cases in New York are reviewed. The Supreme Court of Alabama refuses its concurrence with the doctrine of the Court of Errors of New York, as declared in Union T. Company vs. Jenkins, in 1 Caine's Cases, 85, but approves and adopts the decision of the Supreme Court of that State in the same case. The Alabama Supreme Court also indicates an opinion that a difference exists between a monied corporation and a Railroad Company, and refers to the charter of two of their own banks. But an examination of them will show that the payment of the first instalment is made a condition precedent to their existence. In such case, no doubt, were no money paid there would be no corporation.

The same question was raised and decided in Ohio, in the case of Henry, *et al.* vs. Vamilla, and A. R. R. Com- 136
pany, 17 Ohio, 190. In this case the defence set up was the failure to pay in specie the first instalment, and a contract to pay in goods. The court says: "Although the stockholders were required to pay at the time of subscribing, five dollars on each share subscribed, still in the opinion of the court, the omission to pay that sum does not release them from their liability to pay up their subscription." The case in New York and similar ones in Pennsylvania, were cited by the defendants.

The Supreme Court of Massachusetts have also had under their consideration, the question, in the case of Chester Glass Company vs. Dewey, 16 Mass., 94. They held in opposition to the Court of Errors of New York, that a subscription similar to that in Union T. Company vs. Jenkins, was valid.

In Minor vs. Mechanic's Bank of Alexandria, 1 Peters, 46, a defence offered to be set up that the mode in which the stock was allotted was in conflict with the charter, was not deemed sufficient by the court to release the party from his subscription.

I have thus far treated the subject in an abstract point of view, and without any reference to the peculiar features of the charter of the Southern Life Insurance and Trust Company. I now wish to show that the contract between the subscriber for stock and the company, was a compliance in effect with the spirit of the charter.

By the sixth section of the charter, the company was required to loan its capital on bond and mortgage, but by the amendatory act of 1838, section 4, permission was given to use two-fifths for banking purposes.

It must be observed, that this company was not, in its original creation, purposed to be either wholly or for the most part, a banking concern. The legislature did not

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137 evince any desire to have the capital stock all paid into the hands of the directors, there to remain, but on the contrary, expressly required the directors *not* to retain it on hand. Bonds and mortgages, and not specie, was what the legislature designed should constitute the fund or indemnity against loss to which depositors and others must trust. This being made manifest, the policy which the defence sets up and assumes to have been violated, never existed at all under the first charter, but by express enactment—not vague inference—the Legislature forbid the accumulation of the capital in specie, or its representation. Hence, all the cases quoted which hold the subscription for stock in a bank not paid in specie to be void, because of the policy asserted to exist in relation to banks generally, to wit: the payment of specie for stock, did not apply to this company in its original organization. The Supreme Court of Mississippi, in the case of Hayne vs. Beauchamp, and the court below in this case, hold that the legislature, in requiring that specie alone should be paid for stock, manifested an intention to provide that the bank should have its capital paid in and to be in hand in specie, to provide a fund for the redemption of its circulation. If I am correct in the view which I have taken, that the legislature in the creation of this corporation, manifested the opposite intention, then this case differs *toto coelo* from those relied on by the other side, and the reasons given in those cases, and those advanced by the Judge who decided this case, are inapplicable, and therefore do not support the decision.

Nor does the fact that the Legislature, in the amendatory act of 1838, section 4, gave the *power* to use two-fifths of their capital for banking, change the legal aspect of the contract. If it had any application which could bring it within the reason of the cases in New York and Mississip-
138 pi, it could only do so as to the two-fifths, and no more. But the legislature does not peremptorily repeal the former law and absolutely require two-fifths to be used for banking; it gives the company the privilege of so doing, to be used or not, at the option of the directors—and if they see fit not to do so, they could act in conformity with the former requirements of the charter.

The legislature then, having not only permitted but required the capital paid in to be borrowed on bond and mortgage, having by express provision sanctioned such an investment of it, no act of the stockholders, or of the directors, not conflicting with the law, can be pronounced in valid—but any act which, in its operation and legal effect, secures the end desired to be attained, and effects the intention, is valid for all purposes, upon the most obvious principles of reason and common sense.

One of the fixed rules of construction in relation to corporations, is: "that all acts of incorporation are held to be directory unless they expressly avoid all security taken other than that prescribed, and that although neglect of this kind may be culpable on the part of directors of the company, the security taken may be enforced against him who gave it." Angell & Ames, Corp., 190.

In Little vs. O'Brien, 9 Mass., 423, the case was this—"the charter required the capital should be invested in certain stocks; whereas, instead, the company took the notes of the stockholders with collateral security. It was said by the court, that whether for this misbehavior of the corporation the government might not serve their franchises upon due process, was a question not before them, but that it did not lie in the mouth of a stockholder for this cause to avoid his contract, which, as between him and the company, was made upon a sufficient consideration."

The same principal is maintained in the case of Chester 139
Glass Co. vs. Dewey, before cited.

In the case of the Bank vs. Hammond, 1 Richardson's Law Rep., 288, which was a suit upon a note for a large sum, and secured by a different kind of security than that prescribed by the charter, the Supreme Court say: "It is, however, too strict to insist that a power which is contained in a grant, and which, *in various ways*, may be *pertinent* to the *purposes* of a corporation, may be restricted to a particular *form* of directions for its exercise in *that form*."

In Bates vs. Hines, 2 Ala., Rep., 451, in which a question arose as to the validity of a contract made with a bank, and said to have been in violation of certain provisions of its charter—the court say: "Be the rule of construction in this class of cases ever so strict, it must be admitted that in most if not every act of incorporation, while certain rules are prescribed which cannot be transcended, and the observance of which are essential to the validity of its contracts, there are others which are merely directory to the officers of the corporation, and the observance of which is not necessary to the validity of contracts made in reference to them." The following cases are cited by the court to sustain this proposition:

Commissioners, &c., vs. Leckie, 6 S. & R., 166; Bank N. Liberties vs. Cresson, 12 Ibid., 306; Bank U. S. vs. Dandridge, 12 Wheat., 64; Bulkly vs. Fishing Co., 2 Conn., 252.

In the case of Bates vs. Hines, just referred to, the court says: "The reason of the restraint was to guard the Bank against loss." "It was doubtless expected by the legislature that its commands would be obeyed by its agents, but *it is impossible to suppose* that it was *ever contemplated* as the result of a *regulation* intended to *protect the public* against loss, that it by collusion with the directors (or as 140
was doubtless the fact in this case, an honest mistake on the part of the directors) an individual could succeed in getting, on a bill of exchange, a larger sum than the charter allowed, that the *same regulation* would *protect him* against *paying* it. Whatever may be the liability of the directors in such a case, the *borrower must return the money*. Any other construction would place the capital of the bank at the mercy of a venal directory and profligate borrower."

To the same effect is the case of Bond vs. Central Bank, 2 Kelly, 92. See also 9 Ala., 853.

By the sixth section of the original charter of the bank, it was required that its capital stock should be invested in bond and mortgage, as before remarked. In the transaction with Lanier, the corporation carried out the intention but not in the particular mode which the defence insistss should have been adopted. It is contended that Lanier should have paid specie for his stock; but of course it is not denied but that had he done so, the bank could have immediately loaned him the very money he paid in, provided he furnished the kind of security the charter stipulated would be obtained. I think the counsel for the defence will find it difficult to prove that taking the bond and mortgage for the stock in the first instance, essentially varied the effect of the transaction, or that such mode of investing the capital militated in any way whatever against the end desired to be secured by the sixth section of the first act of incorporation; as to the mode in which the object was effected, the provisions in the charter are clearly directory in their character, and the failure to pursue the order of proceeding pointed out in the law, no more renders the acts done illegal and void, than the more essential deviations which existed in the cases just cited in Alabama,

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141 South Carolina, Georgia, Massachusetts, &c. In those cases, the acts done were in contravention of the charter. In this case, the sale of the stock and the security taken, fully realized the intention of the legislature. No law was violated—no policy frustrated, no one was injured.

But independent of the reason which I have adduced to show that the act was valid and in conformity with the spirit of the charter of the corporation, I beg leave further to refer to the acts of incorporation and the amendatory laws, for the purpose of showing, as I think I can do, beyond a reasonable doubt, that the directions in the 9th, 10th, 11th, and 12th sections of the first act of incorporation do not apply to the sale of the surrendered stock—conceding for the sake of argument, all the conclusions deduced from the provisions of said sections by the defendant's counsel.

The sections referred to, provide for Commissioners to receive subscription—that the book shall be kept open at particular places, and that when the stock is subscribed for, and a certain sum paid in cash, that the Governor shall issue his proclamation, &c. These are the usual restrictions and limitations imposed by the legislature in the creation of a monied corporation. They provide for the mode and manner of the *creation,* and when these conditions precedent are complied with, and proclamation made, the corporation exists.

It must be admitted that the third section of the act of 1838, in giving to the company the right to re-issue the surrendered stock, is entirely silent as to the mode and manner in which the same shall be done. The grant of the power to accept the surrender of the shares subscribed and to re-issue them, is unlimited and unrestrictive. But the defendant contends that the limitations and restrictions contained in the 9th, 10th, 11th, and 12th sections of the
142 original act, are by implication, enjoined in the amendment. It is an unusual doctrine, that a grant, in itself free and unfettered, should receive a construction affixing restrictions of any kind, but such position is the more untenable when sought to be sustained by reference to a previous act imposing such restriction—which act is not prospective as to any amendments which may be made, and which by its terms and context evidently was intended to have relation to acts passed and performed, and which restraining act is not referred to in the grant—but particularly when, as in this case, the restrictions and limitations of the first law could not be made to apply to the exercise of granted power, without supposing that the legislature demanded that to be done which would be manifestly absurd as well as inconsistent and impossible.

If any part of the directions contained in the 9th, 10th, 11th, and 12th sections of the original charter apply to the grant made in the third section of the amended act of incorporation of 1838, and are conditions upon which alone the grant can be enjoyed, then every condition and limitation in the sections cited applies. I know of no rule by which a part can be referred to and the balance rejected. If this be true, I ask the court to consider the absurdities which would result should such reasoning be carried out. It would suppose the legislature to have required that the corporation which was in existence, with a large capital paid in, and in the pursuit of its lawful business, should go through the same initiatory steps which had been provided for its formation, leaving nothing to the discretion of its directors or the judgment of its stockholders, whose interests would be most affected by any false step. Is it within the bounds of reason, that the legislature should have required that new books should be opened, commissioners appointed, and after a certain time, and on the payment of a certain sum, proclamation made by the Gover- 143
nor, &c., &c., before the corporation could sell a share of its stock? Where is any reference to the appointment of such commissioners, or to the proclamation by the Governor? Or what reason is there to suppose that any such requirement was intended? The counsel for defence will say with me, I think, that there is no ground to contend that any such proceedings were enjoined. Where, then, I ask, do they find the rule that is to govern the court in deciding which of the limitations and restrictions in the original charter is applicable, and which is not? The argument used on the other side, if it should prevail, would launch the court into a sea of conjecture, without any fixed rule to govern it. Again—the 12th section of the original act provides that no more than ten per cent. shall be required at the time of subscribing, and that additional instalments may be called for within fixed periods, and that the whole amount shall be paid in a certain time. Now, suppose this to be applicable to the re-issued stock. If such had been the case, the persons subscribing for it would be entitled (by paying ten per cent.,) to enjoy the same rights and privileges, and to the same extent, as the same were had and possessed by the stockholders who had paid for their stock in cash in full. Is it to be supposed that such gross inequality was ever contemplated by the Legislature?

The slightest examination of the two acts referred to will suffice to convince the understanding of any man of common sense that they are inconsistent one with the other, and have no material dependence; and even if the first act had been referred to by the last, no court could have reconciled them—still less will a court find a reference where none can exist, or construe a grant so as to subject it to limitations utterly inapplicable, upon bare surmise of an intention, without any expression in the law making the 144
grant referring to the act containing the limitation. I maintain that no power exists by which such a construction can be made. The mere belief that the Legislature favored such a policy as that contended for, because they had provided certain limitations in the first grant, would not justify the court in imposing similar limitations upon the second, when the Legislature itself had not so provided. To do so, would be to materially alter the contract, and render it less valuable, and amount to a violation of its obligation.

If, then, the provisions of the first act are inapplicable to the sale of the surrendered stock, or even if the whole, or any part, is applicable, yet, if the court should agree with me, that by the amended act giving power to the corporation to accept a surrender, and make sale of the stock, no limitation and no condition are imposed, in either aspect of the case, there is no ground for the defence set up, as to the legality of the sale to rest upon.

But even granting the mode in which the sale of stock was made to be illegal and violative of the policy indicated in the charter, yet I contend that the defendant cannot escape from paying his bond. He has assumed to act and has acted as a stockholder; he has received all the benefits of the contract, and should he be released from liability, he will enjoy the fruits of his illegal act; and the creditors of the corporation, the persons designed to be protected by the Legislature, are saddled with the loss. The observations of the Supreme Court of Alabama, in disposing of a defence similar to that set up in this case, are here peculiarly appropriate, and although before quoted in the argument, I again cite them: "It is impossible to suppose," say the court, "that it was contemplated as the *result of a regulation intended to protect the public against loss,*

145 that if, by collusion with the directors, &c., an individual could succeed in getting on a bill of exchange a larger sum than the charter allowed, *that the same regulation would protect him against paying it.*" By the decision made in the court below, the regulation said to exist, and alleged to have been *"intended to protect the public against loss,"* is made to produce the very result deprecated, and *"the same regulation protects him* (Lanier) *against paying."* This kind of reasoning, which justifies and supports such a decision, is that which disregards the *spirit and reason of the law,* and adheres to the *"letter which killeth."* To such judgments the maxim *"qui haeret in litera haeret in cortice"* be applied.

There is a numerous class of cases of a kindred nature with that before the court, some of which have been cited in another branch of the argument, in all of which it has been held that the defence set up by Lanier is untenable, and the reasons given have been that the party, having obtained the stock and having held himself out to the world as a stockholder, was estopped to deny his character as such, and could not plead his own illegality to avoid the contract. And particularly has this been decided when the corporation had become insolvent, and the suit has been for the benefit of creditors.

The following authorities are to this part of the argument:—5 Alaba. R., 787; 17 Ohio, 190; 19 Ibid, 463; 16 Mass., 94; 9 Ibid, 423; 21 Vermont, 31; 20 Conn., 170; 14 Wendell, 20; 6 Hill, 624; 1 Hall S. C.; 2 Barbour S. C., 294; 7 Alaba., 670.

The complainant is admitted to be insolvent. It has been held, in a variety of cases, that when a corporation becomes insolvent, the officers are trustees for the creditors, and that it is their duty to collect the debts due to the corporation, and pay those due by it. This being the law,
146 the suit before the court can only be viewed as a proceeding instituted for the benefit of creditors, and the decisions last quoted apply with full force to the case. See Wood vs. Dummer, 3 Mason C. C. R., 308. It is all the same as though the suit had been brought by one creditor in behalf of himself and other creditors.

SEMMES, J.:

This was a suit in chancery, commenced in the name of the Southern Life Insurance and Trust Company, and the State of Florida, against A. H. Lanier.

The preliminary question made in argument, and raised by the answer of respondent, is that the State of Florida has no interest in the suit, and that, therefore, the bill should be dismissed. The objection is presented by special matter, set up in the answer by way of demurrer, under the provisions of our statute law. Thomp. Dig., 458, § 9.

We do not doubt the correctness of the doctrine, or its application to this case, that, to sustain the character of a plaintiff, it is requisite to show in him an interest, either legal or equitable, in the subject matter of the suit. The principal facts stated in the bill, and relied on in support of the interest of the State, is, that by reason of certain liabilities incurred by the late Territory of Florida for this Company, under the authority of its charter, the bond and mortgage of respondent were deposited with the Governor of the Territory, to indemnify it against loss; and that, upon the filing of the bill, the said bond and mortgage (which had been previously turned over to the Governor of the State,) was held by him in trust, and as a security for the ultimate payment and redemption of the liabilities of said Territory; and that the suit was brought at the instance of said Governor, for and in behalf of said State. It is a misconception of the term to say that these allegations, or any 147 of them, are inferences of law. They are stated and relied on as matters of fact, and are all admitted by the demurrer to be true.

Whether the State of Florida has, in any mode or form, incurred any liability in respect to this matter, is not a question for our consideration; nor do we so decide, or even intimate an opinion. In fact, as far as concerns the question before us, it is not necessary that there should have existed the remotest *liability* on the part of the State to authorize its being made a party to the suit; for if, upon the organization of the State Government, this bond and mortgage were delivered to the executive, and he as such held them *in trust,* as a security and means of indemnity for another party, it was both proper and necessary that the State should have been made a complainant. It would seem scarcely necessary to refer to the manifest distinction between the case before us and the cases of the King of Spain vs. Machado, 4 Russ., 225; Cuff vs. Platell, *ibid,* 242, and other authorities to the same effect. In these cases, the entire want of interest on the part of some of the complainants, appeared on *the face of the bill,* and the demurrer was of course sustained by the court. In the case of Makepeace vs. Haythorne, 4 Russ., 244, the objection did not appear on the face of the bill, but was raised by plea. In these cases the court, in affirmation of the well settled doctrine on this subject, say that if a party has no interest in the suit, the bill is demurrable, if that fact appears on the bill; but if the fact does not appear on the bill, but is brought forward by plea, it is a good defence to the suit. The principles announced by the court in these authorities, are directly adverse to the argument of respondent's counsel.

But independent of these views, a fatal objection to this demurrer is, that it is a speaking one. 1 Story's Eq. Pl., 148 495. It alleges, in aid of itself, that the Territory of Florida in the first instance was not liable on its guarantee; that the State is not the successor of the Territory as to any liabilities incurred by the latter; that the bond and mortgage were not assigned to the State as a security; and that the Governor had no authority to institute suit without the authority of the General Assembly, who alone had power to enter into agreement recognizing the liability of the State; and that the late Territory, through the Legislature, has, by repeated action, declared said guaranties null and void. All these facts may undoubtedly be true, but it was not the office of the demurrer to set them up in its support. The very attempt to do so is fatal to the demurrer. Being matters *dehors* the bill, they could only be raised by plea in order to be available. But the argument of counsel in support of his demurrer proves too much; for if it be true, as the answer states, that the State was made a party without due authority, then the rule of practice is of peculiar application, that where a person is made a co-plaintiff improperly, without his privity or consent, the proper motion is that his name be stricken out, not that the bill be dismissed even as to him.

The respondent has, at this stage of the case, no cause of complaint. Our statute, which allows a defendant to set up special matter in his answer, and claim the same benefit he would be entitled to if he had demurred to the bill, is but an affirmance of the rule of Chancery practice, as recognized by the English Courts; and the construction given by those courts to this rule is, *that only at the hearing of the cause* such benefit can be insisted on, except in the case of multifariousness or *misjoinder,* in which case, if the defendant does not take the objection *in limine,* the court, considering the mischief as already incur-

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red, will not, except in a special case, allow it to prevail *at the hearing*. 2 Dan. Ch. Pr., Amer. Ed., 819, and authorities cited. 149

If the respondent, as was his duty, had presented this point *in limine*, the objection might have been corrected without prejudice to the rights of the company. Omitting to do so, and going into the merits of the case, he waived his demurrer; for it would be against every rule of propriety to allow a defendant to call upon the court for a decree on the merits, and if against him, to fall back upon his demurrer, and invoke the judgment of the court upon that. And to this extent does the argument of counsel lead us. Its effect would be to mislead opposing counsel, and embarrass the court in the discharge of its duty. We feel no hesitancy in saying that a defendant should never be allowed, by such a device, to spring upon his adversary in the appellate tribunal, an objection he did not urge in the court below, but by his course, induced both the Judge and counsel to suppose he had waived the objection. We know of no rule of chancery practice which would authorize such a proceeding, and we feel no disposition to establish one.

We now proceed to the consideration of the merits of this suit; and, in view of the magnitude of the interest at stake, and with an anxious desire of settling correctly the principles involved, we have bestowed all the time at the disposal of the court to the consideration of the subject, aided as we have been by the very able and elaborate investigation made by counsel.

The bank was organized and went into operation in 1835. In 1839, the company re-issued stock, which had been surrendered, under the provisions of the amendatory act of 1838, and the respondent, Lanier, became the purchaser of one hundred shares, for the payment of which he executed his bond and mortgage to secure the sum of $10,000. Some 150
short time thereafter, in right of his being a stockholder, and upon the faith of his shares of stock, he borrowed from the bank the several sums of $6,000 and $917, for which he gave his notes. The bill is brought to foreclose the mortgage and recover the amounts due on the bond and notes.

Upon the part of the respondent, it is contended that the bond and mortgage were given without consideration, and that they are illegal and void.

First.—Because the surrendered stock was issued by the company contrary to the mode prescribed by the charter;

Secondly.—The capital stock of the bank could not be sold for bonds and mortgages;

And thirdly.—The respondent was induced to execute and deliver to the company his bond and mortgage by the fraudulent representations of its agent.

No defence is urged against the payment of the notes for $6,917, further than that the amount borrowed was not specie or its equivalent, but bills of the bank, which it is alleged were at a discount.

The last point does not require consideration, for whether the fact be as stated or not, it cannot affect the liability of Lanier, or the validity of the contract. There was nothing illegal about the transaction. It was a voluntary act upon his part to receive bank bills and execute his notes payable in *money*.

To sustain the first position, it is insisted that the Commissioner and not the company should have issued the surrendered stock, and that ten per cent. was requisite to be paid on each share, at the time of purchase, to make valid the transfer of stock. We find nothing in the charter, nor are we aware of any rule of construction which would warrant such a conclusion.

First, as to the ten per cent.: The capital stock of the bank consisted of two millions of dollars. The Commis- 151
sioners were directed in the first instance to open books to receive subscriptions to this stock, and it was required that ten per cent. should be paid to the commissioners on each share, at the time of subscribing. So soon as all the capital stock was taken, and $200,000 was paid in, trustees were to be elected, the Governor to be notified of the fact, and upon his proclamation, the company became fully organized, and was authorized to commence business. All this it is conceded was done. Upon the payment of $200,000, which was the first instalment of the capital stock, the sole object of requiring the ten per cent. was fully accomplished, and the company became at once invested with all the acts and powers secured to it by the act of incorporation.

With the view of aiding all subscribers, and relieving them from the penalty of a forfeiture of their stock, imposed by the tenth section of the original act, the Legislature, in 1838, by an amendment of the charter, authorized the company, in its discretion, to allow any stockholder to surrender his certificate of capital stock, and take a certificate of full stock equal to the amount of payment on the stock so surrendered, and the company were to hold or re-issue such overplus stock. Upon what reason or authority can it be contended that the company were compelled to require of the purchasers of this surrendered stock a payment of ten dollars on each share of their purchase? It is not pretended that there is any provision in the act authorizing a surrender and re-issue which requires it. But it is said the terms of the original charter are broad and comprehensive, including *all* subscribers. This is true; but still it has exclusive reference to the subscribers before the corporation was organized, and before it had existence. The ten per cent. was required to be paid as a condition precedent to its existence, and it was paid by all the sub- 152
scribers, in literal compliance with the charter. There was no discretion in the Commissioners, who were but the agents of the government, clothed with a special trust. Their duty was imperative and well defined, and no subscription could be valid without this pre-requisite. So soon as the $200,000 was paid in, the duties of the Commissioners in reference to the original subscribers ceased, and the special requirements of this part of the charter had been accomplished. The object and reason of the rule ceasing, why revise it, and force its application to the exercise of unrestricted authority, in the company's re-issuing its surrendered stock, when, too, the ten per cent. had been paid upon this identical stock, by the original subscribers, before the surrender, and which was in the vaults of the bank?

The question presented on this branch of the case is not a new one. In the leading case of Jenkins vs. The Union Turnpike Company, 1 Caine's Cas. in Error, 85, Chancellor Lansing places the doctrine, in our opinion, upon the true ground—that the power of the Commissioners was restricted to a certain mode of receiving subscriptions. The acts to be performed by them were preparatory to the creation of the corporation. They had no discretion or latitude of action, and to give effect to their acts, in receiving subscriptions and exacting payments, the mode prescribed must be strictly pursued; otherwise, there would be no contract with the subscribers, because there was no corporation to deliver the stock, and consequently no consideration. But when the corporation was in existence, the directors might dispense with the exaction of the first payment. The same well founded distinction between subscription for stock to Commissioners, preparatory to the organization of the corporation, and to a corporation *in esse*, is fully recognized

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153 by all the New York decisions. Vide 19 John. R., 218; 10 John. R., 154; 14 John. R., 238. See also, Lewis vs. Roberts, 13 Smede & Mar., 558; King vs. Elliott, 5 Smede & Mar., 428. Even this principle, in many cases, has been considered too rigid in its application, and it has been modified by the decisions of other States. In fact, there would seem to exist no good reason for holding a contract for subscription to stock to be illegal, because the payment in cash of the first instalment was not exacted, unless a cash capital was requisite, as in the case of a banking institution, or where, by the terms of the charter, it is made a condition precedent. See Vt. Central R. R. Co. vs. Clayes, 21 Ver. R., 31; Selma and T. R. R. vs. Rountree, 7 Ala. R., 670; Henry *et al.* vs. Vamilia and A. R. R. Co., 17 Ohio R., 190; Chester Glass Co. vs. Dewy, 16 Mass. R., 94; Minor vs. Mechanic Bank of A., 1 Peters, 46. The effect of these authorities is sought to be evaded in the argument, by contending that this institution was not authorized to do a banking business until the amendatory act of 1838. If this were true, it would in no aspect of the case affect the merits of the question we are considering. The fourth section of the act authorizes the company to use two-fifths of the capital stock paid in, or which may thereafter be paid in, for ordinary banking purposes. It was an additional grant to the company, not impairing or restricting its previous powers, and it was optionary on the part of the directors to use two-fifths of the capital at that time paid in, for banking purposes, without calling in any further instalments for that purpose, or not avail itself of the right at all, but continue in the full exercise of its original powers, in investing its capital stock in bonds and mortgages. But it is not true that this corporation had not banking powers previous to the act of 1838. By the 19th section of the original act, it had the right to issue bills to
154 the amount of the capital actually paid in. It had the additional right of receiving funds on deposit, and to discount and purchase promissory notes and bills of exchange. These powers constitute all the elements of banking, as understood in this country. See the case of the Bank of Augusta vs. Earl, Peters S. C. R.

It is further insisted that the Commissioners and not the company should have re-issued the surrendered stock. A conclusive answer to this is, that in the case of subscription to stock in the first instance, and in the case of forfeited stock, the Commissioners were required to open books for subscription—in the first case by express terms, and in the latter by implication—while in the case of surrendered stock, the corporation itself was authorized *"to hold or re-issue it."* The grant of power to the company to accept the surrender and re-issue the stock, is as well-defined and unrestricted as language can make it; and unless it can be shown that the Commissioners and the body corporate are one and the same, there is no foundation for the argument. The question is not, as is supposed, whether there is in fact any distinction in the stock itself when forfeited or surrendered, but whether the charter has not expressly defined the grant, by providing that the Commissioners shall offer the one for subscription, and the company re-issue the other.

If it be true that the forfeited stock could only be subscribed for through the Commissioners, it was a wise provision of the act of 1838 which gave to the company this right of re-issuing its surrendered stock, and it was doubtless designed to remedy the evil of the old law, by providing against any contingency which might prevent the Commissioners from being present at all times to open books for subscription. By the 9th section of the original charter, three persons, by name, were appointed Commissioners. After they had performed the duty assigned them, preparatory to the company's being organized, who were to act 155
for them in case of their death or absence? No provision is made for supplying their place or appointing new ones. Was it in the contemplation of the Legislature that these three persons should, under all the changes of life, be present at all times, to dispose of the surrendered stock, during the fifty years' existence of the corporation? Or does not the new law, in providing the remedy, fully meet the mischief?

The next objection taken by the respondent is, that the surrendered stock could not be sold for bonds and mortgages; and a similar course of reasoning is adopted to sustain this position as the first, but it is equally artificial and untenable.

By the sixth section of the original act, the corporation was required to loan its entire capital of two millions upon bonds and mortgages. One of the leading objects contemplated by the law, was to invest the proceeds of the sale of stock in this kind of security; a fund permanent and secure, yielding interest, and to which the creditors of the bank could look as a security for the ultimate payment of its liabilities. Not only the $200,000 paid in was to be invested in these securities, but all subsequent instalments, so that, if money was paid for stock, it was to be at once converted into bonds and mortgages. After the bank was *in esse,* it was an unmeaning and idle ceremony to require payments in cash, and then invest the latter in bonds and mortgages. In the absence of all positive inhibition by the law, what objection could be raised to investing the stock in the first instance in this security? The same purpose is effected by one instead of a double operation, and no sensible distinction between them can be conceived. But it is said "that it is not the stock which is to be invested in bonds and mortgages, but the *capital.*" But where 156
exists the distinction? The stock represents the capital, whether in money or bonds and mortgages. The stockholder's certificate of stock is evidence of the interest he has in the capital and nothing more. Whatever amount he has contributed to the general fund, whether in money or bonds and mortgages, his interest in the capital is the same. In investing the stock you invest the capital of the bank.

No mode is pointed out as to re-issuing this surrendered stock. But it belonged to the company, and they could dispose of it in any mode not inconsistent with their general powers. They could sell it at public or private sale, for cash or on credit. They had as much power as to its disposition as though it had been hypothecated to the company, and been forfeited by the terms of the hypothecation.

It is evident that, if the construction given to the act of 1838 is to prevail, then, by some process unknown to us, the entire provisions of the old law became incorporated in the new. For the same rule of construction that would apply one provision must apply all, and the same mode and formalities are to be observed in re-issuing the surrendered stock as before the organization of the company. The Board of Commissioners are to be revived, if they are in life; if not, the stock is to remain fruitless and dead upon the hands of the company. The ten per cent. is to be paid and the residue is to be sold, not on a credit for bonds and mortgages, but to remain payable in instalments, in such amounts and at such times as the trustees may direct. Thus, instead of conferring on the company an additional franchise, and amending the old law, as it purported to do, it but re-enacted (and all by intendment,) its entire provisions.

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There is a manifest difference between the original subscribers and the purchasers of the re-issued stock. The former could surrender their shares and take a certificate for full stock. The latter could not, even with the assent of the directors, have discharged their liability by a surrender, for it would have been a fraud upon the creditors. Nor could the bank have compelled a forfeiture of their stock. Independent of this, in what possible mode were the dividends to be made to the stockholders? The first class hold certificates for full stock, the whole amount paid, while the purchasers of the re-issued stock are to pay but ten per cent. on their purchase. Are the latter entitled to the same dividends as the former? Or are two distinct classes of stockholders to exist in the same company, with distinct rights and privileges, depending upon no fixed rule, but subject to constant change and modification, by the amount of instalments which each may pay on his stock?

The two acts are entirely independent of and inconsistent with each other, and no rule of construction can reconcile them. The first is a restriction as to the mode and manner of disposing of stock, with the object and purpose clearly defined; the latter is an unconditional grant of power, only restrained by the general object and policy of the law. The principle cannot be questioned, that where a grant of power is clearly defined, and no mode is prescribed for its exercise, it is for the corporation to adopt such mode as in its judgment will secure the purpose contemplated. And so well recognized is this doctrine, that as a general rule a grant specifying the mode and manner of exercising powers, is construed as merely directory, unless there are negative words, excluding the right to adopt any other mode; and restrictions upon grants of power, designed for the protection of creditors, are not to be con-
158 strued to defeat that purpose. The charter of this bank, by the twenty-sixth section, is to receive from the courts "a favorable construction;" but so far from the one given it being consistent with the object of its creation, it defeats both the reason and the spirit of its provisions, by embarrassing the corporation in the exercise of clear and well-defined powers.

But it is said the respondent was induced to become a stockholder by reason of the fraudulent representations of the bank or its agent; and numerous familiar elementary principles, as to fraud and illegality, have been invoked and zealously pressed upon the court. But their application to this case is entirely misconceived. The matter of fraud, in the first instance, is a mere question of fact, and we have in vain searched the record before us for evidence to sustain it. It is said the bank was insolvent in 1839, when Lanier purchased his stock. The proof is, that, though embarrassed, it was solvent in 1840, and paying specie; and that this embarrassment and final insolvency were mainly occasioned by the want of good faith upon the part of the stockholders, to meet their liabilities. And if Lanier has failed to realize all the advantages which he seems to have expected, on becoming a stockholder, it should be recollected that he has contributed to produce the very state of things of which he now complains. The loose conjectures of witnesses, as to the condition of the bank in 1839, based upon no knowledge of their own, but derived from others who had as little means of information could have but little weight under any circumstances, but especially when contradicted by the then officers of the institution. There is no evidence that the agent ever made to the respondent any representations as to the solvency of the bank, or as to any other matter upon which he rests the question of fraud. But conceding the fact to be as alleged, it was his duty, upon a discovery of the fraud to 159
have taken immediate steps for the rescission of his contract. Story's Eq. Jur. § 190-1-2-3-5.

According to his own statement, he first discovered the alleged fraud when he applied to the bank for the loan of the $6,917 on the pledge of his stock, which he received in bills of the bank, and for aught that is known, used as money. Afterwards we find him renewing his notes for this amount, from time to time, without objection and without complaint; holding himself out as a *bona fide* stockholder from 1839 until the filing of his answer to this bill; giving faith and credit to the institution as such stockholder, and enjoying all the advantages of such a relation. Were the facts true, his defense has no foundation in law or morals. By his repeated ratification of the acts of which he complains, and to which he was a willing party, he is forever estopped from setting up such a defense, especially when the assets of the bank would thereby be diminished, and the rights of creditors sacrificed. The means devised by the law to protect the public against loss, cannot be invoked to consummate the evil it was designed to avoid, by releasing him from a contract, the fruits of which he has already enjoyed.

There is one other matter to which, in our opinion, undue importance has been given, yet in consequence of its having contributed mainly to a difference of opinion among the members of the court, we feel bound to notice. It is said the fifth section of the amendatory act of 1838, which provides that the company may call in the residue of its capital stock at any time within the period of five years from January, 1839, restrains, by implication, the power of the company from re-issuing any of its surrendered stock, after that time; that, as a consequence, the company, in the sale of this surrendered stock, had no authority to extend the time of payment beyond that period; and 160
that the credit given to Lanier for five years from July, 1839, was in violation of the charter, and the contract of sale and purchase therefore void. By what process of reasoning all this is arrived at, we are at a loss to conceive. Were the premises true, it would be no difficult matter to show, from principle and authority, that the extension of time did not affect the validity of the sale, and that it does not lie in the mouth of Lanier, for this cause, to avoid his contract, which, as between him and the company, was founded upon a good and sufficient consideration. But the positions assumed are not warranted by any fair construction of the charter, and cannot be sustained.

If reference is had to the 12th section of the original act of incorporation, and the amendatory acts of 1836 and 1837, in connection with the 5th scetion of the act of 1838, it is evident that the latter, in authorizing the company to "call in the *residue* of its capital stock," has exclusive reference to the stock originally subscribed for, and the payments for which were due and *then* outstanding. To make the whole charter consistent with itself, these several sections, treating of the same subject matter, should be construed in reference to each other. By the 12th section of the original act, the subscribers to stock were required to pay ten per cent. in cash on each share; ten per cent. at the expiration of six months thereafter, and the "whole amount remaining due" was liable to be called in by the Trustees at any time within three years from the date of subscription. The shares of every stockholder omitting to make such payment, within the time prescribed, became forfeited, together with all previous payments made thereon. The amendatory acts of the two following years authorized the company to extend these payments—the second instalment from six months to three years, and the

161 residue from three to five years from the time of subscribing. This gave the stockholders until some time in 1840 to pay up the remaining instalments then due. The act of 1838, authorized the company to extend a further indulgence of five years, from January, 1839. It provides for the calling in, at any time within a limited period, the residue of its capital stock—that is, the amount then remaining due, and which represented the capital stock subscribed for. All the capital stock of the bank had been taken, and the instalments liable, as we have seen, to be called in at any time by the trustees, but who could, in their discretion, postpone the payment to the time designated by the act of 1838. How is it possible to extend the provisions of this act to stock which, after the passage of the law, might be surrendered to and re-issued by the company, under a new grant of power? The re-issued stock is not subscribed for as was required in the sale of stock in the first instance. The latter was payable in instalments, at the pleasure of the trustees, and subject at any moment to forfeiture. But upon the company's accepting a surrender of stock, under the act of 1838, it could hold or re-issue it, in any mode it deemed proper, consistent with the leading objects of the charter. The sale of this stock to Lanier, for his bond and mortgage, was not subject to the payment of instalments, to be called in at the pleasure of the company, but it was absolute and unconditional. The contract of sale and purchase was complete, the purchaser holding a full and perfect title to the stock, subject to no recall, no forfeiture or conditions.

It must result from the argument, which assumes that the contract of sale was illegal, because the credit given to Lanier was more than five years from January, 1839, that had the credit been within five years it would have been legal. Suppose it to have been so, and that Lanier, on pur-
162 chasing his shares, had paid in cash the ten per cent., and given his bond and mortgage for the residue, payable in four years. Could the company have recalled in this stock, or, in other words, have enforced the payment of this bond, which represented the stock, before its maturity? If the argument be true, the company could, under the fifth section, exercise its unquestionable power of calling in the stock at any time within five years, by enforcing payment of the bond, at any moment, after it was executed. The very absurdity to which the argument leads us, is a sufficient answer to its soundness.

Again.—Suppose this surrendered stock had been sold to Lanier for cash, and immediately the company had loaned the same to him on his bond and mortgage, for five years, or less time—these securities still represented the identical stock held by Lanier, and the position of the parties would, in legal contemplation, be altogether the same as now. Could the bank call in this stock before the maturity of the bond? Why not, if it has the power claimed for it, under the fifth section? Is its power become suddenly paralized by simply entering into a contract which it is conceded would be a legitimate and legal one, under the provisions of its charter? The entire argument is necessarily based upon the hypothesis that although the bank has ample power to dispose of its surrendered stock, yet, under the same law which clothes it with this power, it can make no contract for its sale which it cannot enforce *at any time within* five years from January, 1839—thus by one sweeping construction denying to the company the right of investing its capital stock in bonds and mortgages, a right hitherto unquestioned in the company, and made by its charter one of the great and leading objects of the institution.

At the passage of the act of 1838, the first instalment upon all the shares, amounting to $200,000, had been paid in. 163
Now, if the stockholders choose to avoid a forfeiture, by availing themselves, as they doubtless would do, of the privilege of surrendering their unpaid stock, then the effect of the construction given to this act to throw upon the company all of this surrendered stock, without the power to re-issue it for bonds and mortgages, and thus reduce the capital of the bank from two millions to $200,000, when by the very terms of the charter, the company had the power of increasing it to four millions.

If Lanier is to be considered a subscriber to stock from July, 1839, the time of his purchase, then the company were authorized, under the original and amendatory acts of 1836 and 1837, to give him a credit of five years from the date of his subscription. But if the act of 1838 applies to the re-issued stock, then in the case of Lanier, and all others who might purchase stock after January, 1839, the provisions of the act instead of being, as is conceded, an extension of the time of payment before allowed, would be a limitation; and thus by the rule of interpretation adopted, the fifth section would extend the time of payment to the first subscribers, and without any words to that effect, limit it to others, who it is contended could only become stockholders by subscribing in the same mode and under the same rules and restrictions as originally provided. It is a strange rule of construction that would thus construe an express grant, which while on its face it extended the power of a corporation, was to be considered as a restriction on its original powers. And it is something new in the history of corporations that this institution then in prosperous circumstances, with a charter containing most extraordinary grants of power, should be represented but three years after its organization as a suppliant before the Legislature, praying that its privileges be curtailed, and that the power under which it could exercise its corporate 164
franchises for the term of fifty years, should be limited to five years from January, 1839.

The construction which is sought to be given to this act, is at variance with both the letter and spirit of the charter, and would lead to endless embarrassment and difficulty. The fifth section of the act, it is manifest, has reference exclusively to contracts then subsisting and cannot apply to future contracts, in relation to the sale of surrendered stock. The third section of the same act contains a new grant to the corporation, well defined as to power, and unrestricted as to time—a power which the company could legitimately exercise in the sale of its stock, as often as it was surrendered, and within the duration of its charter.

The substance of the entire defence made in this case is based upon the alleged misconduct on the part of the directors of this institution. To say that a party can avoid his contract, and thereby diminish the fund which was designed as a security, for the benefit of the public, upon the pretence that there was some abuse of the corporate powers, or mismanagement on the part of the Board of Directors, in making the contract, is to pervert the well settled principles of law, and, under color of its sanction, to open the door for the consummation of fraud upon individuals and the public. Neither party can escape the obligation created by the sale and purchase of this stock. Admitting the contract to have been made contrary to the letter of the charter, it is not thereby void, and the respondent cannot avail himself of any merely unlawful act by himself and the directors, whether only designed or fully consummated, to perpetuate a greater fraud on the creditors of the bank. See 16 Serg. and Rawl., 144.

In the case of the Bank of South Carolina vs. Hammond, 1 Rich. L. Rep., 288, the defence was, that the contract

165 was in violation of the charter, and void. The court held, that a contract with a corporation may be binding on the parties, though it was an abuse of the corporate powers, and for which the corporation was answerable to the government which created it; and that it was too strict to insist that a power which is contained in a general grant, and which in various forms may be pertinent to the purpose of a corporation, may be restricted to a particular form of direction for its exercise. The same defence was relied on in the case of Little vs. O'Brian, 9 Mass. R., 423, and the court say, whether for this violation of the charter, the government may not seize their franchises, upon due process, is a question not now before us. It is sufficient to say it does not lie in the mouth of a stockholder for this cause, to avoid his contract, which as between him and the company, was made upon a sufficient consideration. In the case of Fleckner vs. Bank U. S., 8 Wheat., 338, the court say, that the defence set up was merely a violation of the charter, for which a remedy may be applied by the government, and conceding the bank to have violated its charter in this particular transaction, it is not easy to perceive how that objection could be available. The act did not say that such a transaction or contract was *ipso facto* void. It remained to be shown how if the bank had a general right to discount notes, a contract, *not made void* by the act itself, could on that account be avoided by the party. See also Chester Glass Co. vs. Dewy, 16 Mass. R., 94.

These authorities are based upon this general principle, that all acts of incorporation are held to be directory unless they expressly avoid all security taken other than that prescribed, and that although the transaction may be culpable on the part of the directors, and ground of forfeiture, in a question between the government and corporation, yet
166 the security taken may be enforced against him who gave it. Ang. & Ames, Corp., 190, and Palmer vs. Lawrence, 3 Sanford R., 162; Brower vs. Appleby, 1 *ibid.* 108.

It is conceded that this institution is insolvent, and it cannot be disputed that when a corporation becomes insolvent, the officers are trustees for creditors, and the same principles of law which would be applicable to a suit in favor of creditors, would apply in all their force to the case before us.

For the reasons contained in this opinion, we are compelled to reverse the opinion of the court below, and the complainant is entitled to a decree of foreclosure, with costs, and for the amount of principle and interest due upon the bond and mortgage.

ANDERSON, C. J., delivered the following dissenting opinion:

I differ with a majority of the court in the conclusions to which it has come; and the importance of the case and the general interest of the questions involved in it, induce me to regard it as my duty to give somewhat at length the reasons which have prompted my dissent.

The respondent, under the privilege given by our statute of 1828, insists in his answer, "by way of demurrer to the "said bill of complaint that the State of Florida, who is "set forth in said bill as one of the complainants, has no "interest in the subject matter of the said bill of com-"plaint."

The judgment of the court upon this demurrer does not seem to have been asked for by either party until the final hearing of the cause.

I differ from the court in their judgment upon this demurrer, and regard it as a sufficient answer to the present bill, notwithstanding the counsel of the respondent expressed a desire to have the case decided upon its substantial 167
merits, and not sent back for a defect that may allow of amendment. Objections not intended to be pressed should not be put upon the record, or if put there inadvertently, should be waived with the same formality. I regard it as our duty to decide upon the record as presented to us.

That the misjoinder of a co-plaintiff is a fatal error when taken advantage of by a demurrer or plea, is a familiar and well settled principle of equity pleading and practice. Story's Eq. Pl., § 544; Mitford Eq. Pl., p. 399; King of Spain vs. Machado, 4 Russ., 228; Cuff vs. Platell, 4 Russ., 242.

To my mind it is apparent on the face of the bill that the State of Florida has no interest in the subject matter of this controversy, for though it is doubtless true as stated by complainant's counsel, that the demurrer admits the facts as set forth in the bill, yet when legal inferences are set forth as facts, though they may be called facts, it is our duty to regard them in their true light as matters of law and not to receive them as true unless they are so. A demurrer confesses matters of fact only and not matters of law. Ld. Raymond, 18.

When, for instance, the complainant speaks of the liability of the State of Florida on the bonds of the company, as a necessary consequence of the guarantee given by the agents of the Federal Government when acting as a Territorial Legislaurte in Florida, this liability, though assumed as a matter of fact, is but a deduction of law, and therefore it is not admitted to be true by the respondent's demurrer. The real facts set forth, such as the guarantee made by the Territorial Government and the deposit of the certain bonds with the Governor of the State, may be true, and are admitted to be so, but they do not warrant the complainant in making a co-complainant of the State of Florida, apart from the legal conclusion which he has assumed as 168
facts.

I do not mean to discuss here the soundness of this legal conclusion. It is enough for my present purpose to distinguish it as a matter of law, rather than a matter of fact, and that as such it is not admitted by the demurrer. Upon the face of the bill then, admitting all the facts there alleged to be true, it does not appear that the State of Florida has any interest in the bond or mortgage or promissory notes of the respondent, and there can be no doubt that on a general demurrer under the authority of the case of the King of Spain vs. Machado, the bill would have to be dismissed. For I do not consider as at all tenable the position assumed by complainant's counsel, that the bill can be defended from the imputed defect under the legal maxim that a mere *scintilla juris* will justify the joinder of a co-plaintiff.

The maxim is true, but its application in this case is unwarranted. If the State of Florida has any interest in these bonds and mortgages at all, it is far from being a slight one. It is either nothing or of great importance. It can in no correct sense be called a *spark*. The alleged deposit of the securities with the Governor could scarcely give to the State any interest which it had not otherwise. Such a deposit could only be with the incumbent, as an individual, not as a representative of the State. Though there is no general demurrer in this case, the respondent has insisted in his answer, on the special matter of which I have been speaking; by way of demurrer. The statute of 1828 authorizes him to do so. That statute provides that "the defendant may, in all cases, instead of filing a "formal plea or demurrer, insist on any special matter in "his answer, and have the same benefit thereof as if he had

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"pleaded the same matter, or had demurred to the bill." Thomp. Dig., 458. 169

I cannot perceive that the respondent having availed himself of this privilege, stands before us in any different attitude than if he had demurred to the bill.

The fact of this misjoinder seems to be but very faintly denied, but the complainant seeks to evade the consequences of the defect by alleging that a court will not allow an objection of this sort, being in the nature of matter in abatement, to prevail in the last stage of a cause, when justice can be done to all parties. The court was referred to Story's Equity Pleadings, Sec. 237, which says: "It is "not safe in any case to rely upon the mere non-joinder or "misjoinder of parties as an objection at the hearing, for "if the court can make a decree at the hearing which will "do entire justice to all the parties, and not prejudice "their rights, notwithstanding the non-joinder or misjoin-"der, it will not then allow the objection to prevail." The extension of the quotation a line or two more would have shown the true meaning of the Commentator. "An ob-"jection," he continues, "of this sort should be taken by "demurrer, plea or answer." He evidently means to confine his caution to those cases where the defendant seeks to take his adversary by surprise, and starts his objection orally, at the very last moment.

This was not so in the case before us. The objection is made and insisted upon by the respondent in the very opening of his defence, when the complainant, if he had so chosen, might have had leave to amend and thus avoid the consequences of his mistake. He did not choose to do so. The matter of demurrer was set down for hearing, with the answer in which it was rightfully embodied, and the complainant went to the hearing with full notice of the objec-
170 tion, and of the purpose of respondent to urge it. I think he should abide the consequences he has braved.

I do not mean to be understood as saying that the Chancellor's decree below was justified by the misjoinder alone. It was sufficient to make him dismiss the bill, but without prejudice to the right of the Southern Life Insurance and Trust Company to file another bill; or, under the particular circumstances of the case, he might have given leave to amend at the hearing.

The order of dismissal having been a general one, I will proceed to show why I think, in opposition to a majority of the court, that it was fully sanctioned by the other matters in the record.

The respondent, while admitting the execution and delivery of the bond and mortgage, charges that they are null and void, mainly because the complainant had no right to sell to him the stock which was the consideration for his indebtedness—that no consideration, therefore, passed to him, and the contract was illegal.

In regard to his other defences, I concur with a majority of the court, and shall therefore confine myself to the consideration of the one just recited, as it is upon this point that I differ with my brothers.

I take it to be undeniable that "a corporation created "by statute can do those acts and exercise those powers "only which are conferred on it by its charter, or which "are necessary to enable it to perform its functions and "fulfill the purpose of its creation, or which flow by neces-"sary implication from some power granted." 4 Ala. Rep., 562.

"The exercise of the corporate franchise being restrict-"ive of individual rights, cannot be extended beyond the "letter and spirit of the act of incorporation." Beattie vs. Lessee of Knowles, 4 Pet. R., 152.

"A corporation is confined to the sphere of action limit- 171
"ed by the terms and intention of the charter." Angell & Ames on Corp., 68; 12 Wheaton's Rep., 64; 4 *ibid,* 518; 6 *ibid,* 593.

These stringent rules of restraint may be legitimately carried yet further, for when a mode is prescribed in the charter for the action of the corporation, that mode must be used, and any other is unlawful. Chief Justice Marshall, in the case of Head and Amory vs. the Providence Insurance Company, said, in speaking of the power of corporations: "The act of incorporation is to them an ena-"bling act—it gives to them all the powers they possess; "it enables them to contract, and when it prescribes to "them a mode of contracting, *they must observe that "mode,* or the instrument no more creates a contract than "if the body never had been incorporated." 1 Pet. Cond. Rep., 375.

These rules are well established, and we may proceed at once to apply them as a test to the contract in question.

Let us inquire, then,

1st. If the contract was such an one as the company, by its act of incorporation, was enabled to make or cause to be made;

2d. Whether the charter of the company prescribed a mode of making such a contract, and, if so, whether it was observed in this instance. An examination of the act of incorporation in reference to these points, will enable us to determine the character of the contract and the sufficiency of the respondent's defence.

I have no difficulty in relation to the first proposed inquiry. There was an express provision in the charter in reference to the particular stock bought by Lanier. The 3d section of the amendatory act of 1838 provides "that "the company may, in their discretion, authorize any of "the stockholders to surrender their certificates of capital 172
"stock, and take an amount of certificates of full stock "equal to the amount of payment on the stock so surren-"dered, and the said company may hold or re-issue such "overplus stock." Thomp. Dig., 317.

The record shows that the stock purchased by Lanier, was stock surrendered under the provisions of this section, and as the authority to re-issue is expressly given, there can be no question of the authority of the company to contract with Lanier for the sale of the stock, if they contracted in the proper mode and through the proper agents. In re-issuing the stock to Lanier, they were only doing what their charter enabled them to do.

Before proceeding to the second inquiry, let us define in precise and accurate terms, what was done by the company in this transaction, and we shall thereby better understand whether any particular mode was prescribed by the charter in which that particular thing should be done.

The thing done was the re-issue of stock which had been surrendered under the license granted in the amendatory act of 1838, and it was done under that clause of the act which allowed the company to hold or re-issue the same stock. It was done directly by the company without the agency or intervention of the commissioners, and the company received from Lanier in payment of this stock, his bond and mortgage. Is there any mode for doing this, prescribed in the charter, different from the one adopted? The affirmative is maintained by the respondent, and it is upon the maintenance of this affirmation that his consent chiefly relies.

The mode may be prescribed directly or indirectly. As nothing is said in the act of 1838 which authorizes the re-issue of the surrendered stock, as to the mode in which the re-issue was to be made, and the surrender and re-issue

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173 were not contemplated in the original act, it must be admitted that there are no direct instructions as to the mode in which such stock shall be sold, and we must look into the several acts to see if the mode is prescribed indirectly any where by the legislature. If it be so, those instructions, though indirectly made, are as imperative and obligatory as if made in direct terms.

In the 9th section of the act of incorporation, Lot Clark, Robert Raymond Reid, and Thomas Douglas, are appointed commissioners to open books for subscriptions to the capital stock. The 12th section prescribes that each subscriber, at the time of subscribing, shall pay to the commissioners ten dollars on each share by him subscribed, and that in three years the whole amount shall be paid. The last clause of this section is so material to the argument that I will transcribe it at large. It is in these words: "The shares of every stockholder omitting to make such "payment, shall be forfeited, together with all previous "payments made thereon, and the books shall be again "opened as directed in the 9th section for subscription, "and so from time to time until all shares are subscribed "and paid for."

The last clause of the 9th section prolonged the authority of the commissioners for three years, in case the whole stock should not be taken within that period, and the clause just recited from the 12th section further extends their authority in reference to the forfeited stock till all shares are subscribed and paid for.

It is now important to inquire in what respect, if any, this forfeited stock, whose re-subscription is thus provided for in a mode plainly and directly presented, differs from the surrendered stock spoken of in the 3d section of the amendatory act of 1838. To forfeit is to lose the right to possess, by some neglect or crime—to surrender in the
174 sense here used, is to give up the right to possess, voluntarily, and not as a penalty for neglect. The original charter enforced the surrender of unpaid for stock, as a penalty —the amended charter allowed the surrender without the penalty. The forfeited stock became subject to re-subscription under the charter, as the surrendered stock did to re-issue under the amendatory act. In all respects, except as to relief from the forfeiture of moneys already paid, there was an identity in the forfeited and in the surrendered stock.

Again, what would have become of this surrendered stock if the act of 1838 had not passed? Those who did not duly pay their instalments would haye forfeited it, and the books would have been again opened by the commissioners, and each new subscriber would have been required to pay ten per cent. at the time of subscribing, and the whole price within three years. If this surrendered stock then, but for the amendatory act, would have been necessarily forfeited for non-payment, and afterwards disposed of in the mode just mentioned, then if there is any change in the mode of its forfeiture and subsequent re-issue, it must be authorized by that act. The main object of that act is obviously to relieve the stockholders who had made partial payments, from the penalty imposed by the original act, and neither its terms nor its spirit, in any part of it, indicate the intent of the legislature to change the mode in which the surrendered stock should be re-issued. The simplest rules of construction require that in the interpretation of an amendatory act, reference should be constantly had to the act designed to be amended, and the amending act should not be understood as importing a greater change than its obvious intent and meaning indicate. The purpose of the 3d section of the act of 1838 was to relieve the subscribers from a penalty imposed by the original act, and no more. To this purpose, its operation should be 175
confined, since neither its letter nor spirit import anything more.

It will be observed, too, that the change proposed in this section is discretionary, not mandatory—discretionary both with the company and with the stockholder, for both were only permitted, not required, to receive or to make a surrender of stock. It might very well have happened after the passage of that act, that either the company or the stockholder would have declined to exercise the discretion allowed, and in that case, unpaid for stock would have been forfeited and subject to the original conditions of re-subscription. And yet it is supposed that the exercise of the discretionary privilege offered by the amendment, has wrought a radical change in the stock given up, so as to release it from all rules, regulating the mode of re-subscription originally imposed in view of the public policy and interests.

The conclusion to which this reasoning leads us, is sought to be avoided by making an essential distinction in the character and condition of the original stock for which the commissioners were authorized to take subscriptions, and this surrendered stock which "the said company may re-issue." This distinction is based on the assumption that the commissioners were only employed to adopt the initiatory steps for putting the corporation into existence, and that their functions then ceased. Such, I am very clear, was not the design of the legislature.

The 11th section provides that the Governor, after being duly notified of the subscription of the entire stock, the actual payment of $200,000, the appointment of trustees and their readiness to commence business, should make proclamation, and on its publication the company should commence business. At this point, when all the stock had been subscribed, and the company fully organized, if it 176
had been intended to transfer the duties of the commissioners to the company, it would have been appropriate to terminate their official existence, either by express words or by making no further mention of them or their duties. But the 12th section, indicating the anxiety of the legislature, that the whole capital stock should be paid for within three years after subscription, provides for such payment under the penalty of forfeiture, and jealous lest the corporation might not take the new subscriptions for the forfeited stock, in the mode prescribed by law, express provision is made that "the books shall be again opened as "directed in the 9th section for subscription, and so from "time to time until all shares are subscribed and paid for." The 9th section, it will be recollected, provides that the subscriptions shall be taken by the commissioners.

The reason of this caution is sufficiently obvious, and I cannot see why the same salutary care should not have been intended in reference to the surrendered as well as the forfeited stock. All subscriptions to the forfeited stock, though made after the perfect organization of the company, are by express enactment to be made precisely as subscriptions to the original stock, and, what is more pertinent to the argument, the same system is perpetuated until *"all shares are paid for."* Where is this system which involves the constant agency of the Commissioners, in taking subscriptions *till the last share of stock is paid for*— where is it abandoned? And what is there in the amendatory act to warrant us in supposing that the Legislature designed to place the surrendered stock beyond the operation of this conservative provision? It is undeniable that the provision which makes the Commissioners the sole agents in receiving subscriptions to stock, and in express terms keeping that agency alive not only until the stock

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177 is subscribed for, but until those subscriptions are actually paid up in full—it is undeniable, I say, that this provision embraces all the stock of the company, and therefore the surrendered stock, unless an exception be somewhere made. There is nothing in the amendatory act to indicate such an exception. Its primary object was to relieve the non-paying subscriptions from forfeiting their previous payments, as well as their stock; and to understand it as at the same time changing the mode in which the relinquished stock should be re-issued, is to suppose that the Legislature had abandoned all the guards and restrictions so clearly contemplated and so carefully provided for in the previous enactment. Such an inference is not warranted by the language of the section, nor by any indication of the Legislative will to be anywhere found in the act, and leads to too esential and radical a change in the public policy to be justified by mere implication.

It is said in answer to these suggestions, that authority is expressly given to the company to re-issue the stock after surrender, and it is thence inferred that the stock was held by the company as its own property, for it is said that it belonged to the company, and that it might be disposed of at its pleasure. This might be if the stock, after surrender and before re-issue, was property at all. But there is a fundamental difference between stock after the terms of its purchase have been complied with, and it has become the property of the subscribers, and when it is as property yet in embryo, and only subject to acquisition. Stock may be defined to be a portion of the chartered privileges granted by the act of incorporation. These privileges are granted on certain conditions, and until the conditions are performed, the grant is incomplete, and no property passes out of the grantor. The stock surrendered to the company under the provisions of the act of 1838, could
178 in no sense be regarded as the property of the company, though the company was authorized to hold or to re-issue it. It could in its then condition be the property of no one. It was only the representative of a portion of the chartered rights which the sovereign was ready to bestow upon certain conditions, but which could not pass out of the sovereign till the conditions were complied with. It was therefore not the property of the company, and their right to re-issue and transfer property in it to another, could not be separated from the appointed mode of transfer—a condition imperatively necessary to its very existance as property.

I might perhaps stop here, and conclude that as a mode was prescribed by the charter, in which all forfeited or surrendered stock should be re-issued until the whole was paid for, and as the contract with Lanier for the sale of stock, was made in another mode, it was therefore invalid, but in examining the several acts, I find another injunction of the legislature, which has been palpably violated in this case, and which seems to me of much importance, though not noticed by counsel on either side. It will be perceived that there is apparent throughout all the several acts a determination on the part of the legislature that the stock subscribed for should be paid for before a definite period—that period extended indulgently from time to time, but always made well defined and fixed. The incorporating act of 1835 requires that all the stock shall be paid for within three years, under the penalty of forfeiture —the acts of 1836 and 1837, passed doubtless at the solicitation of the company, extend the period for calling in the instalments, subsequent to the ten per cent. cash instalments, one and two years respectively. In 1838, the company applied for further indulgence, when the provision was made for consolidating the stock. At the same time, the postponement of instalments, which had been the 179
chief purpose of the acts of 1836 and 1837, was fixed upon a permanent though indulgent basis. Modifying the policy of exacting full payment for the stock within three years from 1835, and within one and two years thereafter, the 5th section of the act of 1838, being the final provision on the subject, provides that "the said company may call "in the residue of their capital stock at any time within "the period of five years from and after the 1st day of Jan-"uary, 1839."

The language here, though permissive only, is a qualification of the imperative language of the 12th section of the original charter, and its imports that the application of the imperative requisition of full payment on the stock may be postponed from the time first fixed to the period here indicated. The Legislature clearly intended, as no doubt the public interests demanded, that the stock in this institution should not be merely nominal, but should be paid for in full before a fixed time, and having, from time to time, at the solicitation of the Company, enlarged the term of final payment, their indulgence was at length exhausted, and five years from the first day of January, 1839, was definitely fixed upon as the latest day to which the full payment on the stock should be postponed. That this is the sense in which the word *call* is used in this section is clear from the relation in which it stands to *payment* in the act of 1837.

A sale made by the trustees of the stock, by which they contracted that no part of the consideration money should be required until after the full time had elapsed which had been authoritatively fixed at the utmost period to which the last payment should be postponed, is surely without authority from the charter, and if without such authority, is necessarily void, from the utter impotency of the contracting party to make such a contract. Yet such is the 180
contract made with Lanier. He is sold one hundred shares of stock, on the consideration that he will pay for them within five years from the 30th July, 1839, while the utmost ability of the company—all its power being derived from the charter—was to sell its shares of stock for a consideration to be paid in full within five years from the 1st of January of the same year. Here we find two parties contracting with each other upon conditions expressly prohibited by law, and yet one of them comes into a court of Justice and solicits its aid to enforce this contract. One of these parties owes its very existence to the law it is violating, and the subject matter of the contract—that is, the stock—is created by the same law. The former cannot act —the latter cannot exist, without and beyond the act of incorporation—and yet that act nowhere sanctions the contract sought to be enforced. On the contrary, its provisions, clearly forbidding such a contract, are treated with defiance—provisions, too, which are not mere matters of form, involving no principle, but imposing safeguards necessary to the public interests, as a restraint upon the abuse of the large privileges bestowed by the charter. By the sanctions provided in the different parts of the act, to enforce the payments of the subscriptions the stock which is the subject of this contract became forfeit before the time arrived at which payment from Lanier was required ; and yet the offending party comes to a Court of Equity, asking its aid in collecting the money the promise of which was obtained by such an utter violation of law.

The argument that the fifth section is only permissive, and not restrictive, is totally at variance with the assumption by which the sale to Lanier was justified. The disregard in that case of all the modes and terms which had been prescribed for sales of stock, is defended on the ground

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181 that the authority given in the 3d section released the company from all restraints—a conclusion which makes the 5th section utterly absurd and unmeaning.

I have heretofore considered this contract in reference to what seems to me to be the plain requirements of the law, as to the mode prescribed for its execution and the agency by which it was to be executed. A single consideration of the reason and policy of the law suffices to satisfy me that I have not mistaken the design of the Legislature. It is apparent from the purport of the acts of the Legislature of 1836 and 1837, that at the date of the act of 1838, but little if any more than the first cash instalment of ten per cent. had been paid by the subscribers. By the act of 1838, unpaid for stock might be surrendered, and, according to the construction put upon the 3d section, might be re-issued, upon bonds and mortgages, payable in five or fifty years from the date of sale. A capital of four millions might have been raised in this mode, on which unsubstantial capital the company was invested with almost unexampled powers—with banking powers and privileges —with power to insure lives—with capacity to become trustee for the estates of infants, and others, and to secure annuities—its ostensible capital being four millions, its real capital being but the twentieth part of that sum. These four millions, too, of nominal capital, were to be secured, not by the agency of disinterested Commissioners, chosen by the government in view of the magnitude of the trust confided to them, and the peculiarly sacred character of the funds which were to rest for their safety upon these securities, but taken by the company itself, without accountability or supervision of any sort.

It seems to me to be vain to say that there is no difference between selling stock for bonds and mortgages, as was done in this case, and selling it for cash and afterwards
182 lending the same cash upon bonds and mortgages. According to the distinction I have already made between stock paid for, and stock only offered for sale—the re-issued stock when offered for subscription was not property as money would have been, and it might well be, that the company, in disposing of a share of the chartered privileges, of which it is supposed they were the distributors, would not exercise the vigilance which would have attended an investment of actual money; and it might well be, too, as almost the entire stock was to be thus re-issued, that a combination might have been made to sell their chartered privileges for nominal or insufficient securities, and thereby qualify themselves to become the great trustees of the country and the fiduciaries *par excellence*, of its most sacred interests. It was against possible fraud and evils of this character, that I consider the Legislature to have wisely and carefully guarded, both in requiring the Commissioners to supervise the subscriptions and in providing that the stock should be actually paid for in full before the first of January, 1844; and especially in the emphatic perpetuation of the authority and duty of the Commissioners, not till the company was organized—not till the stock was sold for bonds and mortgages, but till the stock was actually *paid for*.

I cannot regard as important the suggestion made by counsel, that Lanier being a stockholder, should be held more strictly to the performance of this contract than another person. It is a well settled rule, that a corporation in dealing with a stockholder, deals with him as with a stranger, and as such, Lanier should be regarded in this controversy. Besides, this allegation begs the question, in dispute. I do not consider Lanier to be a stockholder, and the violation of law of which I have been speaking consists in vainly attempting to make him so in face of the prohibitions of the charter. Neither do I feel the force of the 183
argument, that Lanier's subsequent recognition of the contract, by borrowing money on the stock, was a waiver of the fraud and illegality. The authorities referred to speak of fraud between the parties, and it might well be in some cases, that a ratification of the contract after the discovery of the fraud, might amount to a waiver. But the view I have taken of this case shows, that the fraud was perpetrated against the Government, and the act attempted to be done was in violation of the public law. The consent of the parties attempting the fraud could not at any future time, any more than at first, give sanction to such a fraud, or any power to the corporation which its charter withheld.

As this case is presented, it is not necessary to inquire whether the intervention of the rights of creditors would make any change in the liability and responsibilities of Lanier, but as it is urged that the trustees of the company, which is admitted to be insolvent, should be regarded as trustees for the creditors, I think it right to say in reply, that I cannot think that a contract attempted to be made by a party, without authority to make such a contract, and in direct violation of law, can be maintained as a contract for any purpose.

That individuals dealing with a banking company may be defrauded by a collusive arrangement between the company and its ostensible stockholders, is true, but it does not invalidate the principles I have endeavored to establish, nor the soundness of that policy which should prompt all courts to frown upon all violations of law, regardless of any partial or temporary interests which the connivance at wrong might promote. This alleged facility of imposing upon the public, shows the wisdom of the Legislature in requiring, (as I have attempted to show has been done,) the interposition of Commissioners of its own choice in ma- 184
king contracts for the purchase of stock, and furnishes another argument against such a construction of the statute, as throws wide open the door for the admission of the frauds and evils apprehended. Besides, if chartered companies do possess greater facilities for practising frauds than individuals, this facility for doing injustice should prompt the courts to be more stern in confining them rigidly within their chartered privileges, while individuals should learn to be more vigilant in dealing with them, and the Legislature of the State be more faithful to their duties as visitors. And it may be in this case, too, that when the creditors come to look after their rights, they may find responsibilities existing elsewhere, in relation to this same stock which was sought to be sold to Lanier—responsibilities springing from the original subscriptions, and which may not have been released, even by the intervention of legislative action.

LUKE, A SLAVE, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA.

1. The law of Florida discriminates between free white citizens and persons of color, whether bond or free, in the mode and decree of punishment for the same offences; the first name being amendable to the act of February 10th, 1832, while the latter are provided for in the act of November 21, 1828.

2. The maxim of "*legis posteriores priores contrarias abrogant*" is not applicable to cases where the precedent act is special or particular, and the subsequent act is general, the rule being that a later general act does not work any repeal of a former particular statute. Hence it follows that the act of November 21, 1828, in relation to crimes and misdemeanors committed by slaves, free negroes and mulattoes is not repealed by the act of February 10. 1832, in relation to crimes and misdemeanors generally.

3. Slaves and free persons of color may be guilty of many of the offenses which may be committed by white persons; in such case, it is an offence at common law, the indictment must be under the act of 1828, because this statute regulates the punishment, and if it is an offence created by the statute of 1832, or any other act a slave or free person of color can commit, the indictment should be under both statutes, that which creates the offence, and the act of 1828, which prescribes the punishment.

Error to the Circuit Court of St. John's county.

This was an indictment found by the Grand Jury of St. John's county against Luke, a slave, for maliciously wounding animals.

The following statement of facts was agreed upon by the solicitor for the State and counsel for the prisoner, viz:

186 "That a negro driver of Joseph M. Hernandez, in search-
"ing for certain stray mules, the property of his said mas-
"ter, found one of his said mules dead upon the road lead-
"ing from his master's plantation to the plantation of
"Abraham Dupont, and two others badly injured with
"gun shot wounds, of which injuries they subsequently
"died. The mule was shot. That witness traced the
"mules to the plantation of said Dupont, prisoner's mas-
"ter, by the blood upon the ground, and meeting with
"prisoner, asked him if he knew who had shot said mules?
"Prisoner replied that he had shot them, and was ordered
"so to do by his master—that the mules had come to his,
"prisoner's garden, in an inclosed field, and destroyed it,
"that he had complained to his master thereof, and asked
"him what he should do if they came again, and that his
"master told him to shoot them, and he had done so.
"Witness further stated that prisoner had told him that
"the mules were in the habit of troubling his master's
"plantation; and it was also in evidence that his master
"was not present when he shot the mules, and that priso-
"ner was the head driver of the plantation." Whereupon prisoner's counsel asked the court to charge the jury, that the prisoner had committed no act for which he should be criminally punished—for that the shooting the said mules as charged in the indictment was not done maliciously, or could be by him, he, prisoner, being a slave, and acting under the control and direction of his master—which instruction the Hon. Thomas Douglas, Judge of said court, declined to give, but having held the same under advisement, reserved the question. Thereupon the jury having rendered a verdict, the court suspended the sentence until the following term of said court, and on the 23d day of August, 1852, refused the instructions asked by the prisoner's counsel. Whereupon prisoner's counsel moved an
187 arrest of judgment and for a new trial, and assigned the grounds aforesaid, which motion was overruled by the court, and sentence pronounced—to which rulings prisoner's counsel objects, and excepts and alleges the same as error.

McQueen McIntosh for Appellant.

1. Prisoner was not liable to indictment under the act of 10th February, 1832, for malicious mischief, for the reason that it was evidently intended, in its penal consequences, to apply exclusively to free persons, and not slaves, the exception being in the 8th section of the act. That section distinctly shows that it was never the intention of the Legislature to lay a fine upon slaves. The punishment in all the other sections is in the alternative, and if a prosecution against a slave can be maintained, the jury might, in their discretion, impose a fine upon slaves, which would be an absurdity.

It is a penal statute, and must be construed strictly; and if the Legislature had intended to extend the operation of the 8th section over the whole act, it would have so stated. The very exception in prescribing the manner of punishment in the 8th section, repels the presumption that the act at large had any relation to the commission of the various offenses enumerated in it, by slaves. Thomp. Dig., p. 505-6-7.

The position is further sustained by the fact that in every other criminal offence committed by a slave, the punishment is death or whipping; and, except in the case of murder, the penal code creates the distinction in the manner of punishment between the free man and the slave Thomp. Dig., p. 537, 84, 40, &c.

The Legislature has passed two general acts for the punishment of crimes and misdemeanors—the one relating to white persons, and the other relating to offences committed 188
by slaves and free persons of color. Pamp. Laws of 1828, p. 48, 174. And this indicates the fact that slaves were not supposed to fall within the provisions of the act of 1832, which is a modification of the act of 1828, relating to crimes and misdemeanors, unless specially designated, as in section 8.

The Legislature has expressly provided the manner in which slaves shall be punished. Thomp. Dig., p. 541, Sec. 19, 20.

If this be so, the verdict of the jury, for a term of imprisonment, cannot be enforced.

It might be contended that the act under which the prisoner was indicted is general in its terms, when it says "if any person shall maliciously," &c. Yet it would be in contravention of the spirit of the law to apply to slaves such portion of it as relates to bigamy, adultery, &c., wherein the same phraseology is used. Thomp. Dig., p. 499.

The prisoner, acting at the instigation and under the control of his master, was incapable of committing the offence charged in the indictment. There was the absence of will, without which there was no malice, the essence of the crime, and what must be proven. 4 Black. Com., Chap. 2, marg. p. 21, 27, 28; 1 Russ. on Crimes, p. 1, 17.

The slave is a chattel in law, and has no volition to disobey a master. Wheeler, p. 2; 2 Black Com., 92, 93: 9 Ga. Rep., 579, 582, 583, 584.

J. P. Sanderson for the State.

1. The slave Luke cannot be excused or justified upon the grounds stated in the assignment of error, and the court below did not err in refusing the instructions asked.

In the absence of any decisions or rulings governing this

189 class of persons when acting under the direction or command of the master, we must turn to those *private relations* which approximate the nearest to that which exists between master and slave, and these are those of *husband* and *wife, parent* and *child, master* and *servant.*

The principal case where constraint of a superior is allowed as an excuse for criminal misconduct proceeds upon the matrimonial subjection of the wife to her husband, for neither a *child* nor a *servant* are excused the commission of any crime, whether capital or not capital, by the command or coercion of the parent or master. 1 Russel, [18,] 1 Hale P. C., 44-516; 1 Hawk. P. C., c. 1, § 14.

It is no excuse for an *infant* that he acted by the command of the father. Humphrey vs. Douglass, 10 Ves. R., 71; cited 5 Law Rep., 50.

This offence was committed when the master was absent and the slave was not acting under the control of the master. For in all cases when the wife offends *alone,* without the company of her husband, she is responsible for her offences as much as a *feme sole.* 1 Russ., 20; 1 Hawk. P. C., c. 1, § 12-13.

Nor is it any excuse for the wife, that she committed an offence by her husband's order and procurement, if she committed it in his absence. 1 Russ., 20; 1 Hawk. P. C., 44.

2. The principles of the common law are held to be applicable to the slave—not as a slave—but as a reasonable being; and having many of its safeguards thrown around his person, and protected by it, he must be held subject and amenable to its provisions. State vs. Rua, Wheeler on Slavery, 210; Fields vs. State of Tennessee, *ibid.,* 256.

The position that a slave is a person, and as such, recognized and protected by the laws, is evidenced by the various statutes of this State, as well as of others. Statutes
190 Thom. Dig., 499, § 2; 511, § 21, &c.; 542, § 1; State vs. Hale, Wheeler, 239.

A general statute against unlawful shooting, stabbing, &c., by free persons, was held in N. C. to extend to the protection of slaves. Commonwealth vs. Corm, Wheeler, 254.

The general criminal statutes of this State are applicable to slaves in all cases except those where special statutes have been enacted for them. Thom. Dig., 507, § 8.

This is a part of the general criminal code. Acts 1832, p. 71.

Previous to the Act of 1832, there was a law of force which would have excused Luke from the charge in the indictment, but which was properly repealed by the Act of 1832, sec. 9. Repealed Act, Revised Code, 1828, p. 50, § 8; Act, 1828, page 75, § 105.

3. Humanity—self-preservation—public policy and necessity enforce and demand that the ruling of the court below be sustained.

THOMPSON, J.:

Two questions are presented by this record for the consideration of the court. The appellant, Luke, was indicted under the Act of 1832, for malicious mischief, in killing sundry mules, the property of Joseph M. Hernandez.

The only evidence against the prisoner, as appears by the bill of exceptions, was his own admission, that he had killed the cattle by the direction and command of his master, because of their having trespassed upon the plantation of the latter. Upon this evidence, the counsel for the prisoner prayed the instruction of the court below to the jury —that the prisoner had committed no act for which he could be criminally punished, for that the shooting of said mules as charged in the indictment, was not done maliciously, nor could be so done by him, he, the prisoner, being a slave, 191
and acting under the control and by direction of his master. The refusal of the court to give this instruction, forms the first error assigned here.

The 2d error is upon the judgment rendered in the court below. The jury having found the prisoner guilty, assessed the punishment under the 59th section of the Act of February 10, 1832, (Thomp. Dig.,) at three month's imprisonment, and the court entered judgment upon the verdict that the prisoner be imprisoned in the common jail of St. John's county for the space of three calendar months, according to the verdict of the jury, and pay the costs of suit, and stand committed until the sentence be fully executed.

It is now alleged, that the prisoner could not be tried and punished under the Act of February 10, 1832, but only under the 61st section of the Act of November 21, 1828, Thomp. Dig., 541.

The first error assigned, presents one of the most interesting questions which can arise out of the institution of slavery as known to, and recognized by, our laws; but as the decision of the question so presented is not absolutely necessary to the disposition of the case, we pass it over without expressing or even intimating an opinion thereon, in the hope that if it is ever again presented for adjudication, we may be enabled to give to it that consideration and reflection which its interest and importance demand, and which the present limited term of this court here, will not permit. It is urged by the counsel for appellant, upon the second error assigned, that the Legislature evidently intended to discriminate between white persons, and slaves and free persons of color, as well in the mode as in the degree of punishment, to be inflicted for the infraction of the penal laws. That in 1828, two acts were passed, that of the 22d November, 1828, entitled an act relating to crimes and misdemeanors—and that of the 21st November, 1828, en- 192
titled an act relating to crimes and misdemeanors committed by slaves, free negroes, and mulattoes; the first named designed to embrace the case of free white persons exclusively, and the latter to the class of persons named in the title alone. That the act of 1832, which repealed the Act of November 22, 1828, is but a modification of the repealed act, designed to supply its place alone, and not to disturb the previous distinction, established by the Legislature of 1828, in relation to the different classes of persons amenable to the criminal laws. And on the other hand, it is contended, on behalf of the State, that the act of 1832 embraces within its provisions in terms, all persons—which term, person, must be taken to include slaves and colored freemen as well as white citizens; and that said act being posterior in date, and imposing a milder punishment than that provided for by the Act of November 21, 1828, it operates a repeal of the latter Act, and therefore, the act of 1832 is the only of law of force, and the conviction and sentence was properly founded thereon.

A careful review of the legislation of the State must lead to the conclusion that it was intended to establish and preserve a distinction between the punishments to be inflicted on slaves and free persons of color, and those on white persons for the same violations of the criminal law. The two acts passed in the year 1828, should be taken and construed together as one statute, and as creating the distinction alluded to. Thus the offences of assault, assault and battery, with or without the intent to kill or murder, were, by the Act of November 22, 1828, punished by a fine, at the discretion of the jury, the utmost extent or limit of the mulct being one thousand dollars; while the same offences committed by a slave or colored freeman upon a white person, are punished more severely by the Act of Nov.

21, 1828, a simple assault being punished by the infliction of 39 stripes, and the more aggravated offence of assault with intent to kill is punished by death. So, again, by the first named Act, robbery and burglary were punished by fine, pillory, or stripes, while by the latter Act, if committed by a slave, they are punished by death. And similar distinctions are to be found throughout the Act, those mentioned being sufficient for the purpose of illustration. Now these two Acts were not in conflict with each other; taking them as forming one whole, effect could be given to each and every part of both, because to interpret statutes properly, it is indispensably necessary to have regard to their provisions; to see of *what they treat;* the *quid* as well as the *quo modo*. Dwarris St. 757. Although in the absence of the Act of November 21, 1828, the punishment of that inferior caste of persons who are either slaves or free, might be inflicted under the general laws, yet as the Legislature has provided other and different modes and degrees of punishment for them, the latter must be observed. So careful was the Legislature to carry out this distinction, that by the 61st section of the Act of November 21, 1828, (Thomp. Dig.,) it was provided, that if any negro or mulatto, bond or free, shall commit any other crime or misdemeanor against the laws, it should be lawful for the jury convicting the offender to punish by any number of stripes they may award, not to exceed one hundred; and thus embracing within the generality of its provisions, the punishment for each and every and all offences, and excluding the idea, that in any case, they were to be liable to the penalties specified in and imposed by the Act of November 22, 1828.

This general Act, however, was repealed by the subsequent general statute, entitled An Act relating to crimes and misdemeanors, approved February 10, 1832; and it is
194 now to be seen whether this Act repealed the Act of Nov. 21, 1828, relating to crimes, &c., committed by slaves, free negroes and mulattoes. As a general rule, it is true, that every affirmative statute is a repeal by implication, of a precedent affirmative statute, so far as it is contrary thereto; *leges posteriores priores contrarias abrogant*—but to apply this maxim of the law, it is necessary that the two Acts be in conflict with each other, which is not the case here. The last Act is general, and though it may inflict a milder punishment than the preceding statute for the same offence, yet the Act which is claimed to be repealed by this implication, is special and particular. The Act of November 22, 1828, which was repealed by the Act of 1832, was general in its terms, extending to all persons not excluded from its operation by the force and effect of its provisions; and the Act of February 10, 1832, which repealed it, is equally extensive in its affirmative provisions; but the Act of November 21, 1828, is special and particular, relating to the same crimes and offences committed by an inferior class of persons, slaves and colored freemen, and therefore, applying another rule in the interpretation or construction of statutes, the later general Act does not work any repeal of a former particular Act; thus the stat. 5 Eliz., that no one shall use or trade without being apprenticed, did not take away the 4 and 5 Phil. and Ma., c. 5, that *no weaver* use, &c. Dwarris Stat., 673, citing 6 Co. Rep., 19, b. That the application of this rule of interpretation does no violence to the *intention* of the Legislature, is obvious from the particularity of the repealing clauses contained in the 79th and 80th sections of the Act of February 10, 1832. Section 79 simply repeals the Act of 22d November, 1828, and section 80 repeals an Act passed 17th November, 1829, which was in amendment thereto, and there is no sweeping clause of repeal as to all
195 acts coming within the purview or conflicting with the provisions of the repealing statute. From this, the inference is clearly deducible, that the Legislature, in 1832, did not intend to disturb the distinction established in 1828, between the two classes of persons subject to the laws, but to preserve it. We have nothing to do with the question of the policy of establishing and perpetuating such distinctions; but if it were proper to express any opinion thereon, we should unhesitatingly express our approbation of the policy and propriety of such distinctions. The perpetuation of the institution, indeed the common safety of the citizens during its continuance, would seem to require that the superiority of the white or Caucasian race over the African negro, should be ever demonstrated and preserved so far as the dictates of humanity will allow—the degraded caste should be continually reminded of their inferior position, to keep them in a proper degree of subjection to the authority of the free white citizens. And thus there is an obvious propriety in visiting their offences with more degrading punishment than is inflicted on the white citizens, while the humanity of the law is demonstrated by securing to them the same forms of law in making defence—a trial by jury—compulsory process for their witnesses—the aid of counsel—and indeed, as full, fair, and impartial a trial, as can or may be claimed by a white person.

The Act of November 21, 1828, being unaffected by the subsequent Act of February 10, 1832, is in full force and vigor, and slaves, free negroes and mulattoes are to be tried and punished according to its provisions. They may be guilty of many of the infractions of the penal laws of the State, of which the white person may be guilty; and hence, if the general statute creates a new offence, before unknown to the common law, if it is one which a slave or free colored person may commit, the latter may be indict- 196
ed and punished for it. The indictment in such case would be under both statutes, that creating the offence, and also the Act of 21st November, 1828, because the one creates the offence and the other provides the penalty. If the offence is one known to the common law, the indictment must be under the act of November 21, 1828, and the punishment must be assessed according to its provisions. In the case at bar there being no punishment specially providing for malicious mischief when committed by a slave, resort should have been had to the 61st section of the Act of November 21, 1828, as the law governing the case, but this was not done; the punishment was assessed according to the provisions of the 59th section of the Act of February 10, 1832, and in this there was error, for which the judgment must be reversed.

And it is accordingly ordered, that the judgment of the Circuit Court be reversed, vacated and set aside.

SAMUEL BUFFINGTON, APPELLANT, vs. JOHN QUACKENBOSS, APPELLEE.

1. The statute of the State of Florida confers upon a defendant the right to plead a set-off, upon which he is entitled to judgment against the plaintiff if his demand proved exceeds that of the latter.

2. After plea of set-off pleaded, and issue joined, the plaintiff has a right to discontinue his suit upon payment of costs; and this is imperative whenever an order for discontinuance is entered in the Clerk's office. But it is in the power of the Court to relax the rule upon special affidavit and motion.

3. If the costs are not paid, or if the order had been conditioned on the payment of costs, the only remedy of the defendant would be by motion in the Court below, to set aside the discontinuance, on the refusal of the plaintiff to comply with the terms of the order or the rule of Court.

Appeal from the Circuit Court for Duval county.

197 The point presented in this case will be found in the opinion of the court.

J. P. Sanderson and *McQueen McIntosh* for appellant.

G. R. Fairbanks for appellee.

SEMMES, J.:

This was an action of assumpsit, founded on a promissory note. The defendant in the court below, filed an account exceeding in amount the plaintiff's demand, and which, under the provision of our statute, he plead as a set-off.

At the trial term, the court, on motion of plaintiff's counsel, ordered the cause to be dismissed, to which the counsel for defendant excepted, and assigned the same as error.

The statute which authorizes proper subjects of set-off to be pleaded, gives the defendant the right to have judgment for the balance which the jury, on the trial of the cause, may find in his favor. Under this statute, it is insisted, that it was not competent in the court below, to dismiss this action at the instance of the plaintiff, without the consent of the defendant. We do not think so. The statute, while it affords a summary mode of adjusting the mutual demands existing between parties to a suit, in no wise, either directly or by implication, impairs the right of a plaintiff to discontinue his suit at any time before trial. According to the English practice, a plaintiff may discontinue his action as a matter of course, at any time before verdict or judgment on demurrer. 1 Salk. 178. Whenever a plaintiff finds he has misconceived his action, or from any other cause, he will not be able to maintain it, he may obtain a rule to discontinue. The judgment on the rule is never, it is true, entered, until the costs are paid; for until paid,
198 the action is not discontinued. 2 Arch. Prac. 233. Our rules are but little at variance with those recognized by the English Courts. By the 13th rule, a plaintiff may become non-suit, at any time before the jury retire. By the 14th rule, he may at any time discontinue his cause in the Clerk's office, by paying costs and entering a written discontinuance. The rules adopted by this court, are not in conflict with any statute of the State, but made in conformity with the law. Whenever an order is entered in the Clerk's office to discontinue an action, it is of no effect, unless the costs are paid. But it is within the power of the court to relax the rule. Cases may occur, as under the English practice, in which, upon a special affidavit and motion, the plaintiff may obtain leave to discontinue, without paying costs, as where a plea of infancy was interposed by defendant, in bar of a recovery for goods sold him. 2 Arch. 898; Van Buren *et al.* vs Fort *et al.*, 4 Wend. R., 209.

In this case, the judgment of the court in allowing a discontinuance, is absolute, and the presumption is, the costs of the suit were paid. If they are not, or if the order of the court had been conditional, on the payment of costs, the only remedy of the defendant would be by motion in the court below to set aside the discontinuance, on the refusal of the plaintiff to comply with the terms of the order or the rule of court.

The supposed hardship which might result from the defendant's set-off being barred by the statute of limitations, in the event of the plaintiff discontinuing his suit, cannot affect the plaintiff's rights. To plead the set-off is a right conferred by statute which the defendant may or may not avail himself, at his election. And when plead, the defendant may withdraw his set-off at any time before the jury retire. It is very obvious, that to deny a plaintiff the right to discontinue his action, by reason of a set-off being

plead, would, in effect, be to rescind the rule and destroy 199
the right altogether, for in any case, it would be in the power of a defendant, by pleading a set-off, whether real or fictitious, to force the plaintiff to a trial.

The case of Branham vs. the Adm'rx. of Brown, 1 Bailey's S. C. Rep., 362, was in every respect, similar to the one before us. It was an action of assumpsit, the defence to which was a discount exceeding the plaintiff's demand. On the trial when the evidence had closed, the plaintiff moved for leave to discontinue, which, on being objected to, was refused by the court, and the case was submitted to the jury, who found for the defendant. Upon a review of this case, the court, by Nott, J., in deciding the motion to set aside the verdict, said, the plaintiff had the right to discontinue his action, or suffer a non-suit, notwithstanding the defendant may have filed his discount. The court should have allowed the plaintiff to discontinue, and he is entitled to do so now, if he desires it. The same rule is recognized as to the defendant's right to withdraw his discount. Vide Dorr vs. Hawks, 3 McCord's Rep., 258.

Let the judgment of the court below be affirmed.

Archibald Barber, Plaintiff in Error, vs. The State of Florida.

After the testimony in a case has been closed, neither party has the right to re-examine a witness, or to introduce any new evidence, but when through the inadvertence of counsel, or other cause, the rigid enforcement of the rule would defeat the ends of justice, it is the duty of the Judge to relax it, whenever it can be done, without injustice to the adverse party.

***Per Thompson, J.*—Such relaxation rests on the sound discretion of the Judge, and if he errs in admitting or refusing to admit the testimony offered, this court has jurisdiction to review the judgment and correct the error.**

Error to the Circuit Court of Duval County.

This was an indictment against Archibald Barber for an 200
assault and battery.

It appears from the record, that upon the trial of this case in the Circuit Court, the State having closed, and the prisoner having offered no evidence, prisoner's counsel contended in his argument to the jury, that the prosecution had not proved the time when the offence charged in the indictment was committed, and asked the court to charge the jury that in such case the prisoner was entitled to a verdict.

The solicitor for the State insisted that the time had been proved by the witness, Beers, and asked to have the witness recalled to state what he had said as to time; the witness having been recalled could not say whether he had stated the time or not. Whereupon, the solicitor for the State conceded the point in question, and moved the court for leave to introduce the witness, to prove the time, to which prisoner's counsel objected. The court having overruled the objection, the witness was introduced and the time proved. To all of which prisoner's counsel objected and excepted, and assigned the same for error.

McQueen McIntosh for the Plaintiff in Error.

In the trial of a criminal cause, when the solicitor for the State has announced that the prosecution has closed, and counsel for the prisoner has made his argument before the jury, and asked the charge of the court, a witness cannot be recalled to remedy defects in the evidence adduced by the prosecution, and which have been disclosed by prisoner's counsel. Prisoner, in such a case, was entitled to all the benefits arising from the defence made by his counsel, and it was error in the court to permit the defective testimony to be supplied with new evidence. Odronaux vs. Helie, 3 Sand. Ch. R., p. 512; Jones vs. Relf, 10 Miss.,

623, cited from 2d U. S. Dig., 350; Hathaway vs. Hemmingway, 20 Conn., 191, cited from 5 U. S. Dig., 440 : May vs. The State, 5 Miss., 71, cited from 5 U. S. Dig., p. 155; §271; 1 Phillips Ev., p. 305, and authority cited in note t; The Queen's case, Brod. & Bing 6 Eng. Com. L. Rep., 294.

The above case is quoted in Ros. Crim. Ev., marginal page 170, and in 15 Petersd. Abr., page 425.

If the principle advocated is sustained by the cases cited in civil proceedings, it should with greater propriety be considered the rule of conducting the examination of witnesses in criminal trials. 4 Chitty Black., mar. p. 356.

There can be no discretion, where there are general fixed rules to control the manner of proceeding, and that discretion which places it in the arbitrary will and power of Inferior Courts to prejudice the rights of parties before them, should be discountenanced by courts holding their decisions in review. Hawkins vs. The State of Georgia, 11 Geo. Rep., p. 92; Bouvier's Law Dic., 328-329, title, discretion; Jacob's Law Dic., title, discretion; 1 Campbell's Lives of the Lord Chan., pp. 33-34.

J. P. Sanderson for the State.

The examination of witnesses is to be conducted in such a manner as to elicit the truth, without taking any unfair advantage. The court will not close the mouth of a witness because counsel omitted to ask a material question at first—the usual course is to suggest the question to the court, which will exercise its *discretion* in putting it to the witness. 1 Starkie's Ev., 150, Ed. 1826; Alfred vs. Halliwell, 1 Starkie R., 117, 2 E. C. L. R., 53; 3 Chitty's Genl. Prac., 901-3, cases cited and note.

The court may, at its *discretion,* allow a witness to be examined by either party, *over and over again,* at any
202 time during the *trial before verdict,* and this as well in *criminal* cases as *civil.* State vs. Silver, 3 Dev., 332 ; Freleigh vs. State, 8 Miss., 606, cited 5 U. S. D., 985, sections 627-28-29; 1 Phil. Ev. 212, n., 1st Ed.

And even as to *new* matter. Curren vs. Connery, 5 Binney, 488; 3 U. S. Dig., 709, §544, *ibid.,* 708, §511 ; U. S. vs. Wilson, 1 Bald., 38.

The time and manner of examining witnesses is in the *discretion* of the court, before which the trial takes place. People vs. Mather, 4 Wend., 229, cited 3 U. S. D., 709, § 543; Law vs. Merrills, 6 Wend., 268, cited 4 N. Y. D., 1316, §469; Duncan vs. McCollough, 4 S. & R., 480, cited 3 U. S. D., 708, §506.

After plaintiff has *closed his case,* he will be permitted to remedy a defect in his evidence, if such defect arose through the inadvertency of his counsel. 1 Arch. Prac., 194; 1 Starkie R., 117; Giles, Assignee of Hills, vs. Powell, 12 E. C. L., 560; Walls vs. Atchison, *ibid,* 566.

And even though the counsel for the prosecution has closed his case, and the prisoner's counsel points out a defect in the evidence, the court is at liberty in its *discretion,* to put what question it pleases to remedy the defect and remove the objection. Rex vs. Remnaut, 1 B. Crown Cases, 136.

Upon a trial for murder of a *male* child, the counsel for the prosecution concluded his case without asking the *sex* of the child, and the Judge would not permit him afterwards to call a witness to prove it, and in consequence of the omission, directed the jury to acquit the prisoner. But to the honor of that Judge it ought to be stated, that he declared afterwards in private, his regret for his conduct. This case is well remembered, but it ought never to be cited, but with *reprobation.* 4 Christian Blk., 356, note.

So, after defendant's counsel had summed up, and while

the plaintiff's counsel were summing up, defendant's coun- 203
sel discovered some written evidence, which they wished to submit to the jury, and which the Judge refused. On an application for a new trial, the court said, the evidence was material, that the Judge had a *discretion* to admit the evidence, and it ought, in *sound discretion,* to have been received—and a new trial was granted on *that ground.* Mercer vs. Sayer, 7 J. R., 306.

This is an assignment of error upon the exercise of a discretionary power by the court, which this court will cautiously examine into, on appeal. 1 U. S. D., 169, §§ 111, 112, 113, and 114; People vs. Mather, 4 Wend., 247, cited 4 N. Y. D., 1316, § 247.

ANDERSON, C. J.:

The case is brought up by agreement as upon writ of error from the Circuit Court of Duval county. On the trial of the plaintiff in error on an indictment for assault and battery, the solicitor of the State omitted to prove the time when the offence charged was committed, till the prisoner's counsel, on the solicitor announcing that he had closed, addressing the court in the defence, asked the court to charge the jury, that the prisoner was entitled to a verdict on account of the omission.

The solicitor of the State then moved the court for leave to introduce a witness to prove the time; to which prisoner's counsel objected. The court overruled the objection, the witness was introduced, and the time was proved. The ruling of this court is assigned for error.

It is undoubtedly true, that after the counsel for the prosecution has closed his case, and counsel for the accused has been heard in the defence, the former has not the *right* to recall a witness or to examine a new one. This is in accordance with well settled rules of practice in relation to the examination of witnesses. But it is incorrect to 204
consider the right of counsel and the duty of a Judge as alike regulated by the same inflexible rules. The province and peculiar office of the latter, is to ascertain and establish the truth, and the policy of the law therefore, wisely confides to him the right so to use the necessary rules of practice, as not to allow the letter to thwart and defeat their spirit.

When the Judge perceives that in consequence of the inadvertence of counsel or other cause, the rigid enforcement of the rules would defeat the great object for which they were established, it is his duty so to relax them (when it can be done without injustice to any) as to make them subserve their true purpose, which is to aid the court and the parties before it in determining and adjusting their respective rights.

The security which we have from any injury growing out of this license, arises from this distinction—that counsel have no *right* to examine witnesses out of the prescribed order; it is only a permission which may be awarded or refused by the court, as the Judge may perceive that it can or cannot be allowed with justice to all parties.

In the case before us, the solicitor had no *right* to recall the witness Beers—his rights are regulated by the rule, and according to its terms the witness could not be recalled. But the Judge had the right to recall or to permit the solicitor to recall him when, as in this case, it was obvious no injustice could be done to the other party by the relaxation of the rule. Such we understand to be the practice in all the best regulated courts, and it appears to us that the practice is in accordance with the purposes for which courts of Justice are established. We conclude, therefore, that there was no error in the ruling of the court.

Per curiam. Let the judgment be affirmed.

Barber vs. State of Florida—Opinion of Court.

205 THOMPSON, J.:

Although I concur in the judgment pronounced in this cause, I prefer to state my own reasons therefor, inasmuch as my views do not entirely coincide with those of my brethren.

For the purpose of avoiding confusion and embarrassment, and the surprise of the the parties litigant, rules have been, from time immemorial, established for the orderly proceeding of the litigants in the introduction of evidence, the examination, cross-examination and re-examination of witnesses. The witness, when introduced, is to be examined by the party calling him, after which he may be cross examined by the opposite party; and a re-examination by the party who calls the witness is only allowable, as of right, on those topics on which he has been cross-examined, to give an opportunity of explaining any new facts which have come out upon such cross-examination. But the witness cannot at this stage be again examined *in chief* —that is, as to any facts unconnected with the cross-examination. If a question as to any material fact has been omitted upon the examination in chief, the usual course is to suggest the question to the court, which will exercise its discretion in putting it to the witness. 1 Stark on Ev., 120, 149.

Such are the rules established in this particular; but they are not inflexible and unyielding; the discretion of the Judge may and should be exercised, in proper cases, to dispense with the rigor of the rule, and to permit the re-examination of a witness as to matters in chief, or to allow a new witness to be called to prove a disputed fact, at any time during the trial of the cause, whenever it is necessary to the advancement of justice, if it can be done without injury or surprise to the adverse party.

206 It is, however, contended on behalf of the State that this is a matter properly belonging to the practice of the subordinate court, and that this court cannot interfere with, or regulate the exercise of this discretion. I cannot admit this as sound doctrine. The discretion is not an arbitrary exercise of the will and pleasure of the Judge, but it is a sound legal discretion, to be exercised according to the exigency of the case, upon a consideration of the attending circumstances, and if he errs in the exercise of this power, either in permitting a re-examination of a witness when he should not have done so, or refuses to waive the rule and allow the evidence to be admitted when he should do so, this court has the power to correct his error. Discretion, says Ld. Coke, is to discern between right and wrong, and therefore, whoever hath power to act at discretion, is bound by the rule of reason and of law. 2 Inst., 56, 298. And though there be a latitude of discretion given to one, yet he is circumscribed that what he does be necessary and convenient, without which no liberty can defend it. Hob. R., 158. And again, it is said that when anything is left to any person, to be done according to his *discretion*, the law intends it must be done with sound discretion, and according to law; and the court in B. R. hath a power to redress things that are otherwise done, notwithstanding they are left to the discretion of those that do them. 1 Lill. Abr., 477.

And this seems to be the correct rule, for many errors may be committed and much wrong be done if this discretion is not to be reviewed in this court, as a court of error and appeal.

There is always danger that a discretion which may not be controlled by a superior tribunal, however properly it may at first be exercised, will soon degenerate into mere caprice; an arbitrary *sic volo sic jubeo, stat pro ratione voluntas.* It may be asked why this discretion may not 207
be as safely reposed in the Circuit Courts, as in this court, where it will be ultimately lodged, if this court entertains jurisdiction over the matter? The answer is obvious—the Circuit Court is held by a single Judge; in this court, three Judges must preside, and confer on all questions decided by it, and two of them must concur; the Circuit Court is not required to give the reasons for its judgment; in this court, the reasons for every judgment must not only be given, but must be written out, and read in open court before the judgment is pronounced. The law provides for a more mature deliberation and consideration of every question in this court than could with convenience be given by the Judge of the Circuit Court, and hence there is a very obvious propriety in confiding the ultimate decision of all questions, including even the so-called discretionary powers, to a tribunal constituted as this court is. But it has been said that the Circuit Judges possess, with regard to the exercise of these discretionary powers, better opportunities, indeed in some cases, the only opportunity of making a correct decision on the subject matter. If this be true, the cases, I think, are rare, and are more than countervailed by the considerations before mentioned of more time for deliberation, and the benefit of the united labors of the three Judges. And again, it has been contended, that if this court claims and exercises the power of regulating and controlling the exercise of these discretionary powers, it will have the effect of degrading the Circuit Court Judges, and in fact would materially interfere with the efficient discharge of their duties. I cannot think so. The Circuit Court Judges are well aware that the tribunals in which they preside are with respect to this court, inferior and subordinate; and presuming that the sole and only care of that very meritorious branch of the judicial power of the State is, that justice may be ad- 208
ministered according to the rules of law, they would always rejoice that unintentional errors should be corrected by the court of last resort. But if the argument is well founded, it proves too much; it goes to show that this court can and ought to be dispensed with in order to preserve the dignity and efficiency of the subordinate Judges—it is an argument against all appellate tribunals—for it is impossible to conceive that the Judges of the subordinate courts would not entertain as much pride of opinion upon such questions as it is conceded may now be assigned for error, as upon those questions which are claimed to rest exclusively in the discretion of the Judge.

That this court has the power to entertain the jurisdiction which I contend for, I have no doubt; the citations above made, declare that the Court of King's Bench, in England, hath power to redress things erroneously done, which are confided to the discretion of subordinate tribunals, and the power of this court as a court of revision is as full and ample as that of the English Court. By the Constitution, it is invested not only with full appellate jurisdiction proper, but with a superintending power and control over all other courts. In some of the cases cited upon the argument, while the right to review the exercise of such discretionary powers is denied the appellate court, it is admitted that the court will interfere whenever there is a case presented of gross maladministration of the power. This presents a most glaring inconsistency, for how can an appellate tribunal ascertain that the power of exercising this discretion has been grossly abused except by an examination of the question? And if the appellate court has not the jurisdiction which I claim for it, the answer should be in all cases where the assignment of error is based upon the discretionary power, that the court can-

209 not interfere for want of jurisdiction. These cases proceed upon this idea—we will look into the matter; if the power has been fairly, properly and justly exercised, we will not affirm the judgment, because it is right and just, but will do so on the ground that the court has no power to interfere with it. And if, on the other hand, it shall appear that it has been arbitrarily exercised—if there has been a wanton or gross abuse of the power, the Appellate Court will interfere and apply the proper corrective, because it is not a proper and just exercise of discretion. In fact jurisdiction is and must be assumed, according to these cases, to ascertain whether it is or is not the exercise of judicial discretion; and yet it is said no appeal lies from the exercise of such judicial discretion, because the Supreme Court has not power to review it. The course of reasoning by which such a result is attained, seems to my mind too highly artificial to be sound. I cannot understand how the right to exercise this discretionary power, if free from control, is made to depend on the fact whether it is rightfully or wrongfully used; so also it seems to me, that an uncontrollable discretion which acts materially on the rights of parties litigant, is, according to the principles of the common law, simply an absurdity; and that it justly merits the eloquent denunciation of Ld. Camden, quoted by the counsel for the appellant. "The discretion of a Judge," says that eminent jurist and statesman, "is the law of ty-"rants; it is always unknown, it is different in different "men; it is casual, and depends upon constitution, temper, "and passion. In the best, it is oftentimes caprice; in "the worst, it is every vice, folly and passion to which hu-"man nature is liable."

In the case at bar, although the Circuit Court allowed the witness to be re-examined at a very late stage of the cause, yet I am unable to perceive, from the statement of 210 the bill of exceptions, that the discretion was exercised otherwise than soundly and properly. There was no surprise upon the appellant, and he does not appear to have been prejudiced by the discharge of witnesses, &c., previous thereto. It was a simple isolated fact as to the time when the offence charged was committed, and not as to the guilt of the appellant, whether he had in fact committed the offence or not. I can very well conceive of cases, both on the civil and criminal sides of the court, when the re-examination of witnesses would tend greatly to the prejudice of the adversary party, and present temptations to the witnesses to commit perjury. Witnesses remaining in the court room, and ascertaining from the arguments of counsel before the jury the weak points of the case, if their feelings are strongly enlisted, would be prompted by the bias of their minds, to supply the deficiency, upon a re-examination. So also the new and substantive fact proved by a witness recalled to the stand, or a new witness introduced after the evidence had been closed, might be susceptible of contradiction, and yet the opposite party deprived of this opportunity by the discharge or departure of witnesses who had been in attendance. Other suggestions present themselves, but those stated are sufficient for the purpose of illustration. The discretion is to be exercised with reference to all the surrounding circumstances, and these circumstances in almost every instance, may be made to appear intelligibly to the Appellate Court, by the bill of exceptions, so that if it has been improperly exercised, it may be corrected here. As before remarked, I concur in the judgment of affirmance, because I cannot see that any error has been committed by the court below in the application of a sound legal discretion.

ADEN WATERMAN, APPELLANT, VS. SAMUEL B. MATTAIR, 211
APPELLEE.

1. It is too late after plea to the action, for the defendant to demand a bill of particulars.

2. The statute requiring the plaintiff to file with his declaration, a copy of the cause of action, is merely *directory;* but still the defendant may refuse to plead until a copy is filed or furnished him. He has a right to his rule on the plaintiff when made at the proper stage of the case, after appearance, but he waives this right, by plea to the action. It is, however, discretionary in the Judge who tries the case to grant the order at any time before the trial.

3. In an action for deceit, the covenant of warranty is not the cause of action, but the inducement to it.

4. The action is not on a *breach* of the contract, but the fraud or deceit of the defendant in the sale. It is, therefore, not requisite for the plaintiff to set forth the contract, but simply, the fraud or deceit and damages.

Appeal from a judgment of the Circuit Court of Marion county, Hon. Thos. Douglas presiding.

The appellee, Mattair, instituted against the appellant an action on the case for a deceit in the sale of a slave. The declaration is in the usual form, and alleges unsoundness of the slave at the time of sale. The following bill of exceptions, which was made a part of the record, embraces the points submitted to the court below, the rulings of the court thereon, and the facts appearing in the record:

The issue having been made up in this cause, and the same having been called for trial, defendant's counsel demanded a bill of particulars from plaintiff's counsel, which being refused, defendant's counsel moved the court for an order on plaintiff's counsel to file bill of particulars, which motion was refused by the court, to which ruling defend- 212 ant by his counsel, excepted."

"Plaintiff's counsel offered in evidence in said cause a written covenant of warranty, under seal, from defendant to plaintiff, setting forth a warranty by defendant of the soundness of the negro woman slave, the subject of controversy in said cause. Defendant, by his counsel, objected to the admission of said paper writing, on the ground that said covenant was not set out nor described in plaintiff's declaration, either in substance or form. The Court overruled the objection, and defendant, by his counsel, excepted. Defendant, by his counsel, further objected to the admission of said covenant of warranty on the ground that no copy of the same was filed with the declaration. The Court overruled said objection, and the defendant, by his counsel, excepted; whereupon the defendant appeals and prays the Court to sign and seal this his bill of exceptions, and make the same a part of the record in said cause."

No evidence of unsoundness is exhibited in the record. The Jury returned a verdict in favor of the plaintiff, and appealed.

B. M. Pearson for appellant.

C. A. M. Mitchell for appellee.

SEMMES, J.:

This is an action on the case, for *deceit,* in the sale of a negro slave, and the points presented to us are purely questions of practice.

The declaration alleges the warranty and fraud, on the part of the defendant, in the sale, and avers that the plaintiff, by reason of the unsoundness of said slave, incurred great expense for medical services, and in feeding and clo-

thing her. No bill of particulars was filed with the declaration, but the defendant, by his attorney, pleaded to the action, and the issues were thereupon made up. After this, and when the cause was called for trial, the defendant moved the court for an order on the plaintiff to file a bill of particulars, which motion was refused, and this is assigned as error on the part of the court below. 213

It is very clear, and cannot admit of argument, that it is too late, after plea to the action, for the defendant to demand a bill of particulars. The only object of it, is to apprise the defendant of the nature and extent of the cause of aciton, in order that he may plead with the greater certainty.

Our statute requiring the plaintiff to file with his declaration a copy of the cause of action, is merely directory; but still, the defendant may refuse to plead, until a copy is filed or furnished him. He has a right to his rule on the plaintiff when made at a proper stage of the case, after appearance, but he waives this right by plea to the action, although it is discretionary with the Judge who tries the case, to grant the order at any time before the trial. 2 Arch. Prac., 222. Circumstances may arise in the progress of a cause, where it would be the exercise of a sound discretion, on the part of the court, to relax the usual rule.

The second ground of error assigned by appellant, is, that the covenant of warranty from him to appellees, was, notwithstanding his objection, admitted by the court below, as evidence on the trial, when in fact it was not set out in the declaration, either in substance or form. The covenant is not incorporated in the bill of exceptions, as it should have been, nor is it to be found in the record before us. If a variance in fact exists between the declaration and the covenant, it is not in the power of this court to ascertain it, with the defective record before us. It is unques- 214
tionably the duty of counsel to see that the record of cases appealed from is complete, and had an application been made to us, it would have been an easy matter to have supplied this omission. We can hardly be expected to review the decisions of the courts below, unless the facts upon which the decisions are based are brought before us.

The third and last error assigned, is, that a copy of the covenant was not filed with the declaration. Had this been necessary, it was waived by the plea. But it was not necessary. The statute requires that all bonds, notes, bills of exchange, covenants and accounts, upon which suit may be brought, or a copy thereof, be filed with the declaration. Thomp. Dig., 331.

But this suit is not brought on the covenant. It is not the cause of action, but the inducement to it. The plaintiff's right to recover, it is true, grows out of the contract of warranty, but the action is not on a breach of the contract, but the fraud or deceit of the defendant, in the sale, of an unsound negro slave—a matter outside of the covenant. The *gravamen* is the deceit, and not a breach of the warranty. Williamson vs. Allison, 2 East., 246. In an action on the case, *upon* a warranty, it is necessary to state the whole consideration, the substantial parts of the warranty, and the breach of which the party complains. Miles vs. Sherwood, 8 East, 7. But in the case of Barney vs. Dewey, 13 John. Rep., 224, it was held, that in an action for deceit, it was not requisite for the plaintiff to set forth the contract in his declaration, or any consideration, but simply to state the fraud or deceit and damages. And although it is true, that the contract stated is only matter of inducement, and therefore, the same certainty is not requisite as if the action was on the contract itself, yet, whatever is alleged as inducement, must be proved, and a variance in this respect would be as fatal, though the action is on a collateral matter, as if on the contract. 215

The whole case as presented to us, is too plain to admit of any doubt. A mere statement of the facts, as presented by the bill of exceptions, would seem to afford a conclusive answer to the several grounds of error assigned by appellant.

Judgment below affirmed.

MARIA DOGGETT, APPELLANT, VS. ISAIAH D. HART AND OTHERS, APPELLEES.

1. Although as a general rule, the plaintiff in ejectment must show a legal title to enable him to maintain the action, yet in particular cases, where ejectment is brought upon the demise of a *cestui que trust*, the jury will be permitted to presume that the trustee has made a regular surrender of estate, in every case where the purposes of the trust estate have been satisfied, or the beneficial occupation of that estate by the possessor induces a supposition that a conveyance of the legal estate has been made to the party beneficially interested, or where the trust is a plain one, and a Court of Equity would compel the trustee to make a conveyance.

2. To enable a *cestui que trust* to claim the jurisdiction of a Court of Equity in asserting a legal title, it must be distinctly and positively alleged that the trustee had refused the use of his name to the party beneficially interested in an action at law.

3. A Court of Equity will not entertain jurisdiction on the ground of preventing a multiplicity of suits, merely because the complainant has a multitude of suits to bring depending upon the same question or the same title, but will entertain such jurisdiction where the bill is in the nature of a bill of peace, as where the party is in possession, and is threatened with numerous actions, and in cases where a Court of Equity having entertained jurisdiction upon a clear ground of equity, as for a discovery, will also give relief, consequent upon discovery.

4. A Court of Equity will not entertain jurisdiction in cases of confusion of boundaries, upon the ground merely that the boundaries are in controversy, but will require that there should be some equity superinduced by the act of the parties, such as fraud, gross negligence, or misconduct on the part of those whose duty it is to preserve and perpetuate such boundaries. 216

Appeal from a decree of the Circuit Court for Duval county.

The appellant, who was complainant in the court below, filed her bill against Isaiah D. Hart and others, setting forth that on the thirteenth day of September, 1816, the Spanish Governor of East Florida granted to one Maria Taylor a certain tract of land, containing two hundred acres, situated on the River St. Johns, and particularly describing it by boundaries; that said Hart, by divers conveyances, became possessed of this tract of land, or such parts as had not been previously conveyed. The bill further alleges that on the thirteenth day of December, 1816, the said Spanish Governor of East Florida granted to one John Masters a certain tract of land, situated on the river St. Johns, supposed to contain one hundred acres; that this last mentioned tract was "bounded and described, "and a plat of the same duly returned and recorded, as "follows: Bounded on the west by the aforesaid 'Maria "Taylor's' grant, on the north and east by Hogan's "Creek, and on the south by the river St. Johns, and con- "taining in reality about seventy-five acres;" that said Hart, on the 4th day of May, 1836, by virtue of diverse conveyances, and especially of a deed of conveyance from one John Bellamy, became seized and possessed of the tract known as the "Masters grant," or to such parts as had not previously been conveyed away by previous owners; that said Hart, on the eighteenth day of December, 1836, for the consideration of $1,100.00. conveyed, with covenant of warranty, all his right, title and interest in and to the tract known as the "Masters grant" to William J. Mills, in trust, for the exclusive use and benefit of the

217 complainant, Maria Doggett, then the wife of John L. Doggett, free from all or any claims of said John L. Doggett, or any other person or persons claiming by, through or under him. The bill further sets forth that the consideration for the transfer from Hart to Mills, in trust as aforesaid, has been fully paid by complainant; that her husband, John L. Doggett, died before the institution of the suit, and that Mills, the trustee, neglected and refused to perform the trust reposed in him. The complainant claims that the "Masters Grant" was bounded on the west by the "Maria Taylor Grant," and alleges that Hart, since the execution of the deed of trust to Mills, claims that the said west boundary line of the "Master's Grant" is distant about forty rods from the east boundary of the "Maria Taylor Grant." The bill alleges that the two grants referred to comprise the territory upon which the town of Jacksonville is now located, and sets forth certain conveyances from Hart to the other defendants, who were purchasers of lots within the disputed boundaries. It also asserts that Hart is and has been in possession of certain other lots within the disputed boundaries, some of which have been yielding rent for a series of years, for which it is claimed he should be held liable. The bill also alleges that certain other lots were conveyed by said Hart after the execution of said deed of trust by him, but before the same was recorded so as to fix the purchasers with notice, and claims that Hart should be held liable therefor under the covenant of warranty contained in the deed of trust aforesaid. It concludes by praying that Hart should be decreed to deliver up the possession of the several lots still held or claimed by him, and that the boundary line between the Maria Taylor Grant and the Masters Grant may be established; that Hart may be decreed to pay the amount, with interest, for which he is chargeable under his covenant of war-
218 ranty; that he may be decreed to render an account of the rents and profits which have come to his hands for and on account of any of the lots claimed to be within the Masters Grant, and pay the same to complainant; and that the other defendants may be decreed to deliver to complainant the several lots of which they are respectively in possession, as stated in the bill.

To this bill Hart for himself, and several of the other defendants jointly demurred, alleging as the causes of demurrer

1. That the complainant has not, by her bill, made such a case as entitles her to any relief against the defendants in a Court of Equity, but that the said complainant has a full, complete and adequate remedy in a Court of Law;

2. That the said bill is multifarious, in that the same is exhibited against the defendant, Hart, for divers separate and distinct matters and causes, and also against the defendants who demur, and divers other defendants, for divers separate and distinct matters and causes, in which they are in no wise jointly interested;

3. That by the said bill it appears that the said complainant hath not any legal or equitable interest in the subject matter of the said suit.

These demurrers were sustained by the court below, and the bill was dismissed with costs. From this decree the complainant appealed.

Philip Fraser (with whom was *Felix Livingston,*) for appellant.

Of the jurisdiction.—The third general division of the cognizance of equity arises from the establishment of principles, or the possession of powers, of a nature exclusively adapted to the subject matter, but wholly inadmissible at law.

Thus, trusts, equitable mortgages, and equities of re- 219
demption, the equity of a *feme covert* to a settlement, and to her separate estate, are confined to chancery, because these interests are creatures of that court, owing their existence solely to its principles, and supported exclusively by its powers. Fonb. Eq., 23, note 3.

A trust is a creature of equity, and to be governed by their rules. Fonb. Eq., 227 and 307, note*; Story's Eq. Jur., § 29.

Boundaries.—The court has never entertained bills for establishing boundaries, unless where the soil itself is in question, or where there might have been a multiplicity of suits. 4 Bridg. Eq. Dig., 133; Story's Eq. Jur., 616, 619, 620 and 621; Wake vs. Conyers, 1 Eden, 331; *ibid.*, 2 Cox, 360.

Multifariousness.—A single copyholder is not relievable in equity for an excessive fine, (that being determinable by a jury,) but to avoid multiplicity of suits, several copyholders may join to be relieved against a general fine, that is excessive. 4 Bridg. Eq. Dig., 39 & 90; 3 P. W., 157.

A demurrer for multifariousness will hold only where plaintiff claims several matters of different natures, but when a general right is claimed by the bill, though defendants have separate and distinct rights, a demurrer will not hold. 4 Bridg. Eq. Dig., Tit. Demurrer, 203; *ibid.*, § 71-2-4; Salvidge vs. Hyde, 5 Madd., 138; Exeter Coll. vs. Rowland, 6 Madd., 94; Kay vs. Moore, 1 Sim. & St. 61.

Definition of multifariousness.—1 Daniel Ch. Pr., 383, 384, 393, n.; Story's Eq. Pl., 271.

Bills against persons with distinct interests in the same transaction, or arising under the same instrument, not multifarious. 1 Daniel Ch. Pr., 386, *et seq.; ibid.*, 389, 392, 396

To ascertain boundaries.—Turner vs. Robinson, 1 S. & 220
S., 313.

Impertinence no ground for Demurrer.—1 Daniel Ch. Pr., 401.

G. W. Call for appellee, Hart, (with whom was *McQueen McIntosh*, for the other appellees.)

1. The bill would be multifarious if Hart were sole defendant, for it prays four distinct matters against him, each of which would be the proper matter of a separate suit.

Multifariousness consists in uniting in one bill several matters perfectly distinct and unconnected, against one defendant. Story's Eq. Pl., § 271, 280, 252-3.

It is not competent where A. is sole plaintiff, and B. sole defendant, to unite in one bill all sorts of matters in which they are mutually concerned. Attorney Genl. vs. Goldsmith's Co., 5 Simons, 670-5; 7 Cond. Eng. Ch. 573.

2. But the case is stronger here where there are many defendants. "What is more familiarly termed multifariousness as applied to a bill, is where a party is able to say he is brought as defendant to a record, with a large part of which and the case made by which he has nothing to do." 1 Daniel Ch. Pr., 385, cites 1 Mad., 89.

If the owner of the equitable title to land in a bill to compel a conveyance of the legal title to him, join the owner of the adjoining land as a defendant to settle a disputed boundary, the bill is multifarious. Hickman vs. Coke, 3 Humph., 640, cited in 2 U. S. Eq. Dig., 426.

This was originally done here, but the bill was, after allowance of the demurrer, so far amended as to strike out that prayer. It is a question whether that amendment can now be considered as made.

In Gaines and Wife vs. Chew, the Supreme Court held a bill multifarious which prayed an account from execu-

Doggett vs. Hart and others—Argument of Counsel.

221 tors with which the other defendants had nothing to do. Gaines et *ux.* vs. Chew *et al.*, 2 How., 644.

In Whaley vs. Dawson, the Chancellor allowed a demurrer for multifariousness, to a bill praying for the partition of certain lands held in common, and for setting aside a lease granted to plaintiff. Whaley vs. Dawson, 2 Sch. & Lef., 371-2.

See also Salvidge vs. Hyde, Jacobs, 151; Harrison vs. Hogg, 2 Vesey, Jr., 323; Saxton vs. Davis, 18 Vesey, 71; Dunn vs. Dunn, 2 Simons, 329; Maud *et al.* vs. Ackholm, 2 Sim., 331; 2 White & Tud., part 1, page 318.

And in Boyd vs. Hoyt, after full argument, it was decided that where a joint claim against two defendants is improperly joined in the same bill with a seperate claim against one of the defendants only, either or both may demur for multifariousness. Boyd vs. Hoyt, 5 Paige, 79

II. But this is properly recognizable at law.

Boundaries.—Story on this subject, says: This jurisdiction is one which has been watched with a good deal of jealousy of late years, and there seems no inclination to favor it, unless special grounds are laid to sustain it. The general rule now adopted is not to entertain jurisdiction in cases of confusion of boundaries, upon the ground that the boundaries are in controversy, but to require that there should be some equity superinduced by the act of the parties. 1 Story's Eq. Jur., § 615-619.

In the case of the Duke of Leeds vs. Earl of Strafford, the court said, "the bill assumes that the plaintiff knows that these are copyhold lands, but does not know the boundaries, *it is the duty of the tenant to keep the boundaries that is the foundation of the bill.*" Duke of Leeds vs. Earl of Strafford, 4 Vesey, 181.

In Gierson vs. Eyre, the court said, "in all cases upon this head, the court has gone upon this, that the defendant
222 or those under whom he claims, had a duty imposed upon him to keep the subjects distinct. But if there was no such duty, I do not know that any relief could be given." Gierson vs. Eyre, 9 Vesey, 345.

The same point was decided in Speer vs. Crawter, 17 Vesey, 216; Atty. General vs. Fullerton, 2 Ves. & Beames, 263; Loker vs. Rolle, 3 Vesey, 4-6; Metcalf vs. Beckwith, 2 P. Will., 376; St. Luke's vs. St. Leonard's, 1 Brown Ch. Rep., 40; Borwene vs. Prentice, 1 Brown Ch. Rep., 200.

2. It will be answered that this bill avoids a multiplicity of suits; the same may be said of every multifarious bill, and the more multifarious the greater multiplicity of suits is thereby avoided.

In the Mayor of York vs. Pilkington *et al.*, the court allowed a bill on the ground that it would avoid a multiplicity of suits. That case goes further than any before or since, and has been made the subject of animadversion by other Chancellors, and in some of the cases cited, has been substantially overruled. Even in that case, the Chancellor said: "Now it is a rule that a man should not come into a Court of Equity to establish a legal right, unless he has established his title at law, if he can," and he cites two cases where parties in possession brought their bills to be quieted in possession, without first recovering at law, which bills were allowed, "otherwise," says the Chancellor, "if they had been interrupted and dispossessed, for then they had their remedy at law." Mayor of York vs. Pilkington, 1 Atk., 283.

3. But here no multiplicity of suits is to be apprehended; there are but two titles, Hart's and Doggett's, one ejectment may be brought for the whole land in dispute.

Ejectment may be brought against several defendants claiming under different titles, who may defend under their respective titles. White vs. Pickering, 12 S. & R., 435, 223 cited in 2 U. S. Dig., 130, § 253.

Several defendants may be joined in one suit in ejectment, where the plaintiff's title in relation to all is the same, although their possession may be several and not joint. Each defendant may be found guilty separately, for the part of the premises in his possession, and the plaintiffs have judgment against them separately. Jackson vs. Andrews, 7 Wend., 152, cited in 5 U. S. Dig., 131, §287.

Ejectment against several persons occupying different rooms in plaintiff's house is not misjoinder of defendants; each may plead severally as to the room which he occupies and disclaim as to the residue. Marshall vs. Wood, 5 Verm., 250, cited in 2 U. S. Dig., 131, §288.

A plaintiff in an action of ejectment brought against eleven persons in possession of different portions of the premises claimed, holding by separate titles, though all derived from the same source, but without any community of interest, will be compelled on application of the defendants, to enter into a separate consent rule with each. Porter vs. Scoville, 5 Wend., 96, cited in 2 U. S. Dig., 132, § 331.

See also Adams on ejectment, 237, and notes.

4. The intervention of a trustee does not change the case.

In Motteux vs. London Assurance Co., Hardwick, Chancellor, said, "two reasons have been assigned by the plaintiff for coming into this court, first, that the insurance is in the name of a trustee; if the trustee had refused the *cestui que trust* the use of his name in an action at law, there might have been some pretence, but upon this general ground of a trust, I should at this rate determine all policies without giving the company a chance of a trial." 1 Atk., 547.

See also Mitford Ch. Pl., 125.

In Hopkins vs. Ward, it was decreed that "a *cestui que* 224 *trust* may after the purposes of the deed have been satisfied, maintain ejectment in his own name, although the legal estate is in the trustee." Hopkins vs. Ward, 6 Munf., 38, cited in 2 U. S. Dig., 129, § 234.

III. But there is no equity in this bill.

Upon its face, the bill shows one continuous exercise of jurisdiction by defendant Hart, over all the disputed lands, commencing on 26th July, 1826, and continuing to the present day, although on 4th May, 1836, Hart, for the first time, acquired title to the lands now owned by complainant.

The bill then shows that every successive owner of the Masters grant has acquiesced in the boundary as claimed by Hart. Complainant is now estopped from asserting it to be otherwise.

Where a person has stood by and saw a great and costly improvement made upon lands by persons claiming title and interposed no claim or pretensions of title for thirteen years, held that he was thereby estopped. Higginbotham vs. Barnett, 5 John. Ch., 184; Stors vs. Buck, 6 John. C. R., 166.

Declarations made by a person in possession of real estate as to his interest or title to the same, may be given in evidence against those who have subsequently derived title from him. Padgett vs. Lawrence *et al.*, 10 Paige, 170.

ANDERSON, C. J.:

This is an appeal from the Circuit Court for Duval County, sitting in Chancery. The appellant filed in that court her bill against the appellees, praying that the respondents might be decreed to deliver up to her the possession of certain real estate lying in the town of Jacksonville, and for other relief.

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225 We propose to consider whether the complainant applied to the proper tribunal for the recovery of her alleged rights, and the conclusion to which we shall come upon this inquiry will render unnecessary the further examination of the imputed defects and errors in her bill.

"Has the complainant, then," to use the words of the demurrer which was filed by the respondents, "by her bill made such a case as entitles her to any relief against the defendant in a Court of Equity?"

There are three several grounds on which the complainant rests her claim to come into a Court of Equity.

First, That she had no relief at law, in consequence of her interest in the lands in question, being only an equitable interest;

Second, That it was necessary to come into Equity, in order to avoid a multiplicity of suits; and

Third, That she had a right to claim the aid of a Court of Equity on account of a confusion of boundaries, which confusion involved the title to the disputed lands.

We shall consider these grounds in the order here persented, with the facts connected with it as we find them in the record.

Mrs. Doggett's interest in the land is derived from a deed executed by I. D. Hart, one of the defendants. By this deed Hart conveyed certain lands, which it is not necessary to our present purpose to describe, to one William J. Mills, "in trust, for the exclusive use and benefit of Maria "Doggett, wife of John L. Doggett, free from all or any "claim or claims of said John L. Doggett, or any other per-"son or persons claiming in or through or by him, for the "sole use of the said Maria, free from all claims or de-"mands of the said John L. Doggett." The boundaries of the land conveyed in this deed are claimed to embrace the lands sued for. The bill shows that John L. Doggett died
226 in 1844, before the commencement of the present suit. It also charges that Mills, the trustee, has neglected and abused his trust by confederating with Hart to deprive the complainant of a large portion of the land conveyed in the deed.

The bill alleges that Hart continues to hold much of this land, and has sold other portions and received payment for the same, and other of the defendants are in possession of portions of the land. From this statement, it appears that Mrs. Doggett's title is that of a *cestui que trust* under the deed from Hart, and it is obvious that she relies chiefly upon this as her warrant for coming into Equity to enforce her possessory rights. If in her character as developed by the statements of the bill, she could go into a Court of Law, and find there a full and adequate remedy, for her alleged injuries, the door of an Equity Court would be denied to her. Let us inquire into her capacity to sue in a Court of Law.

The general rule doubtless is, that to enable a claimant to support an action of ejectment in a Court of Law, he must be clothed with the legal title to the lands, (Adams on Ejectment, 32,) but the necessity of having exceptions to these general rules, upon the principle of adaptation which is essential to their utility as instruments for administering justice, has prompted the Law Courts to relax this rule in regard to the class of persons to whom the complainant belongs. A *cestui que trust,* after the purposes of the deed have been satisfied, may maintain ejectment, upon a demise in his own name, although the legal estate is still in the Trustee. Hopkins & Watkins vs. Ward and others, 6 Munford's Reports, 38. Now in this case, the deed of trust was designed, and it is so expressed on its face, to give an absolute property to Mrs. Doggett, free from all claims or demands of her husband, John Doggett. The husband having died several years since, the 227 purposes of the deed in vesting the legal title in a Trustee, have been satisfied, and the *cestui* may therefore properly sue in ejectment.

In the case of the Town of North Hempstead vs. the Town of Hempstead, (2 Wend. Rep., 109, 134,) it was adjudged by the Court for the correction of Errors, that *cestuis que trust,* in the case of a resulting trust, may maintain or defend ejectment for the lands which constitute the trust property. Mrs. Doggett alleges in her bill that the consideration money in the trust deed was fully paid by herself; she is therefore entitled to all the benefits allowed in the case just cited to the *cestuis que trust* of a resulting trust, besides her peculiar privilege as a *cestui* of a satisfied trust.

These reasonable relaxations of the rule that a legal title can alone prevail in ejectment, seem to be founded upon a presumption in the accepted cases that there has been a conveyance of the legal estate. It is upon this ground that the court in the case of Jackson *ex dem.* Smith et al. vs. Pierce, 2 J. R., 226, puts the allowance, and we find also that this is the ground upon which Adams in his Treatise on the action of Ejectment, places it. "To obviate," he says, "the inconveniences, which may at times arise, when an ejectment is brought by a *cestui que trust,* from the operation of the salutary maxim that the legal estate must prevail, as affecting his situation with his Trustees, the jury will in particular cases be permitted to presume that a regular surrender has been made by the Trustees of their estate, thereby clothing the *cestui que trust* with the legal title, and enabling him to recover in the action. Thus a surrender will be presumed, if the purposes of the trust estate have been so satisfied; or if the beneficial occupation of the estate by the possessors induces a supposition that a conveyance of the legal estate has been made to the 228 party beneficially interested, in whom the trust is a plain one, and a Court of Equity will compel the Trustees to make a conveyance." Tillinghast Adams, 87.

Mrs. Doggett's case belongs to all three of the classes of cases here enumerated, as those in which the presumption of a legal title may be indulged. The trust has been satisfied, inasmuch as her husband, from whose claims and demands the trust was designated to protect the estate, is dead. She is in the beneficial occupation of at least a portion of the estate, for in the charge of confederacy against Hart and her Trustees, she charges that they had conspired to deprive her of the use and benefit of a large portion of the land conveyed in trust, and the trust is so plain a one that a Court of Equity would not hesitate to compel the Trustee to make her a conveyance, upon proof of her allegation as to the death of her husband.

Besides these general considerations, which indicate clearly that Mrs. Doggett would have been admitted into a Court of Law to try and establish the possessory rights claimed by her, it is further apparent upon the face of the bill that it is demurrable for her failure to allege that her Trustee had refused the use of his name in an action at law. This allegation is necessary even to set up a pretence for coming into equity, to use the language of Lord Hardwick in the case of Motteux vs. the London Assurance Company, reported in 1 Atkins, 545.

But it is claimed, in the second place, that the complainant had a right to the aid of a Court of Chancery in order to avoid a multiplicity of suits. It is very clear that the jurisdiction of a Court of Equity cannot be invoked simply on the ground that the party seeking its interposition has a multitude of suits to bring, whether they be against defendants in suits of ejectment or in other actions.

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229 If it were so, all the barriers between Courts of Law or Equity would be broken down in favor of the litigious, and the Equity Courts be overwhelmed with the consideration and adjudication of matters altogether foreign to their peculiar principles and rules of jurisprudence. A merchant in extensive business might bring in all his debtors to answer to a single monster bill, upon the same principle that a plaintiff in ejectment might bring his complaint into a Court of Equity, because there was more than a single trespasser upon the premises which he sought to recover.

In the case of Mayor of York vs. Pilkington and others, reported in 1 Atkins, 282, a precedent beyond which the courts have never gone, there was a bill filed to quiet the plaintiff, who was in possession in a right of fishing against a number of defendants claiming several rights. This possession, or at least the establishment of the right of possession in an action at law, appears to be an indispensable pre-requisite to the interposition of a Court of Chancery. "The bills filed under these circumstances are bills of peace, and are designed to call upon the Equity Courts to extend their protection over parties who are in possession under the sanction of the Courts of Law." In the case last referred to, Lord Hardwicke says: "It is a general rule that a man shall not come into a Court of Equity to establish a legal right until he has tried his title at law, if he can."

So Lord Redesdale says, in Mitford's Equity Pl., 145-146, "In most cases, it is held, that the plaintiff ought to establish his right by a determination of a Court of Law in his favor before he files his bill in equity, and if he has not done so, and the right he claims has not the sanction of long possession, and he has any means of trying the matter at law, a demurrer will hold." The expressions
230 which qualify the expression here used by Lord Redesdale, that this doctrine *is held in most cases,* do not any of them embrace the case of Mrs. Doggett, and are in fact almost exclusively confined to cases of possession where the party has had no opportunity of trying his right at law.

Mr. Justice Story, in his Commentaries upon Equity Jurisprudence, in enumerating the various subjects of equity jurisdiction, no where sanctions the bringing of a suit in that court upon the naked allegation that a bill there would avoid a multiplicity of suits in a Court of Law. Where a suitor seeks the aid of Chancery for the purposes of discovery, the court will then, having possession of the case, proceed to adjust the relative rights of the parties in order to avoid a multiplicity of suits which might result from sending them back to a Court of Law.

So in cases of accounts, of agency, of apportionment, of general average, of contribution, of waste and of partnership, where Chancery once entertains a suit upon grounds legitimately cognizable in that court, it will proceed to adjudicate other matters of which it has only incidental cognizance, in order to avoid multiplicity of suits. The cases we have enumerated embrace most of those which induce a Chancery Court to step out of its peculiar domain to intrude upon the province of a Law Court to prevent oppression and expensive litigation. In these, as well as in others which we have not enumerated, it will be found that this species of jurisdiction is consequential rather than original, and is exercised chiefly in regard to matters springing out of subjects belonging appropriately to its own jurisdiction. One of the earlier Chancellors (Lord Nottingham,) betrays by the language in which he claims the jurisdiction, that it may be traced in some degree to the ancient jealousy between the two courts, as well as to the more becoming desire of suppressing useless litigation. "When," said his Lordship, "this court can determine the 231
matter, it shall not be a handmaid to the other courts, nor beget a suit to be ended elsewhere." 1 Story's Eq. Jur., § 65.

Mrs. Doggett's case does not belong to this class, for she is not before a Court of Chancery for any purpose belonging properly to its jurisdiction, so as to entitle her to an incidental inquiry into her rights of possession to the land she claims, nor for the reasons which we have already given, can her bill be considered in the nature of a bill of peace. She is therefore not entitled to the aid of a Court of Chancery upon this ground.

Third. We will inquire thirdly, whether she is entitled to its aid because one of the subjects of concurrent jurisdiction belonging to the Chancery Courts arises from the confusion of the boundaries of land. We will first examine the facts as set forth in the bill upon which this alleged confusion of boundaries rests.

The defendant, Hart, is alleged to be rightfully possessed of a grant of land on the St. John's river, known as the "Maria Taylor" grant, bounded and described as follows: "Beginning at a gum tree at the mouth of McCoy's Creek, and running thence north forty chains, to a pine tree, thence east fifty chains, to a pine tree, thence south forty chains to an oak tree on the bank of the said St. John's river, and thence along the river westwardly to the place of beginning."

The deed of trust under which Mrs. Doggett claims, conveys to her trustee "a certain tract of land situated in Jacksonville and bounded as follows: On the south, by St. John's River, on the north and east by Hogan's Creek and on the west by lands granted to the heirs of Purnel Taylor, and now owned by I. D. Hart, which land described as above was formerly granted by the Spanish Government to John Masters." The grant thus referred to is 232
described in the bill and exhibits, as bounded on the west by the aforesaid "Maria Taylor" grant, on the north and east by Hogan's Creek, and on the south by St. John's river.

It thus appears from the bill, that the two tracts abut upon each other, and that the controversy is as to the locality of the co-terminous boundary line. The bill alleges that Hart continued to hold possession of the disputed land after the execution of the trust deed by the connivance of the trustee.

It is to settle this boundary and to restore to complainant the possession of the land which she alleges to be wrongfully withheld from her, that he asks the aid of a Court of Equity.

Treating of the subject of boundaries, Mr. Justice Story, in his Commentaries, says, "whatever may have been the origin of this branch of jurisdiction, it is one which has been watched with a good deal of jealousy by Courts of Equity of late years; and there seems to be no inclination to favor it, unless special grounds are laid to sustain it. The general rule now adopted, is not to entertain jurisdiction in cases of confusion of boundaries, upon the ground that the boundaries are in controversy, but to require that there should be some equity superinduced by the act of the parties, such as some particular circumstances of fraud, or some confusion where one has ploughed too near another, or some gross negligence, omission or misconduct on the part of persons whose special duty it is to preserve or perpetuate the boundaries." I Story's Com., § 615.

None of these equities belong to the case before us.

Again, "when there is an ordinary legal remedy," continues the Commissioner, "there is certainly no ground for the interference of Courts of Equity, unless some peculiar

233 equity supervenes which a Court of Common Law cannot take notice of or protect. §616.

In this case we see no obstacle to the exercise of an ordinary legal remedy, nor do we recognize any peculiar equity which a Court of Common Law cannot protect.

Again, "the existence of a controverted boundary by no means constitutes a sufficient ground for the interposition of Courts of Equity. Between independent proprietors, such cases would be left to the proper redress at law." §619.

These principles are fully sustained by the case of Wake Conyers; indeed the language of the Commentator is the same as that of the Lord Keeper Henly who decided the case, 2 Wh. & Tud., 509.

In St. Lukes vs. St. Leonards, referred to in the same book, at page 512, a bill was filed by the Parish of St. Lukes to avoid confusion in making their rates, and prayed a Commissioner to fix their boundaries for that purpose. Lord Thurlow refused to interfere. In a note to this case, rd Thurlow is reported to have said that if he should entertain a bill and direct an issue in such a case as this, he did not see what case would be peculiar to the courts of law. In the case of Spear vs. Crawter, 2 Mer. 417, Sir W. Grant, M. R., refused to issue a commission to ascertain the boundaries of manors, upon the authority of the two cases just referred to. Such has been the uniform ruling of the courts, and as there is nothing in the case before us upon which an equity can be based, we must dismiss the complainant to look for her proper remedy in a court of law.

Having thus fully considered the right of the appellant to come into a Court of Equity at all, and decided adversely to the right, we find it unnecessary to discuss the matters of demurrer set forth by the defendants

234 The decree of the Chancellor to dismiss the bill must be affirmed.

AMAZIAH W. ARCHER, APPELLANT, VS. ISAIAH D. HART AND JOHN S. SAMMIS, APPELLEES.

1. If a party in a cause depending enters into a bond to perform the decree or abide the judgment of the court, it is intended to mean the court which ultimately decides the cause.

2. An appeal is matter of right, if entered during the term of the court at which the judgment is pronounced, or within ten days thereafter, and such appeal, when entered, suspends the judgment, sentence and decree appealed from; and if reversed, it is as if it had never existed.

3. Where a decree in equity was in favor of a defendant, and the bond which he had given to perform the decree of the court, was directed to be cancelled, on an appeal from so much of the decree as related to the principal matter, if the same be reversed, that portion of the decree directing the cancellation of the bond is also reversed; it is also accessory to the decree appealed from, followed it, and shared its fate.

4. A voluntary bond is valid as a common law contract, if it is entered into by competent parties, and for a purpose not prohibited by law, and is founded upon a sufficient consideration.

Appeal from the Circuit Court of Duval county.

This was an action of debt on bond executed by appellees, by which, after reciting "that whereas, the said Amaziah W. Archer and others have heretofore filed their petition before the Hon. Thomas Douglas, Judge of the Circuit Court of the Eastern Circuit of the State of Florida, and thereupon obtained an order to the Sheriff of Duval county, and caused to be arrested sundry persons of color, to wit: a boy called Dennis Bryan, also a girl called Mary Bryan, said colored persons and others being alleged in

said petition to be slaves and the property of the said pe- 235
titioners; and whereas, the above named Dennis Bryan and Mary Bryan are now in the custody of the Sheriff of Duval county, and claim to be free persons of color, and ask to be discharged from the custody of the said Sheriff, (on bail as per written agreement between the attorneys of the parties petitioners and defendants,") it was conditioned that "if the said Dennis Bryan and Mary should appear before the said Judge of the Circuit Court, from time to time as may be required, and abide the decision of the issue upon the said petition as well as the further order of the court, then and in that case the bond or obligation to be null and void, otherwise to remain in full force and virtue." The declaration alleges that Dennis, one of the persons of color above named, who had been declared to be a slave and the property of plaintiff, did not appear and abide the decision and order of the court, as required by the condition of the said bond, but that he disappeared before the final determination of the cause, and was not then to be found.

The appellees, (the defendants in the court below,) pleaded, 1st. That they had faithfully performed and complied with the condition of their said bond, and that Dennis did appear before the Circuit Court and abide its decision and order, until, by the sentence and decree of said court, he was discharged from custody and dismissed without day. 2d. That the bond in question was ordered to be discharged and cancelled by the decree of the Circuit Court, and so much of said decree as directed the bond to be discharged and cancelled still remained in full force unreserved, no appeal having been prayed or prosecuted from the same.

The facts in the cause will appear in the following agreement of the parties:

It is agreed that this cause shall be argued as if upon is- 236
sue joined, the following special verdict had been duly entered, and the court shall proceed to pronounce such judgment *nunc pro tunc*, as if the said verdict had been duly entered and argued at the last fall term of this court, and either party may take an appeal or writ of error to the next ensuing term of the Supreme Court:

"We, the jury, find the slave Dennis to be of the value of nine hundred dollars, that upon the twenty-first day of February, A. D. eighteen hundred and fifty, one of the said plaintiffs filed a petition before the Honorable Thomas Douglas, Judge of the Circuit Court for the Eastern Circuit of Florida, praying that the said slave Dennis, together with other slaves, formerly the property of Jacob van, deceased, should be taken into custody by the sheriff of Duval county as having been manumitted contrary to the provisions of the Act of November 22, 1829; that afterwards, to wit, on the following day, an order was issued directed to the said sheriff, commanding him to take the said slaves into his custody, and them safely to retain until the further order of said court.

"That such further proceedings were had upon the said petition, that afterwards, to wit, at the May term of 1852, of the said Circuit Court, the following order was entered: 'Now on this day came the said petitioners, by James W. Bryant and John P. Sanderson, Esquires, their solicitors, and the said Dennis Bryan, and Mary Bryan, being again brought into court by the sheriff aforesaid, and Samuel Spencer, J. McRobert Baker, P. Fraser and Felix Livingston, appearing to oppose in this behalf upon the issue *liber vel non*, raised by their plea heretofore put in, were permitted by the court to do so, and the solicitors of the respective parties having entered into a stipulation in writing, that the said Dennis and the said Mary claimed as

237 slaves as aforesaid, may be discharged from the custody of the sheriff, on condition that a bond in the penal sum of four thousand dollars, payable to the petitioners, be filed, conditioned that the said Denis and the said Mary appear before the Circuit Court from time to time as may be required by the court, to abide the decision of the issue in this cause, and the further order of the court. And it is further stipulated that the said bond may be given and received without prejudice to either party as to the question at issue, and that no advantage shall be taken by either party of any informality in this agreement, *nor in the said bond to be given by said defendants,* but the same will be enforced according to the true intent and meaning of the same as understood between the counsel for the parties, which is done, and said bond being duly filed, it is ordered accordingly. And on motion of the said petitioners, by their said solicitors, it is further ordered, that the issue of *liber vel non,* raised by the plea of the said Dennis Bryan and Mary Bryan to the said petition be tried by a jury upon the Common Law side of this court, at the next term, according to the rules and principles governing the trial of issues in Common Law cases, and that the testimony be taken in the same manner as testimony is allowed by the law to be taken in Common Law cases."

"That afterwards, and upon the same day, the writing obligatory which is the subject matter of this suit, was duly executed and filed. That afterwards, such further proceedings were had upon the said petition, that upon the 26th day of November, A. D. eighteen hundred and fifty-one the following final sentence or decree was pronounced in the Circuit Court for the county of Duval, viz: 'Now on this day this cause came on to be heard upon the issue *liber vel non,* joined between the parties, and a statement of facts herein filed and argued upon between the
238 parties and by their counsel, and the said parties having waived a jury, and after argument by counsel and due deliberation by the court, it is thereupon ordered, adjudged and decreed, that the said Dennis and the said Mary, in the said petition mentioned, are free persons of color and not slaves, and that the said Dennis and Mary be forthwith discharged out of custody, and that the bond heretofore given for their appearance in this cause, and executed by Isaiah D. Hart and John S. Sammis, be discharged and cancelled; and it is further ordered, adjudged and decreed that the said Sarah mentioned in the said petition, is a slave and not free, and that the said Sarah be sold by the sheriff of this county at public outcry, after due notice of the time and place of sale, and at the time and place and in the manner of sales under executions at law. And that the said sheriff pay the proceeds of said sale forthwith into the Registry of this court, to abide the further order of this court in the premises.'

"That afterwards, to-wit, on the first day of December following, being within the ten days allowed by law, the following agreement and prayer for appeal were duly filed with the clerk of the Circuit Court for said county of Duval, viz: This agreement witnesseth, that in the case of Amaziah W. Archer, *et al.,* against certain persons of color named Sarah Bryan, Dennis Bryan, and Mary Bryan, it is agreed by the undersigned, as attorneys for both parties, that in the appeals about to be taken by either party from the decision of the Circuit Court, made Nov. term, 1851, in said case, that the appeal bonds to be given by both parties shall be made payable to the Governor of Florida and his successors in office, for the use of such persons as may be interested, therein, and that neither party shall take exception to the same upon that ground, but they shall be deemed a compliance with the statute in

such case provided, and that the costs heretofore accrued 239
shall be equally divided between the parties. Entered into this the 27th November, 1851.

F. LIVINGSTON,
Atty. for Dennis, Mary and Sarah Bryan.
J. P. SANDERSON,
Atty. for heirs of Jacob Bryan, deced.

"The bond having been duly filed in said cause, the solicitors for petitioners pray an appeal as to so much of the decree in said cause as declares said persons of color, Dennis and Mary, free.

J. P. SANDERSON,
Solicitor for Petitioners.

"It is agreed by and between the undersigned solicitors in said cause that the foregoing prayer for an appeal be filed as of the first day of December, A. D. eighteen hundred and fifty-one, *nunc pro tunc.*

J. P. SANDERSON,
Solicitor for Petitioners.
F. LIVINGSTON,
Solicitor for Defendants.

"And afterwards, upon the same first day of December, D. 1851, all the costs were paid, and an appeal bond was filed by the said Amaziah W. Archer, payable to the Governor of the State of Florida, and conditioned for the diligent prosecution of the said appeal, and the payment of all costs which might be adjudged against him in such appeal.

"And afterwards, at the February Term of 1852, of the said Supreme Court for the State of Florida, such proceedings were had upon the said appeal that the said Supreme Court reversed the decision of the court below, in so far as it declared the said negroes, Dennis and Mary, to be free, and proceedings to render such judgment and decree as the Court below ought to have rendered, did 'further order, adjudge and decree that the respondents, Dennis 240
and Mary, have not sustained the issue of *liber vel non* made in the court below, and are slaves for life, and the property of the appellants, and that they, the said Dennis and Mary, be delivered up to the custody of the appellants. And it is further ordered, that the appellants pay the costs of these proceedings, and that the cause be remitted to the court below, with instructions to execute the decree of this court in the premises.'

"And we, the jury, further find that several days after the rendition of the said decree of the Supreme Court at its February Term, the said slave, Dennis, absconded, and never been delivered to said appellants, although a demand was duly made upon said defendants for the delivery of said slaves, on the day of the rendition of said last decree; and forasmuch as the jury are ignorant in point of law, upon the facts of the case, on which side they ought to find the issue, they do agree that if the court should be of opinion that the said plaintiffs are entitled to recover the value of the boy Dennis, and that the condition of the said bond has been broken, then they find for the said plaintiffs the sum of four thousand dollars, to be discharged upon the payment of nine hundred dollars, the value of said boy Dennis, together with one cent for the damages of said plaintiffs, and also their costs in this behalf expended; but if the court should be of opinion that the condition of the said bond has not been broken, and that the said plaintiffs are not entitled to recover, then the jury find for the defendants.

McQUEEN McINTOSH,
GEO. W. CALL,
Attorneys for Defendant.
J. P. SANDERSON,
Attorney for Plaintiff.

241 The court below rendered judgment in favor of the defendants, from which the plaintiff appealed.

J. P. Sanderson for Appellant.

The questions now submitted by the pleas and special verdict, and presented to the court, are:

I. Whether the conditions of said bond have been performed.

II. Whether the decree of the court, directing the cancellation of said bond operated as a discharge to Hart and Sammis, the obligors; or,

III. Whether the appeal taken did not operate as a *supersedeas*, as well to the part of the decree cancelling the bond as to the part declaring Dennis and Mary to be free and not slaves; and

IV. Whether said decree, cancelling said bond, has not been reversed by the decree of the Supreme Court at its February Term, 1852, in said cause.

It is the duty of appellant to maintain and prove the affirmative of the third and fourth propositions and the negative of the first and second.

The statute, Thomp. Dig., 446, regulating appeals, provides, "That if any party feels aggrieved by a final judgment or decree, it shall and may be lawful for such party during the session of the court in which such judgment or decree shall be pronounced or within ten days thereafter, to obtain an appeal to the Supreme Court, and an appeal obtained shall in all cases operate as a *supersedeas*."

The appeal was obtained within the ten days prescribed by statute, bond filed, and costs paid. There is no pretence that the appeal was not regularly taken, and operated as a supersedeas to the part of the decree declaring "Dennis and Mary to be free and not slaves," and I presume it will be conceded that the appeal suspended that part
242 of the decree. But it will be contended by counsel for defendants that the order of the court directing the cancellation of the bond was not appealed from, and still remains of force, and that defendants were discharged from said bond by said decree, for such is the issue tendered by defendant's second plea.

Upon these two grounds the defendant's counsel have rested their defence.

I. Have the conditions of the bond been performed?

The conditions are as follows: "Now, if the said Dennis Bryan and Mary Bryan shall appear before the said Judge of the Circuit Court from time to time as may be required, and abide the decision of the issue upon the said petition, as well as the further order of the court, then and in that case this bond or obligation to be void, or else to remain in full force, virtue and effect."

The principal condition of this bond is, that the said Dennis and Mary shall abide the decision of the issue upon the petition, and must mean the final decision on that issue. Have they performed that condition? The issue was finally decided by the Supreme Court at the February Term, 1852, and immediately thereafter demand was duly made for a surrender of said slaves; said slave Dennis had absconded, and the obligors have failed to obey the decision of the issue. The Supreme Court proceeding to render such judgment and decree as the court below ought to have rendered, "did further order, adjudge, and decree that the respondents, Dennis and Mary, have not sustained the issue of *liber vel non* made in the court below, and are slaves for life, and the property of the appellants, and that they, the said Dennis and Mary, be delivered up to the custody of the appellants."

The slave Dennis has not been delivered up as ordered and directed by said decree, and the condition of the bond

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in this respect has been broken, and the plaintiffs are en- 243
titled to recover: and the condition of the bond has not been performed in this—he, Dennis, did not abide the further order of the court below. The order and decree discharging and cancelling the bond, was not the further order of the court. The further order of the court was the order allowing the appeal. The allowance of the appeal, though taken by the parties, when taken under the statute becomes an order of the court, and suspends the whole decree. Therefore the obligors did not comply with this condition of the bond. The bond was given to abide the decision of the issue, and the further order of the court: the last order of the court was the appeal, which transferred the cause to this court, and with it the bond as an incident to the issue.

The taking, the dismissal or withdrawal of an appeal is a judgment of the court. Harder *et al.* vs. Stoval, 1 Kelly, 95, Index 359; Ball vs. Gardner, 21 Wend. 166, 1 N. Y. Dig., 326, § 8.

The term "court," uesd in the condition of the bond, has been held to mean the "court" which shall ultimately decide the cause. U. S. vs. Schr. Little Charles, 1 Brock., 380.

II. Did the decree of the court directing the discharge and cancellation of said bond, operate as a discharge to Hart and Sammiss, the obligors, or did the appeal taken operate as a *supersedeas* as well to the part of the decree cancelling the bond as the part declaring Dennis and Mary free and not slaves?

I. The order, judgment, and decree of the court below discharged Dennis from custody and cancelling the bond, were uttered by the court in one and the same breath, and together constitute but the judgment pronounced upon the issue joined. If no appeal had been taken, the bond was cancelled and discharged by the judgment and decree de- 244
claring Dennis free, and not a slave, and no order cancelling said bond was necessary. That part of the decree is, therefore, mere surplusage, unnecessary, and void.

"A void judgment, quashing a forth-coming bond, may be wholly disregarded." Fellows vs. Griffin, 9 S. & M. U. S. Dig. 1848, 58, § 80.

If this view of the case be correct, it follows that Hart and Sammis were not discharged by said decree.

The appeal operated as a *supersedeas* to the entire decree. The prayer for an appeal is as follows: "The bond having been duly filed in said cause, the solicitors for petitioners pray an appeal as to so much of the decree in said cause as declares said persons of color, Dennis and Mary, free." This appeal carried up the whole case. This was a proceeding on the Chancery side of the court, and as the Appellate Court is by law directed to proceed to render such decree or judgment as, upon the whole case, the court below ought to have done, the whole cause before the court below was carried up, and open to review. The decree and mandate of this court in the cause, not only reversed the decree, but directed the slaves to be delivered up to the custody of the plaintiffs.

A court of review gives up such a decree as the court below ought to have done; and when the plaintiff below brings the appeal, the court above not only refuses what is wrong, but decrees what is right, and models the relief according to its own view of the ends of justice and the exigencies of the case. Gelston vs. Codwise, 1 J. C. R., 182.

And on an appeal from Chancery, the decree and order of the court of errors becomes, to the court below, the law of the case, and the party can have no further relief

then, than what is administered by the decree of the court above." *Ibid.;* 2 Fla. R., 276; 4 Fla. R., 357.

The appeal then carried up not only the issue joined, but the whole cause, and especially the bond, which was coupled with and dependent upon that issue, for the appeal opens the whole cause, though taken from a part only, and suspends the whole judgment of the court below. Colby's Prac., 306; 3 Bouvier Ind., 70; Allison vs. Chaffin, 8 Ga., 330, cited Index 40, § 12.

An appeal, from the moment it is made, suspends the execution of the decree; and if taken within the time presented by statute has relation back to the day of the rendition of decree. Penhallow vs. Doan, Adm'r., 3 Dall., 89, 99, 1 Arch. Prac., 241; Colby's Prac., 306; Stewart vs. Preston, 1 Fla. R., 8.

The appeal operates from time of motion, and the filing of the bond will have relation back and bind the parties from the time of notice. 1 Arch. Prac., 241; Hawkins vs. Jones, 1 E. C. L. R., 111; 2 Strange, 867, 1186; Edward's Treatise, 148, n.; Salk., 321, Perkins vs. Woolaston.

The 4th assignment of error, alleges error in deciding that the bond was a creation of the court.

The bond was made and executed by agreement of the parties to the bond, as will appear by the facts contained in the special verdict—no agreement was made with Dennis—he is no party to the bond—he was treated as a slave—and entered into for his benefit by Hart and Sammis. It was an act of plaintiffs and defendants, the obligors, and they only had power to cancel the contract, and this court is called upon to enforce the agreement.

This bond violated no public policy or private morality, but was appropriate to the execution of the laws and a proper adjustment of the rights of the parties in the cause. Had the original suit been commenced by an attachment
246 and this suit brought to recover on an attachment bond, would this court have doubted but that the bond, in the event of an appeal, would hold good and abide the decision in the Appellate Court? Or, suppose suit had been commenced by attachment, and Dennis taken into custody under levy of the writ of attachment, and the obligors had come forward and entered into bond precisely under the conditions of this bond, and the court below had rendered judgment for the defendant, or, as in this case, directed a surrender of the property, and a cancellation of the bond, and an appeal had been duly taken by the plaintiffs, I ask if this court would doubt for a moment but that the appeal would suspend the judgment and carry with it the bond given for the forthcoming of the property? It must of necessity operate in this manner, for the plaintiffs in attachment, after judgment against them, could not direct a new levy and hold the property to respond to a final decree in the court above in their favor. If the contrary is held, he would be without remedy—the property in the meantime might be removed from the State and the attachment law would be to him a dead letter upon the statute book. Stephens vs. Baird, 9 Conn., 274, cited N. Y. Dig., 64.

This was a bond voluntarily entered into by the obligors, and binding upon them—a bond valuntarily given, and though not prescribed by law, is a valid instrument upon the parties in point of law. U. S. vs. Tingry, 5 Peter's, 115; U. S. vs. Bradly, 10 Peter's, 343, cited Peter's Dig.; Franklin vs. Pendleton, 3 Sand. S. Ct., 572; U. S. D., 11, 78, §39; 1 Brock., 383.

A voluntary bond may be had as a statutory bond, but good at common law. Stephens *et al.*, vs. Crawford, 1 Kelly, 583, Ind., 94, §5; Justices, &c., vs. Ennis, 5 Ga., 569, Ind., 95.

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A bond which violates no public policy or private mo- 247
rality, which is appropriate to the execution of law, is *valid,* and may be entered into and recovery had thereon, though there be no statute expressly authorizing the execution of such bond. The Governor vs. Allen, Kin. Law Com., 1850, §51.

It is objected that there has been no proceedings in the court below to carry into execution the mandate of the court above. This comes too late, after plea, &c. Lee vs. Moore, 12 Miss., 458, U. S. D., 11-79, 50: 1. N. Y. D., 328, §37-38.

Upon a forthcoming bond, notice is all that is necessary. Mapp vs. Thompson, 9 Ga., 42, Ind., 923, 17; 2 U. S. Dig., 458, §16.

Exceptions to the want of proper parties or to the declaration, comes too late after plea. The issues are performance and discharge—no exceptions taken as to bond, &c. 5 U. S. D., 922, §12; Colby's Prac., 14, 187; U. S. Dig., 1848, 366, §2, 7, 10, 17.

Too late to raise objections in the Court of Errors, which were not raised by the pleadings in the court below. Franklin vs. Osgood, 14 J. R., 527, cited J. Dig., 181, § 159.

Too late to object to the form of appeal after appeal has been answered. Rodgers vs. Cruger, 3 J. R., 564, cited J. Dig., 180, §143.

A party cannot take advantage of an ambiguity in a traverse after having taken issue upon it. 4 Harrison's Dig., 2566.

The regularity of the appeal and judgment in the other case cannot thus collaterally be called in question.

A replevin bond informally executed, if voluntarily executed, cannot be avoided on that account. Moore vs. Hodson, 5 Mass., 314; Minot. Dig., 108, §20.

If a party who is bound to perform a condition, disables 248
himself, this is a breach. 2 Bac. Ab., 310.

Coke has it—A man shall never take advantage of a condition, where the non-performance cometh by his own act or default. Coke, 206, 209

G. W. Call and *McQueen McIntosh* for Appellees.

1. To constitute a breach of the bond there must have been a return of *non est inventus.* Pearsall vs. Lawrence, 3. J. R., 514, cited in 1 Dig. N. Y. R., 132-133; Colby's Prac., 146; Collins vs. Mitchell, 3 Florida, 11.

2. The judgment of 26th Nov., 1851, exhausted the requirements of the bond. Mills vs. McCoy, 4 Conn., 406, cited in 1 Dig. N. Y. Rep., 131; Butler vs. Bissell, 1 Root 102, cited in 1 U. S. Dig., 352, §378; Sopeman vs. Henderson, 4 Baar., 231, cited in 1 U. S. Dig., 74, §4.

II. The order of 26th Nov., 1851, directed that Dennis should be discharged from custody, and the bond cancelled *coinstanti* this was done; no appeal can *undo* what has been done. Hawkins vs. Jones, 5 Taunton, 204; Ex'rs. Brasher vs. Cortlandt, 2 John., 505; Perkins vs. Woolaston, 1 Salk., 321; S. C., 9 Peter. Abr., 25; Burr vs. Burr, 10 Paige, 169; Clark vs Clark, 7 Paige, 607.

III. But the Supreme Court did not reverse the order cancelling the bond. Heirs of Bryan vs. Dennis, 4 Flor., 450-6.

IV. No appeal lay from the order of 26th Nov., 1851, and the action of the Supreme Court is not binding upon these defendants not privy to the suit.

1. This whole proceeding was *ex parte,* and an exercise of the summary powers of the court. Fraser vs. Livingston, 1 Flor., 400-401; 2 Chit. Arch. Prac., 1194; 2 How., 240; Colby Pr., 306.

2. The order of 26th Nov. was not final, and therefore

no appeal. Putnam vs. Lewis & Wife, 1 Flor., 474; Bellamy vs. Bellamy, 4 Flor., 254, 257.

The bond is wholly illegal and void, and cannot now be enforced.

1. This point appearing in the record is good upon writ of error. 1 Chitty's Pl., 661-2, 484; 1 Harrison's Dig., 527.

2. This bond is a bail bond, and contrary to the policy and express enactment of our law, and is taken in a cause not authorized by law. Thomp. Dig., 326, 532-3; 1 Sup. Pet. Abr., 128; Colby's Prac., 306; 1 U. S. Dig., 74, § 8, cites 2 Barr., 492.

3. It should have been made payable to the sheriff. 1 [illegible]ze, 51; 4 Bibb., 505; Hardn., 501; 1 Met. & Per., 352, Wright, 180.

4. It should have been executed by the principal as well as the surety. 17 Mass., 591.

5. The bond is void for uncertainty in the designation of the obligors.

THOMPSON, J.:

In a controversy which arose in the Circuit Court sitting in Duval County in relation to the slavery or freedom of certain negroes, an issue was directed to be made up and tried at a succeeding term of the court; and in the meantime, by consent of the claimants, of whom the present appellant was one, two of the persons so claimed to be slaves for life, and then in custody, were delivered to the respondents upon their entering into bond in the penalty of four thousand dollars, payable to the appellant by name, with the addition of the terms "and others," conditioned that Dennis and Mary, (the persons who were claimed to be slaves, and were asserting their freedom,) should appear before the Judge of the Circuit Court from time to time as
250 may be required, and abide the decision of the issue upon the petition, as well as the further order of the court. The issue so made up, was determined in favor of Dennis and Mary in the Circuit Court; they were declared to be free, and the bond entered into by the respondents was ordered to be cancelled. From this judgment of the Circuit Court an appeal was prayed by the claimants to this court, from so much of the judgment of the Circuit Court in said case as declared said persons of color, Dennis and Mary, to be free; which appeal was allowed and perfected within the term of ten days prescribed by law.

In this court, the portion of the decree appealed from was reversed and set aside, and proceeding to give such decree as the Circuit Court should have given in this particular, this court declared that the said Dennis and Mary were slaves for life, and the property of the claimants, and ordered that they should be delivered up to the custody of said claimants. Soon after the decree was reversed in this court, demand was made upon the respondents for the slave Dennis, but the demand was not complied with; and it further appears, that at or about this time he absconded, and has not since been arrested.

Suit was brought upon the bond by the present appellant, whose name only appears on the face of the instrument as the obligee thereof, aginst the respondents, who are the obligors, assigning as a breach that the said Dennis did not appear from time to time, &c., and did not abide the decision of the issue upon the petition, as well as the further order of the Circuit Court, but on the contrary absconded, &c. By the subsequent pleading, the defence is made to rest upon two grounds:

1st. That Dennis was only to appear before the Circuit Court, that he did so appear, and was discharged without day by the decree of said court of the 26th of Nov., 1851.

And 2dly, That by the decree of the Circuit Court, the 251
bond in question was ordered to be discharged and cancelled, that such portion of the decree was not appealed from, and remains in full force and unreversed.

Upon a special verdict finding the facts which are above briefly stated, the Circuit Court gave judgment for defendants; the principal ground of error assigned is, that the court erred therein, and that the judgment should have been for the plaintiff.

In the decision of this case, we do not deem it material or necessary to consider in their order the numerous points made and discussed at the bar upon the argument, because the grounds upon which we put our judgment herein will be found to have met and included all the positions taken by counsel which were open to discussion.

The main grounds upon which the respondents rely, in support of the judgment of the court below, are founded on the terms of the condition of the obligation sued upon, and the effect of the appeal prosecuted by the present appellant from the decree of the Circuit Court in the original cause, made and passed on the 26th November, 1851, which declared Dennis and Mary to be free.

It has been argued with much zeal by the counsel for the respondents, that the decree of the Circuit Court alluded to, exhausted the requirements of the bond, that Dennis was only to appear from time to time before the Judge of the Circuit Court, and that when the decree was pronounced in his favor and the bond declared to be discharged and cancelled, every thing was accomplished which the respondents had bound themselves to the performance of. This is certainly a very technical view of the question, even if correct in point of law; but it is most clearly erroneous. In every case where it becomes necessary that any of the parties should enter into a bond for the performance of the decree of the court, the condition provides 252
in terms only that the party shall answer the decree, sentence or judgment of the court in which the cause is depending; no provision is made for the event of a writ of error or appeal, but in such case the law supplies the omission in every case where the writ of error or appeal arrests the execution of the decree, sentence or judgment of the inferior court, and suspends its force and energy until the question is examined in the appellate tribunal. Thus in the case alluded to, a decree had been pronounced upon the equity side of the court, with which the losing party was dissatisfied; assuming that an appeal could be taken from that decree to this court, if it was taken in due time it arrested the execution of the decree, suspended its effect and force as a judgment, and removed the cause to this court by force and operation of law. In such case the law substituted the judgment of this court for that of the Circuit Court, and such rule of law entered into and formed a part of the contract as completely and effectually as if it had been inserted therein in terms.

By the Act of February 11th, 1832, appeal from the equity side of the Circuit Court operates as a *supersedeas* in two cases:

First When the appeal is entered as in other cases as provided by the general law of February 10, 1832, which is during the term of the court in which the decree is pronounced, or within ten days after adjournment; and, secondly, when, being taken within two years after it is pronounced, a justice of this court shall allow its operation as such, upon giving bond and security as required by law, (Thomp. Dig., 462, 446.) The first named *supersedeas* is obtained as a matter of right, subject to no condition except that of giving the security required by law; and the other rests in the existence of the sound discretion of the

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Judge. At law, no execution can issue upon the judgment of the court until after the lapse of ten days from the adjournment of the term, except in a certain special contingency to be made known to the court by affidavit of the plaintiff; consequently the judgments rendered during the term are ineffectual until after the expiration of the time limited; if an appeal is taken within the time, the execution is superseded, and the force of the judgment suspended until the appeal is determined. And so is the rule in equity. By the Act of Nov. 7, 1828, § 28, no decree in equity pronounced by the Judge could be engrossed and signed until after the lapse of thirty days, and not then, if the decree had been appealed from, or a petition for rehearing filed. And it is further declared that no process shall issue on any proceedings be had on any final decree or order, until it had been engrossed and signed as directed, and filed in the clerk's office. (Thomp. Dig., 461.) The effect of the Act of 1828, was to allow thirty days for the unsuccessful party to enter his appeal, during which time the decree pronounced was not effectual, and the appeal if taken within the limitation, operated as a further suspension until the appeal was heard.

The Act of 1832, before cited, restricts the party to ten days, within which to enter his appeal, and this is the only change.

The authorities cited by the counsel for the respondent lay down the rule correctly, but they are inapplicable to the present case. If the execution of the decree had been commenced, the *supersedeas* would arrest the proceedings at the stage in which they were when the *supersedeas* was allowed, but the execution of the decree in the case of Dennis and Mary had not yet commenced, and could not by force of law have been begun when the appeal or Archer was taken, he having pursued his remedy within the ten
254 days, and while the decree was inactive. If the party had suffered the time to have passed, and the execution of the decree had been consummated by the discharge of the boy Dennis, and the cancellation of the bond, and he then had prayed an appeal, and obtained an order for a *supersedeas*, such order would not have retroacted so as to make void what had been done in pursuance of the decree.

In the case of the United States vs. the schooner Little Charles, depending in a District Court of the United States, the vessel, which was under arrest, was released upon a bond to perform the decree of the court. In the District Court the vessel was acquitted, but on appeal the sentence was reversed, and the vessel was condemned by the sentence of the Appellate Court. Then, as in this case, it was contended that the condition of the bond was not broken; that it was to perform the decree of the court, which could only mean the District Court, and by that decree the libel was dismissed. But Chief Justice Marshall said: "This objection must search for other sup-"port than is furnished by the merits of the cause. The "bond was intended to be submitted for the vessel, "and to be acted upon as the vessel would have "been acted upon, had it remained in the power of the "court. I think myself justified, then, by authority and "by reason, in construing the general term 'court,' which "is used in the condition, as meaning the court which "shall ultimately decide the cause." 1 Brock. R., 382-3.

This case is directly in point. Here the boy Dennis was in custody, the bond was entered into to procure his enlargement, the respondents undertaking that he would abide the judgment of the court, and to afford to the claimants as full and perfect a remedy as if the slave had remained in custody. If the slave had remained in custody, no one will pretend to say that he was entitled to claim the execution of the decree until the time had elapsed 255
within which the adverse party was allowed to enter his or their appeal, for the law is explicit that no process shall issue or any proceedings be had on any final decree until it is engrossed and signed as directed, and filed in the clerk's office; and this cannot be done at an earlier day then ten days after the decree is pronounced. Upon what principle, then, is it that the rights of the claimants were charged by the substitution of the bond for the person of the slave? We are not aware of any, and none has been suggested in the argument. If authority be wanting to show the affect of an appeal, it will be found in Packman's case, 6 Co. R. 18, b. In that case it was held that when an appeal is taken from a sentence or decree allowing a probate of a will, or granting letters of administration, if the sentence or decree is reversed, all intermediate acts of the former executor or administrator are ineffectual, because the appeal suspends the former sentence, and on its reversal, it is as if it had never existed; but if it is otherwise, if the probate or administration is revoked upon citation, when the grant was only voidable, for the citation is in the nature of a new suit.

In the case under discussion, the conclusion cannot be avoided that the appeal of Archer and others against Dennis and Mary suspended the decree of November 26, 1851, in the original cause, and that decree, so far as appealed from, having been reversed, it is as if it had never existed, as if it had never been pronounced by the Circuit Court, and its place and stead was substituted by force and operation of law, the decree which was made by this court upon the appeal, and it therefore results that the condition of the bond is broken.

Another point assumed in the argument, and which is said to have formed the ground of decision in the court below is, that the appeal of Archer and others from the 256
decree of the 26th November, 1851, was restricted to that point alone which declares Dennis and Mary to be free persons, and did not therefore embrace the direction that the bond in question shall be discharged and cancelled.

It is undoubtedly true that a party by his appeal may complain of a part of a decree pronounced in a court of Equity, and that while the whole case is open to the respondents under the limitations established by this court in the Southern Life Insurance & Trust Company vs. Cole, (4 Fla. R.,) yet so far as the appellant is concerned, the duty of the appellate tribunal is limited to the matters complained of. Is this the case here? A reference to so much of the record of the original suit as is found in the special verdict in this case, will furnish a ready answer. Several persons were, in the original suit, claimed by Archer and others to be slaves, and to be their property. As to Dennis and Mary the claim was not sustained, and the bond, which had been substituted for their persons, was declared to be discharged and cancelled; and this judgment formed the first clause of the decree. Another person was found to be a slave, and so declared by a subsequent clause, with a direction for sale, &c. The appeal, in the terms in which it was prayed, was from "so much of the decree in said cause as declares said persons of color, Dennis and Mary, to be free;" and this, we conceive, carried with it all that portion of the decree which related to Dennis and Mary, and their condition. The direction, in the same clause, as to the cancellation and discharge of the bond, was but the consequence of the declaration that they were free; it was ancillary thereto and dependent upon it, and precisely analagous to the case of an award of process to a complainant to carry out and effectuate the relief awarded by the decree: or to the case where a right in

257 real estate is ascertained by the decree of the court to be in a complainant, and the defendant is decreed to convey in accordance with the title ascertained by the decree.

In all such cases, the process and the conveyance are but accessories to the principal relief, and cannot subsist without it. Why should the bond be cancelled and discharged but because Dennis and Mary were ascertained and declared to be free by the decree? The matter is so plain that any attempt by argument further to elucidate it, would be vain and futile. The direction was but ancillary and accessory to the principal direction, and followed it, and shared its fate. Another position assumed is, that this court had not jurisdiction of the appeal from the decree in the original cause, for two reasons: 1st. Because the proceedings were *ex parte,* and, 2d, because it was not a final judgment, and therefore, as against these respondents, the decree of this court has no validity.

A very serious question presents itself, whether if this court assumes jurisdiction of and decides an appeal or writ of error, there is any power or authority in this or any other court to review the judgment, and declare the proceedings to be *coram non judice* and void? We are not disposed at this time to claim that power and authority for this court after the term in which the judgment was pronounced has been closed by adjournment. But it is unnecessary to pass upon this question, for even if this court possessed the power to pronounce its own judgments nullities, and to disregard them, and could do so in favor of parties or privies, the points are not well taken. We know of no prohibition to the jurisdiction of this court, because the proceeding was *ex parte.* Causes often proceed *ex parte,* and this court reviews the judgments pronounced therein. In every case where a plaintiff pursues his remedy at law, upon a default, and in equity, upon an
258 order to take a bill *pro confesso,* the court below proceeds *ex parte,* and the judgment or decree may be and is reversed in this court. But the proceeding alluded to was not in point of fact *ex parte*—the persons who were claimed to be slaves asserted their freedom, and the humanity and justice of the law as administered by the courts, allowed them, *pro hac vice,* the *status* of free persons to enable them to make that right clear, and to obtain all the benefits to result from that condition if they could establish it, and thus there were both plaintiffs and defendants, the slaves holding the affirmative.

The authorities cited at the bar upon this point relate to the summary jurisdiction of courts, and are inapplicable. As to the other point that the decree was not final, the decision of this court in Bellamy vs. Bellamy, 4 Flor., R., 242, 258, shows that it was final. If the parties had waited until the money arising from the slave directed to be sold, had been distributed under order of the court, they would have been subjected to irreparable injury; the bond would have been cancelled and discharged, and the slaves eloigned before they could have had an opportunity of having the error redressed in this court. The case is clearly within the exception recognized in the decision quoted, and also in the case of Forgay vs. Conrad, 6 How. S. C. Rep., 201.

The only remaining point to be considered, is the position assumed by respondents, that the bond in question is wholly illegal and void, and cannot be enforced. It would be sufficient here to say that the point does not arise in the case, the defence of illegality of the bond declared on not having been presented by plea. By Reg. Gen. of Jan. Term, 1847, title Pleadings in particular actions, § 2, Art. 1, it is laid down thus: "In debt on specialty or covenant, "the plea of *non est factum* shall operate as a denial of

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"the execution of the deed in point of fact only, and all 259
"other defences shall be specially pleaded, including mat-
"ters which make the deed absolutely void, as well as
"those which make it voidable." But as this objection was not presented, and the point was argued with much zeal on both sides, we are disposed to consider and pass upon it, as if it were regularly presented. We are clearly of opinion that the bond in question is neither a bail bond nor a replevin bond, nor a statutory bond, and therefore the authorities cited in the argument in relation to such instruments are not applicable, but we consider it as a voluntary bond, good and valid at Common Law, provided it is entered into by competent parties, and for a lawful purpose, not prohibited by law, and is founded upon a sufficient consideration. United States vs. Tingey, 3 Peter's R., 115; United States vs. Linn, 15 Peter's R., 311.

There is no allegation that the parties to the instrument rest under any incapacity to contract; that the respondents Sammis and Hart were incompetent to sign, seal and deliver the obligation, or that Archer was under any disability to accept and receive it, and we must consider them able to contract with each other. It is for a lawful purpose—that is, it does not appear that the objects and purposes of the instrument were in violation of any positive rule, or infringed any policy of the law. Nothing has been alleged in the argument as tending to show a violation of any rule of law, except that urged upon the hypothesis that the instrument in question was a bail bond. That it is not of this character, is so clear that it is only necessary to state it; no argument could demonstrate it more fully. Although it was conditioned for the appearance of Dennis and Mary, it was not to answer any debt or sum of money claimed to be due and owing from them to Archer and others, but to abide the order and decree of the court on the question of their slavery or freedom, and is there- 260
fore not within the letter or spirit of § 5 of the Act of November 23, 1828, which declares that "no person shall be required to give bail for his or her appearance to answer any original writ or summons emanating from a Court of Law."

That the contract was founded upon a sufficient consideration has not been denied, and indeed it cannot be questioned; for admitting that the respondents derived no profit or advantage therefrom, yet if there be detriment or loss to the obligee, it is sufficient. Dennis and Mary were claimed to be the slaves of Archer and others, which claim has been sustained by this court; Archer and others consented to the bailment or delivery of said slaves to the respondents, accepting the bond in their place and stead. This is a sufficient consideration to support the contract, and hence the deduction that the instrument sued upon is a good and valid Common Law contract, which the courts can and ought to enforce.

We believe that the view of the case which we have presented in this opinion covers and disposes of every point made in the argument, and that it only remains to declare the evident conclusions of law therefrom, that the judgment of the court below is erroneous and should be reversed, and that a judgment should be entered in this court upon the special verdict for the plaintiff and appellant. It is accordingly so ordered.

LOAMMI DAVIS, APPELLANT, VS. MARTHA FITCHETT AND CHARLES F. FITCHETT, ADM'RS., &C. OF SAMUEL ELLIOT, DECEASED.

1. Upon an appeal from a Justices Court to the Circuit Court, the trial in the latter court is to be had anew upon the merits, and the original defendant is not limited and confined upon such new trial to the same points of defence made in the court below, but may present new defences upon the merits.

2. There being no time specified within which a plea denying the signature of the defendant to a bond, bill or note should be filed in a Justices Court, it may be filed on the entry of the appeal in the Circuit Court.

3. A free person of color should not be sued by guardian; he is under no incapacity or disability with regard to the defence of suits brought against him, but may appear and defend by attorney as other persons of full age.

4. A free person of color, who is defendant in a suit upon a bond, bill or note, &c., may by plea deny the execution thereof in the manner provided by law; the interposition of such plea, sworn to, does not make the party a witness within the 42d section of the Act of Nov. 21, 1828.

[The Reporter has not been furnished with a copy of the record from which to frame a statement of the facts in this case, but enough appears in the opinion of the court, to enable the case to be fully understood.]

James Gettis and *M. Whit Smith* for appellant.

J. T. Magbee for appellee.

262 THOMPSON, J.:

The appellant, who is, as it appears, a free man of color, was sued by the respondents in a Justice's Court in a plea of debt, upon a promissory note for the sum of fifty dollars, upon which judgment was rendered by the Justice against him for the said sum of fifty dollars, with interest and costs. From this judgment he appealed to the Circuit Court of the Southern Circuit, sitting in Hillsborough County, when upon a new trial, judgment was rendered against the appellant for the sum of sixty-six dollars, and from this last judgment the record has been removed to this court by appeal, upon several points of law reserved upon bill of exceptions.

The first error assigned is upon the ruling of the Circuit Court, that the appellant, who was defendant in the Justice's Court, could be sued without joining his guardian, and making the latter a party to the suit. The necessity for making the guardian a party to every suit brought by and against a free person of color, is supposed to arise from the provisions of the Act of January 8, 1848, entitled "An Act to authorize Judges of Probate of the several counties in this State to appoint guardians for free negroes." The first section of the statute provides, that free persons of color shall be required to have guardians, to be selected by themselves, or if under ten years of age, by their parents, with the approval of the Judges of Probate, and it is made the duty of the Judge, if the gaurdian is approved of, to issue a certificate of appointment. The second section provides, that such guardians "shall have power to sue for and recover all such sums of money as are or may hereafter be owing to such free negro, or free mulatto, and shall have the same control over them as is possessed by guardians in other cases."

263 The last section is the one which is relied upon to support the position assumed, that a free person of color cannot be sued otherwise than through, or by his guardian. The statute, it will be observed, provides only for cases in which such free person of color is the plaintiff or creditor; it is silent as to those cases in which he is the debtor and defendant; and it will also be observed that the enactment is couched in affirmative terms only. Hence it will follow, that if before the Act, such persons were not under any disabilty to sue for the recovery of their rights, they may do so still, upon the principle that an affirmative statute does not take away the Common Law—the only effect will be, to give to the guardian appointed under the law, the right to sue equally with the ward. But as before remarked, the Act speaks of creditors and plaintiffs only, and if the corelative parties of debtor and defendant are included within the Act, it must be by force of the general terms—"and shall have the same control over such free negroes and free mulattoes as is possessed by guardians in other cases." This, it is supposed, places the free person of color under all the disabilites, in relation to his position as a party in court, which an infant labors under; but it is very clear, that the terms quoted do not extend beyond the authority which such guardians may exercise over the persons of those committed to their wardship. If, however, the provision should be deemed ample enough to put the free persons of color with regard to their property and rights of property under the same disabilities as if they were infants, yet a reference to the law in relation to infants, as parties in a court of justice, will show that the position is ont well taekn. When it is said that at Common Law, infants could neither sue nor defend, except by *guardian*, it is not intended to be the guardian of the infant's person and estate, but either one admitted by the court for the particular suit on the infant's personal appearance, or one appointed for suits on the general by the King's letters patent. Fitz. Nat. Brev., 27, H. 26-

But this rule being found inconvenient, it sometimes hapening that an infant was secreted by those who had the legal custody of his person, and so prevented from applying to have a guardian *ad litem* appointed, it was remedied by the Stat. Westm., 1, (3 Ed., I,) c. 49, and Westm. 2, (13 Ed. I,) c. 15, which authorized suits by the infant by *prochein ami*. Co. Lit., 135, b. n. 1.

If an infant is sued, he is not sued by his guardian, nor is there any principle of law which requires he should be sued in this manner; but the suit is brought against him as if he were of full age, and being brought personally into court, a *guardian ad litem* is assigned him to enable him to make his defence; and in this way only, by reason of the incapacity and disability resulting from his non-age, can he *defend* any action or suit at law or in equity. If the infant, when sued, does not apply to the court for the appointment of a guardian *ad litem*, the plaintiff's attorney should apply to him to appear and move for that purpose, and in case of refusal so to do, the plaintiff's attorney may, six days afterwards, make application to the court. Schief. Prac., 168, citing 2 Wils. R., 50.

So it would appear that if free persons of color were placed on the same footing as infants, the action was, in its origin, rightly brought against the appellant. We do not, however, consider that free persons of color rest under the same incapacities and disabilities with regard to the *defence* of suits, which infants do, but they may appear and defend by attorney as other persons of full age, and this assignment of error is therefore overruled.

2. In the Circuit Court, the appellant sought to interpose a plea denying the execution of the note sued upon,

Davis vs. Adm'rs. of Elliott—Opinion of Court.

but which plea the court would not admit to be filed on the ground that the plea could not be admissible, unless it appeared from the record of the justice, that such plea had been regularly filed in the court below; and this refusal of the court forms the second and third errors assigned here.

If the trial in a Circuit Court of an appeal from the decison or judgment of a Justice of the Peace were upon the record, in the same manner as appeals from the Circuit Court to this court, the ruling of the Judge below would without doubt, have been correct; but as by the Act of Feby. 12, 1832, (Thomp. Dig., 364,) the case is to be tried anew upon its merits, we are at a loss to perceive that force of the reason stated for rejecting the plea when offered in the Circuit Court.

By the Act regulating the practice and proceedings of the Circuit Court, (Thomp. Dig., 330,) dilatory pleas and pleas denying the execution of any bond, note or other writing sued upon, are not to be received unless pleaded on oath, and filed before the cause is called upon the appearance sued upon, are not to be received unless pleaded on oath, and filed before the cause is called upon the appearance docket; but by the Act regulating proceedings before Justices of the Peace, although such plea is required to be sworn to, yet there is no time limited within which it is to be filed. (Thomp. Dig., 471.) It may therefore be put in at any time before trial in the Justice's Court; and as the appeal from his judgment altogether suspended its force and effect as a judgment, and the party was entitled to a trial of the case anew, as if it had never been tried before, we can see no valid objection to an amendment of the pleadings by either party, or to the interposition of new defences. If the new trial had been in the Justice's Court, it is very clear the right to amend the claim or defence existed, and we cannot conceive that the removal to a Superior Court would operate any change of
266 the rule. If the removal of the case by appeal to the Circuit Court brought it within the influence of the rules of practice of the latter, yet such rules would not retroact so as to operate upon the case from its commencement in the court of the Justice of the Peace, but would only affect it from the time it came within the jurisdiction of the Circuit Court by the appeal; and it is not pretended that the plea was not tendered at the first term in the Circuit Court, and was for that reason rejected. We are not aware of any rule of law which would restrict a party who upon appeal is entitled to a new trial upon the merits, to the same defences which he had made in the Court below upon the first trial.

It is however urged that the ruling was right, but for other reasons than those assigned by the court below; and if this be true, the respondent is entitled to have the benefit of them.

It is argued that the appellant, being a free man of color, could not interpose a plea denying the execution of a bond, bill, note or other writing sued upon at any time, or in any court, in a case where a white person is a party, because by the Act of November 21, 1828, § 42, it is provided that negroes or mulattoes, bond or free, shall be good witnesses in civil cases where negroes or mulattoes shall alone be parties, and in no other case whatever. By the term a witness, we understand one who gives testimony or evidence in a cause; and it is difficult to perceive how an affidavit, by a party to his plea, would constitute him a witness. By the statute 4 & 5 Ann, c. 16, pleas to the jurisdiction of the court, to the disability of the plaintiff or in abatement, which are termed dilatory pleas, are not to be admitted, unless affidavit be made of the truth of the matter pleaded, but it never was supposed that such affidavit made the defendant a witness.

Our statute, before quoted, following the statute of Ann 267
for the purpose of protecting plaintiffs against these dilatory pleas, makes the same provision, and goes further and provides that pleas which deny the exectuion of any bond, note, &c., sued upon, shall, like dilatory pleas, be put in upon oath; and so the plaintiff is not to be put to the proof of the instrument, unless the truth of the pleas is sworn to. Such verification of the plea, is not evidence; it cannot be read to the jury as testimony for the party pleading it; nor does it, like an answer in chancery, require the testimony of two witnesses to contervail the allegation of the plea, but it is simply a formality which must be observed before the plaintiff shall be required to maintain the affirmative allegation of his declaration in this particular. By the common law, in an action upon a bond, if the defendant pleaded *non est factum*, the plaintiff was bound to prove the execution of the bond; and so in an action of assumpsit upon a bill or note, the plea of the general issue would throw upon the plaintiff the onus of proving the making and delivery of the bill or note; the statute changes the rule in this respect, and declares that the plaintiff shall not be put to this expense and trouble, unless the issue tendered is supported by affidavit of the defendant, and that the only force and effect of the affidavit is to raise the issue, to show that the plea is a real and substantial defence, and not a frivolous plea intended merely to harrass the plaintiff wantonly, and put him to needless expense. A party may with as much propriety be termed a witness in a cause who makes and presents to the court an affidavit for continuance. There is nothing in this objection; a free person of color being liable to be sued, it follows as a necessary consequence that he is entitled to all the means and opportunity of making and presenting his defence which are permitted and allowed to other suitors, except when he is restricted by the force of 268
some express statutory regulation; and this court being clearly of opinion that a party in an appeal tried in the Circuit Court from the judgment of a Justice of the Peace, who was the defendant in that court, is not limited and confined to the points of defence made in the court below, the Circuit Court erred in refusing to receive the plea which was tendered; for which error the judgment of the Circuit Court must be reversed, and the cause remanded, with instructions that the plea be received, and a new trial had in said court on that as well as all other proper issues in said cause.

Judgment reversed and new trial ordered.

JAMES MCKAY, APPELLANT, VS. WILLIAM LANE, APPELLEE.

1. Whether on the failure of a Judge to hold the term of court at which a *sums ad. resp* is made returnable, it is nevertheless a term for pleading, and whether the defendant is bound to plead to the declaration filed at said term. *Qu?*
2. Courts of Error will not consider an assignment of error which is presented as a mere abstraction, when the party has been in no degree damnified thereby; or, where the error, if it is one, is either corrected by the Judge himself, or is rendered harmless by the subsequent events of the trial.
3. The omission of a bill of particulars is not a proper ground of demurrer to the declaration.

4. The venue being correctly stated in the margin is sufficient, although a wrong venue being inserted in the body of the declaration.
5. A plea which is defective in the essential quality of certainty as to time, is bad on demurrer.

6. Objections to the admissibility of evidence must be made before it goes to the jury; it was therefore too late after an instrument of writing was read to the jury to object that its execution was not sufficiently proved.
7. The general rule No. 23, of the Reg. Gen. Jany. Term, 1847, had in view the

question of the costs of proving documentary evidence intended to be offered on the trial of a cause; it is not obligatory on either party to give notice of all the documentary evidence intended to be introduced.

8. In an action of assumpsit upon an express warranty of chattel, the plaintiff may recover costs, charges, and interest on the principal sum paid as the consideration, although the contract of the sale has not been rescinded, nor the property returned, nor any offer made to return it.

James T. Magbee, for Appellant.

O. B. Hart, for Appellee.

ANDERSON, C. J.:

This case is brought up by appeal from the Circuit Court for the county of Hillsborough.

The plaintiff in the court below, William Lane, brought an action of assumpsit aginst McKay to recover from the defendant damages on account of the alleged unsoundness of a certain negro slave, which the plaintiff had bought from defendant under a warranty of soundness, and which slave afterwards died from disease alleged to have existed at the time of purchase.

The plaintiff also declared that he had been put to expense and charges in and about the taking care of the said negro.

Besides the special count setting out the purchase and warranty and unsoundness of the negro, the common money counts are in the declaration.

The nature of the other pleadings will be stated in our consideration of the assignment of errors.

There was a verdict and judgment for plaintiff for the sum of $692.40, from which judgment an appeal was taken.

The errors assigned are twelve in number, and so far as they are material to the proper adjustment of the rights of the litigant parties we shall consider them in their order.

270 The first and second errors assigned, though involving an interesting and important question of practice, we find upon an examination of the whole case, it is not necessary to decide; for admitting that the Judge's ruling was erroneous, the appellant was not prejudiced, as we shall presently show. As the point is of very general interest and application, and the case before us does not require its decision, we think it our duty to reserve it to a more favorable opportunity, when we may have access to more books than we can procure here, and thus have the benefit of fortifying, or of correcting, our present opinions.

The question as stated in the assignment is this, whether on the failure of a Judge to hold the term of court at which a *summons ad respondendum* is made returnable, it is nevertheless a term for pleading, and whether the defendant is bound to plead to the declaration filed at said term.

Under the ruling of the court upon this point, the defendant was obliged to withdraw a demurrer which he had filed to the declaration, and this he complains of as error; but at a subsequent stage of the case, when he had pleaded to the declaration, the plaintiff demurred to one of his pleas, and thereby the defendant had the full benefit of his own demurrer to the declaration, upon the well settled rule of pleading that a demurrer at any stage of the pleading opens all the antecedent pleading. 1 Chitty, 707.

Under the authority of this rule, his Honor in the court below, doubtless deemed it his duty to look into the sufficiency of the declaration, as the plaintiff had previously requested him to do; and in like manner we shall consider ourselves as bound to give him the full benefit of his demurrer. Thus as we have said, he is in nowise injured by the ruling of the court in the point presented in his first and second assignment of errors.

The third error assigned is as follows: The court erred in ruling the defendant to plead to plaintiff's declaration before the covenants and warranties upon which said declaration was based, were filed in the cause. 271

We cannot find in the record any such ruling as is here stated. The court, it is true, ruled the defendant to plead *instanter* to the declaration, as a condition of having a default opened; but he had made no complaint (except in a demurrer which, as we shall see, was not the proper mode,) as to the omission of the particulars, or asked for an order to have them supplied. In an action of assumpsit, as this is, the warranty for the breach of which damages are demanded in the action need not be filed, certainly not without an order first asked for and obtained.

The assignment is not in precise and correct terms, but so far as the actual ruling of the court was, which is sought to be presented, we soo no error. We shall consider further the subject of particulars at a subsequent point of this opinion.

It is assigned further for error, that the court erred in ruling defendant to withdraw his demurrer to plaintiff's declaration, and plead thereto, there being no bill of particulars filed and there being no court holden the preceding term.

As we have already seen, the defendant was subsequently to this ruling, admitted to all the benefits of his demurrer, and it has been our uniform practice and it is the practice of all revisory courts, not to consider an assignment of error which is presented as a mere abstraction, when the party complaining of it has been in no degree damnified, and where the error, if it is one, is neither corrected by the Judge himself, or is rendered harmless by the susequent events of the trial, as in the case before us. We decline, therefore, the further consideration of this alleged error, and pass on to those having a practical bear- 272
ing on the case.

It is alleged in the fifth assignment of error, that the court erred in its ruling whereby it decided that plaintiff's declaration was good, and defendant's third plea bad.

Our consideration of this assignment will involve, as we have already intimated, an inquiry into the merits of the defendant's demurrer. The demurrer alleged that the declaration is not sufficient in law, first, because no bill of particulars was filed with the declaration.

The omission of a bill of particulars is not a proper subject of demurrer, as must be obvious from a moment's consideration of the object and effect of this form of pleading. A defendant may move for an order requiring a bill of particulars, and on proof of such order the plaintiff will either be stayed in his proceedings until the bill is furnished or subjected to other penalties appropriate to his default.

It is said secondly, that the declaration is not sufficient because the general conclusion is informal and insufficient.

In what particulars it is supposed to be so, we are not informed, and we perceive nothing on examination to warrant the allegation.

It is said thirdly, to be insufficient, because no specific indebtedness is stated in the counts for money paid, and money had and received, on the part of defendant.

These counts are connected by the copulative conjunction with the one immediately preceding, in which the indebtedness of the defendant to the plaintiff is stated specifically to be the sum of one thousand dollars, and the use of the words "and for so much money," have direct reference to the sum stated, and are in accordance with the most accustomed forms.

The same remark applies to the fourth point in the demurrer.

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273 The defect alleged, fifthly, to-wit: that it was not stated that the slave had not been tendered back to defendant, is not sustained by any authority or principle. The allegation was not necessary in this form of action. The count is no otherwise vague and indefinite than arose from the omission of the bill of particulars, which omission might have been supplied as we have stated, upon the motion of the defendant.

It is stated, sixthly, that the venue of the first count is laid at Key West, and not in Hillsborough county.

It is true that in the body of the declaration the venue is laid in Key West, with the addition of Monroe county, but the venue in the margin is correctly stated to be Hillsborough county, and this we hold to be sufficient.

"Such venue in the margin will aid, but not prejudice, "and in civil cases, if the name of a place only, and no "county or a wrong county be stated in the body of the "declaration, it will suffice, because the place is always "construed to refer to the county in the margin, although "another county has been mentioned." 1 Ch. Pl., 305. See also Rég. Gen., Jan. Term, 1847, § 2, Rule 3.

The last point in the demurrer is untenable.

The consideration referred to as set out in the second and fourth counts, and which is said not to be sufficient, is stated in the following words: "In consideration that the said plaintiff at the request, &c., had then and there bought of the defendant two certain negro slaves at and for a certain price or sum of money, then and there agreed upon, &c."

Why this is not regarded as a sufficient consideration to support the subsequent promise and undertaking, we are at a loss to understand.

It was an executed consideration, and therefore did not require to be stated with the same particularity as to quan-
274 tity and value as is required in stating executory considerations—the allegation of a past consideration being but matter of inducement, and as such, not in itself traversable. 1 Ch. 323. The objection to the declaration on this ground is not well taken.

The court correctly ruled that the third plea of the defendant was bad. The simple allegation that the slave Monday was sound, was no sufficient reply. The plea is defective in the essential quality of certainty as to time. The complaint is, that the negro was unsound at a particular time, namely, at the time of the purchase—it is no defence to say that the negro was sound, without saying further that he was sound at the time of purchase.

Having thus disposed of the questions presented by the respective demurrers, we resume the consideration of the assignment of errors.

It is assigned in the sixth place as error, that the court erred in admitting certain testimony. Had the objection been made to the reading of the bill of sale at the proper time, it should not have been allowed to go to the jury without further and other proof of its execution—but such was not the case. No sufficient objection was made till the bill was read to the jury, and it is well settled, that objections not urged before the Judge below permits evidence to go to the jury, cannot be assigned in this court as error.

The decree and answer in the equity suit were rightfully admitted. A judgment or decree in a controversy between the same parties, is the highest species of evidence, and the admission of a party in an answer in Chancery are scarcely less conclusive as evidence against him. The objection to their introduction, founded on the 23d rule of the Rules of Practice, asumes that the rule was designed for a purpose different from its real object, which had in view only, the question of the costs of proving certain doc- 275
uments. The admissibility of the evidence is a totally distinct question, and can admit of no doubt.

The 7th, 8th and 9th assignments refer to the same point already discussed.

The objections to the reading of the bill of sale came too late.

The qualification made by the Judge to the instruction asked in relation to the bill in Chancery was altogether proper. The effect and weight of evidence is exclusively and appropriately within the province of the jury, as stated by his Honor The tenth assignment therefore is not sustained.

The error assigned in the eleventh place, is, that the court erred in ruling out the evidence of Bradley and others. The question to which this testimony had relation, was the soundness or unsoundness of the negro at the time of the sale. The witnesses excluded were called to show his soundness three weeks before and previous to that time. The testimony was clearly admissible upon the general rule which we quote from 1 Starkie on Ev., 17, that "all "facts and circumstances upon which any reasonable pre- "sumption or inference can be founded as to the truth or "falsity of the issue or disputed fact, are admissible evidence."

The fact that the slave was sound three weeks before the sale and for a long time previous thereto, was certaintly calculated to raise a reasonable presumption of his soundness at the time of sale, and being so, was, under the rule we have quoted, admissible evidence.

We think that the ruling of the Judge excluding it was erroneous.

But the error was unimportant, for there was abundant evidence before the jury of the actual condition of the ne-
gro at and about the time of the sale, and it is impossible 276
to conceive that the admission of Bradley's testimony, presumptive in its character as it confessedly is, could have had any weight with the jury in opposition to the testimony of a medical gentleman having the facilities for forming a correct opinion, which we find from the record that Dr. Peachy had.

This court has uniformly proceeded upon the practice not to reverse a judgment, however, erroneously an isolated point may have been ruled by the Judge below, when it is clearly apparent that the party complaining has been in no degree injured by the improper ruling. This is clearly so in the case before us, and for this reason we do not sustain the assignment of error of which we have just been speaking, notwithstanding it is abstractly well made.

It is alleged lastly, for error, that the court erred in instructing the jury that they might give costs, charges, and interest, inasmuch as the contract had not been rescinded, nor the negro returned, and no offer to return him made.

The objection here raised might apply to some forms of action, but not to the present one. This is an action of assumpsit which may be properly brought as it here is, upon an express warranty of the soundness of a personal chattel, and the judgment in this species of action, if in favor of theplaintiff , is, that he recover *damages* by him sustained by reason of the defendant's nonperformance of his promises and undertakings. Costs, charges and interest come properly under the denomination of damages, and we know of no principle of law which excludes them as proper objects of consideration with the jury while determining the *quantum* of damages sustained by the plaintiff.

Upon a review of the whole case, we can discover no adequate reason for interfering with the judgment of the

277 court, and we shall therefore direct the judgment to be affirmed.

Per curiam. Judgment affirmed with costs.

JOHN MERCER, APPELLANT, VS. WILLIAM B. HOOKER, APPELLEE.

1. Under the Act of March 15, 1844, Sec. 2, an execution is in force until satisfied; if a sheriff indorses any action thereon, it is not his duty to return the same to the clerk's office; nor does the writ thereby become inoperative, unless the same is satisfied.

2. In this State, by statute, a married woman may acquire a separate and independent title to both real and personal property, during coverture, by bequest, demise, gift, purchase or distribution, subject however, to the same becoming liable to the debts of the husband, unless an inventory thereof is filed and recorded, within six months from the time the title vests in her, as specified in the statute; the record of title papers particularly describing the property given to the separate use of a married woman, is a sufficient inventory and compliance with the statute.

3. The exclusion by the Circuit Court, of a bill of sale of a chattel to a married woman, because the execution thereof was not proved before it was recorded, was erroneous; but as it did not appear from the instrument that the property was to be the separate property of the wife, or by any evidence that it was paid for with the separate money of the wife, but purchased and paid for by the husband, it became his property, and subject to his debts, and therefore the party was not injured by the error of the court in the exclusion of the evidence.

Appeal from a judgment of the Circuit Court for Hillsborough county. The facts of the case are sufficiently stated in the opinion of the court.

James Gettis, for Appellant.

J. T. Magbee for Appellee.

SEMMES, J.:

In this case, an execution in favor of William B. Hooker
278 against Edward T. Kendrick, issued in 1847, was levied on a horse, as the property of the defendant, and to which the appellant, John Mercer, interposed his claim.

Upon the trial of the issue in the court below, the following facts appeared in evidence. In 1850, Kendrick purchased a bay horse of one Hagler, who at the request of Kendrick, executed a bill of sale to the wife of the latter.

Some few months thereafter, Kendrick traded this horse for the one in controversy, and shortly after sold the latter to one Cowart, who subsequently sold the same to the present claimant.

To support his claim in the Court below, the appellant relied mainly upon the alleged previous title of Mrs. Kendrick to the horse originally purchased, as well as the one in controversy.

It is unnecessary to notice specifically the several in-

structions given to the jury by the Court below, and to which the counsel for the appellant excepted.

The execution it appears, came to the hands of the sheriff in December, 1848, who afterwards endorsed upon it *"nulla bona."* Counsel are mistaken in supposing that it was the duty of the sheriff, after having made his return, to deposit the execution in the clerk's office, or that the writ itself become inoperative after the endorsement. On the contrary, it was the duty of the sheriff to retain the writ in his hands, and it was by its very terms, in full force until *satisfied.* Thomp. Dig., 355. It created a lien upon the personal property of the defendant from the time it came to the hands of the sheriff, without respect to the rights of third persons, who may subsequently have acquired title to the same.

To establish the title originally in Mrs. Kendrick, it was not only necessary for the claimant to prove that the purchase was made for her and with her money, but that the property was inventoried and recorded in the clerk's office 279
of the Circuit Court within six months after said property was acquired by her.

In this State, married women may acquire a separate and independent title to both real and personal property during coverture, by request, demise, gift, purchase or distribution, subject, however, to the same becoming liable to the debts of her husband, unless an inventory thereof is recorded within six months from the time the title vests in her. Thomp. Dig., 221. The record, however, of title papers particularly describing the property, is a sufficient inventory and compliance with the statute.

The court below was right in deciding that the husband and wife should join in all sales, transfers and conveyances of the separate property of the latter. Thomp. Dig., 221.

The exclusion by the court of the bill of sale, as evidence, because its execution had not been proved before it was admitted to record, is clearly erroneous, because there was no necessity of its being recorded. But this ruling cannot affect the judgment below, inasmuch as the claimant was not damnified thereby. It does not appear from the bill of sale, that the horse was the separate property of Mrs. Kendrick; on the contrary, it appears from the evidence that the property was purchased and paid for by the husband, there being no evidence that the money was that of the wife.

These points embrace all the rulings of the court below upon the trial of the cause, and with the exception stated, we are not disposed to overrule them. They are made in conformity with our statute, and we see no reason to doubt their correctness.

Judgment below affirmed.

DECISIONS

OF THE

TERM HELD AT MARIANNA, 1853.

JOEL CONKLIN AND JAMES SMITH, PARTNERS, &C., AS CONKLIN & SMITH, APPELLANTS, VS. MANUEL GOLDSMITH, EMANUEL FORCHEIMER AND SIMON FORCHEIMER, PARTNERS, &C., AS GOLDSMITH, FORCHEIMER & CO., APPELLEES.

A bond executed and filed, on obtaining a writ of attachment by the *agent* of the plaintiff in his character as agent, and professing to bind himself and not his principal, is a substantial compliance with the requisitions of the statute provided the bond be also executed by two good and sufficient sureties.

Appeal from the Circuit Court for Santa Rosa county.

On the 10th day of February, 1853, Moses W. Garrison, agent for the appellants, applied to and obtained from the Clerk of the Circuit Court for Santa Rosa county, at the instance and in the name and for the use of the appellants, against the appellees, a writ of attachment, returnable to the next term of the Circuit Court for said county.

The bond required to be executed by the statute of this State in all cases of attachment was executed by Garrison, the agent, in his own name, binding himself and not his principals.

The appellees (defendants below) at the ensuing term of the court, hoved to dissolve the attachment on the ground that "the bond executed by Garrison is his individual bond and not the bond of Conklin & Smith, and therefore

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281 the writ of attachment has issued without a bond as required by the statute in such case made and provided." The court below sustained the objection thus taken by the defendants and ordered the writ of attachment to be quashed, from which the appellants took an appeal.

Hawkins, for appellants.

Campbell, for appellees.

SEMMES, J.:

This was an attachment suit brought by appellants against the respondents.

The attachment bond was signed by Moses W. Garrison as agent, binding himself and not his principals, Conklin & Smith.

Upon motion, the court below quashed the attachment, because the bond was not given in the name of the principals, and the question for our consideration is, whether this was necessary to the validity of the writ? We confess the point is not free from embarrassment. The whole difficulty arises out of the peculiar phraseology of the statute, which to say the least, renders the intention of the legislature as to the mode in which the bond should be executed, somewhat doubtful. The words of the statute are, that "before the issuing of any writ of attachment, the party applying for the same shall by himself, his agent or attorney, enter into bond with two or more good and sufficient securities," &c.

However important it is to give significance and effect to everyword, clause and sentence in a statute, yet less regard is to be paid to the words used than the policy which dictates the act. Broome Leg. Max., 440. And therefore where the language used is doubtful, or susceptible of two meanings, that which will better advance the remedy and is more consistent with the intention of the Legisla-
282 ture, should prevail; and it is thus the object of the law becomes one of the surest guides to its proper exposition, Nothwithstanding the truth of this principle, and its application as a general rule, in the construction of the stautes, yet if the mode in which the bond should be executed in this case was clearly defined by the statute, the argument drawn from the *general* purpose and policy of the law, would be entitled to but little weight in determining the question before us. For, though the policy of the attachment law was to facilitate the collection of debts by giving an additional remedy to the creditor, yet the main object of that part of the statute before us, was to protect the debtor from an improper use of this remedy, by requiring two good and sufficient securities to the bond. This object can as well be accomplished where the agent executes the bond in his own name as in the name of his principal. A very familiar rule in the construction of the statute, and one we think much more applicable to this case is. that the different parts of the statute should be so construed with reference to each other, that effect may if possible, be given to the whole act, and to this purpose the words should receive their ordinary meaning, and be prevented if possible, from becoming superfluous, void or insignificant.

If, as is contended by respondent's counsel, the bond should be executed in the name of the principal, the question may well be asked as to the meaning to be given to the words "agent or attorney," or whence the necessity of using them at all? The principal being required to give a bond "by himself." it was but an idle ceremony in lieu of this, to authorize him to give the bond "by his agent." For what he does through his agent, in contemplation of law, he does himself. Why therefore clothe him with a power which he had at common law, above and independent of the grant in the statute? Besides the word *attorney* is evidently used in contradistinction to the word 283
agent. If the agent was required to execute the bond in the principal's name, as is insisted on, he must of necessity be an attorney in fact; otherwise, he could not bind the principal. But it could not have been contemplated in the use of the word *attorney,* to imply he should be one *in fact,* but an attorney *at law,* unless we conceive the folly that after the word *agent,* the Legislature should have seen the necessity of using the relative term, conveying the same identical idea. If the word *attorney* does not mean one *at law,* then it must be rejected as superfluous and unmeaning. The absurdity then seems manifest, that the party applying for the attachment is required to give a bond by himself or through his agent, who must have special authority for that purpose, while it would be a literal compliance with the statute for his attorney at law to execute the bond in his own name, binding of course upon no one himself and the sureties who might subsequently sign.

The inconsistency of this construction is avoided by holding, as we do, that the bond is a good one under the statute if the agent execute the same in his own name, and this seems the only construction which the law seems susceptible of, to preserve its unity and give force and effect to the language. Being a remedial act, it should receive a liberal interpretation, such as, while it looks to the object of the staute, and secures ample indemnity to the defendant, leaves the remedy unfettered by a useless restriction, and one in our opinion not designed by the Legislature. An argument drawn from inconvenience, is invoked in favor of this construction, and we think it is entitled to great weight.

The remedy afforded by the statute would, in a majority of cases, be unavailing if the creditor, who is supposed to be absent, is expected to furnish his agent with special authority to execute attachment bonds in anticipation of 284
his debtor's fraudulent acts. In this case, the agent having executed the bond in his own name, and given two good and sufficient securities, the end and purpose of the law, in our opinion, was complied with, while the consistency of the statute is preserved.

Statutes similar to our own have received in some of our States a judicial construction which supports the foregoing views.

In Mississippi, the law requires that before the attachment is granted "bond and security shall be taken from the party for whom the same shall be issued, his agent or attorney," &c. Upon the same question as the present, coming before the court, in the case of Frost vs. Cook, 7 Howard R., 358, Clayton, Justice, said: "The bond given by the agent complied substantially with the statute; the object was to secure the defendant in the recovery of costs and damages, and that object is as well obtained by a bond of the agent as of the principal." See also Page vs. Ford, 2. S. & M., 266.

Let the judgment of the court below be reversed and set aside, and the cause remitted to the court below with instructions to deny the motion to quash, and to proceed in the cause.

Hon. J. Wayles Baker of the Middle Circuit, who sat in this cause, was understood to dissent from the judgment of the court.

Simon, a Slave, vs. the State of Florida—Statement of Case.

285 SIMON, A SLAVE, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA.

1. Whether the confession of a prisoner is or is not voluntary is a question for the determination of the court; and it is error for the court to refer it to the consideration of the Jury.

2. Although the inquiry should, in the first instance, have been restricted to the question of the influences which operated upon the prisoner to induce the confession, yet it afterwards appeared that such confession was not voluntary, the court should have arrested the examination, and withdrawn the evidence from the jury.

3. To render a confession voluntary and admissible in evidence, the mind of the prisoner should at the time be free to act, uninfluenced by fear or hope. Whether the prisoner had been arrested on a charge of arson, on suspicion merely, and carried to the Magistrate's office, a large and excited crowd of persons attending, from the violence of which the firmness and determination of the Magistrate was barely sufficient to protect him, and thus situated, the excited populace remaining without the office, but within the hearing of the prisoner, who exhibited marks of great terror and alarm, he, the prisoner was urged by the Magistrate to confess his guilt, saying to him that "they were satisfied of his guilt—that he would be put upon his trial and would certainly be hung—that if he had accomplices, they would be put upon their trial and not him, if he would turn State's evidence;" and thereupon the prisoner confessed his own guilt, but denied he had any accomplices: HELD, That the circumstances of the case lead to and induce the conclusion that the confession was not voluntary, but was forced from the mind of the prisoner by the "torture of fear."

In this case, the prisoner's guilt, according to the bill of exceptions, rested alone on the confession, unsupported by any proof of the circumstances which directed suspicion against him; and in the proof of the *corpus delicti*, the statement of the prisoner as to the place where the house was fired, was contradicted by two witnesses.

At the June term, 1853, of the Circuit Court for Escambia County, the Grand Jury presented an indictment against Simon, the plaintiff in error, for burning a dwelling house belonging to Richard T. Maxwell.

286 The record, after stating that certain persons, naming them, were on the tenth day of June chosen and sworn as Grand Jurors, proceeds to state that "on another day, the fifteenth day of June, in the year one thousand eight hundred and fifty-three, the Grand Jurors came into court and presented the following bill of indictment, which said indictment is in the following words and figures, and is endrosed as follows:"

The indictment is in the usual form, and is endorsed thus: "State vs. Simon, a slave"—"Arson" "A true bill. Wm. H. Baker, Foreman."

The following bill of exceptions, embracing the testimony offered on the trial, and the rulings of the court, was made a part of the record:

BE IT REMEMBERED, that on the trial of this cause the State produced the following witnesses, who testified as follows:

1st. Joseph Sierra was produced as a witness for the State, who being sworn, testified, that Doctor Maxwell's house was burned down in Pensacola on the seventeenth day of October last—that the house formerly belonged to Mr. Ahrens, but had been sold by him to Dr. Maxwell—that it was in the morning of the 17th October, that the house was set on fire and burned down. Simon, the prisoner at the bar, was afterwards taken up, and brought before the witness on suspicion, the witness being at that time, Mayor of the City of Pensacola—that Simon made confession before the witness that he had set fire to Maxwell's house—that no compulsion and no influence was used to extract from the prisoner such confession. That witness said to Simon that if he told the truth, and that if he, the prisoner, was the one who burned the house, he would be put upon his trial and would be certainly hung; that if he had any accomplices he would, by testifying against them, become State's evidence, and they would be 287
put upon their trial and not him. Witness said to Simon the prisoner, do not bring any innocent person into this matter, for if you do, although you may not be punished in this world, you will be in the next, which is worse. If you bring any one into this matter, let it be one who is gulity. Simon hung down his head for a while, and I asked him what he had to say? He replied, send for my master, and I will tell the whole. Witness then sent for his master, Mr. McVoy, and when he came witness told him what had happened. The prisoner then asked his master, Mr. McVoy, as he had already asked the witness, as to the consequences of his confession, or in relation to the punishment if he should tell the truth, and Mr. McVoy made the same reply to him which the witness had made.

Simon, the prisoner, then said, he had set fire to Dr. Maxwell's house, that he was by himself at the time he did it, and that no body else was with him. This confession was about the 21st or 22d of last October, and the house was burned in this county. On the next morning the prisoner was committed.

Witness visited the prisoner in jail to find out if he had any accomplices, and on one occasion he told the witness that there was a boy who was an accomplice, but that he did not know his name. Witness procured the boy to be apprehended, but the prisoner declared that he was not the one, and so the boy was discharged.

Upon his cross examination, the witness said that there was great excitement among the people—that there was a great crowd, but that the excitement was out of doors, and that the people said, he the prisoner, should be hung. Witness told the prisoner that they were satisfied about his guilt, and that all they wanted to know was who his accomplices were. At the time prisoner made his confession
witness asked whether he had set fire to Moreno's, Collin's 288
or Maxwell's house? Witness says there were no threats and no coercion used toward the prisoner, and no promise made him to induce the confession. Witness says he thinks that but for his protection afforded the prisoner, the people would have taken him into their own hands. Witness says he had several interviews with the prisoner in jail, and at the second interview the prisoner told witness that he had an accomplice. Witness said to the prisoner, you are in irons and you cannot escape. Witness told him he had to come to trial, and that if he had any accomplices, he had better inform upon them before they got away from town. Witness told him he had better inform upon his accomplices for the benefit of the community, so that they might be arrested. Witness told the prisoner that he would be State's evidence if he had accomplices and would disclose them. The prisoner appeared to be greatly alarmed, but the witness told him he should be protected.

In reply to the questions here asked by the State, witness said, I used no threats and held out no promises or favors to the prisoner at the time he made his confession of guilt. The house burned was a dwelling house, and at that time was undergoing repair by Doctor Maxwell, who was then living in another house. Don't know whether any one was sleeping in the house that was burned, at that time or not. Prisoner said he had set fire to the east window under the gallery, and staid there until it was blazing. Witness says the house fronted south, and that the window which the prisoner said he fired, was the last window fronting on the gallery to the east. Witness says that the excitement to which he has testified, was sometimes in the presence of the prisoner, and sometimes not, but in his hearing.

Simon, a Slave, vs. the State of Florida—Bill of Exceptions.

289 2d. John Brosneham was then produced as a witness for the State, who being duly sworn, proved the articles of agreement between Henry Ahrens and Doctor R. T. Maxwell, conveying the house that was burnt, to Doctor Maxwell.

3d. Richard T. Maxwell was now introduced by the State, and upon the agreement and conveyance of the house and lot between Ahrens and himself being placed in his hands, he acknowledged that he executed it, and said that the house that was burned down, and for which the prisoner was then on trial, was the property designated in said agreement.

Upon his cross examination, Doctor Maxwell said that he was not residing in the house at the time it was burned, but that he was then living in another house—that the house that was burned had not been occupied for two or three months previous to the burning, but that about six weeks before the burning, a negro woman slept in the kitchen by his permission—says that the house he was residing in at that time is in Pensacola.

In answer to a question here presented by the solicitor for the State, Doctor Maxwell said that the house that was burned was a dwelling house.

4th. Henry Ahrens was now introduced as a witness by the State, and being first sworn says, upon the said agreement between him and Doctor Maxwell being shown him, that it was executed and delivered by him to Doctor Maxwell—says that previous to the execution of said agreement he was in possession of the house—that he built it, and that he lived in it sometime before he sold it to Doctor Maxwell, but did not live in it at the time, but was then living at Arcadia in Santa Rosa county.

Here the Solicitor for the State announced that he would rest the case for the State for the present, and thereupon,
290 on the part of the prisoner, the following witnesses were produced, who testified as follows:

Joseph Commyns, who being first sworn, testified that he saw the house on fire about two o'clock in the morning—that he thinks the fire commenced in the upper story—that he was about the first to give the alarm, that he heard somebody there, and knew it was Mr. Knapp and Joseph Sierra by their voices—that the house had no basement of brick—that it had an attic, and that he thinks the shingles were set on fire—that the fire was running out on the shingles when he first saw it—that he was at the custom-house, about two hundred yards off, when he first discovered the fire, and that he saw the fire over the top of McVoy's and Moreno's and Brosnaham's houses—that he went to the market house before he went to the fire—that he could not see the ground floor of the burning house from the position in which he stood at the custom-house—that the windows of the house that was burned came pretty near to the roof of the house—that he thinks he could have seen the window in the south east corner of the house, if it had been on fire, from where he stood, but did not take much notice—that the street where he stood runs up by the house that was burning—that he noticed nothing but the fire, but that he could have seen the fire in the front windows from where he stood, had they been on fire, but don't know whether the lower part of the house was burning when he got there.

The defendant then introduced Chester P. Knapp, who testified that he saw the house on fire between two and three o'clock—that the south east attic was burning when he first saw it—that he saw the fire through the windows, that he went in at the front gallery and saw no fire there and saw none of the windows burning—that he tried to break down the door—thinks he would have seen the fire in the front windows if they had been burning—that the 291
building was a story and a half high—that it was through the upper windows that he first saw the fire—that the windows above were the smallest, that the windows below had blinds, but does not remember as to the upper windows.

Hereupon the defendant rested his case, and the State offered to produce Mr. McVoy as a witness, to prove the ownership of the slave Simon, the prisoner. To this the defendant, by his counsel, objected, and the court overruling the objection, Mr. McVoy was sworn, and testified that the prisoner is his slave, his property.

And upon his cross examination by defendant's counsel, Mr. McVoy said that he had heard Mr. Sierra's testimony, and that he was in the Mayor's office when the prisoner confessed—that the prisoner was under a great state of excitement, that he was laboring under great terror, and that he never say any one more terrified—that witness, Mr. Sierra, and the city marshal were in the room with the prisoner, and the crowd on the outside.

Thereupon the counsel for the prisoner moved the court to withdraw the confession of the prisoner from the jury, because it satisfactorily appeared that the said confessions were elicited from the prisoner by undue terror or the hope of reward, which motion was overruled by the court, the court not being satisfied that the said confessions were obtained by undue terror or the hope of reward, and thereupon the said confessions were referred to the jury, leaving it to them to say whether they had been elicited from the prisoner by undue terror or the hope of reward.

Whereupon the counsel for the prisoner made their exception to the ruling of the court, and prayed that this bill of exceptions might be signed, sealed, and made a part of the record in this case. Which is accordingly done.

Campbell for the plaintiff in error. 292

First. The first error assigned is, that there is nothing in the record to show that the Grand Jury found a true bill against the prisoner. Holton vs. the State, 2 Fla. R., 476.

Second. It was left to the jury to say whether the confesisons of the prisoner were admissible; whereas it was the province of the court, and not of the jury, to decide upon their admissibility. 1 Phil. Ev., 18; 2 Starkie Ev., 36; 2 Russell on Crime, 826; Roscoe Ev., 34; 1 Greenl. Ev., 255.

Third. The court should have ruled out the confessions, because it was evident they were extracted by fear and the hope of favor.

A confession to be admissible, must be free and voluntary, it must not be extracted by any sort of threats or violence, nor be obtained by any direct or implied promises however slight, nor by the exertion of any improper influence. 2 Russell on Crimes, 825, 826; 1 Chitty Cr. Law, 570; 1 Wheeler, 69. And to ascertain whether a confession is voluntary, we are not simply to consider the language used to the prisoner by the person to whom it was made, but also the age, situation and character of the prisoner, and the circumstances under which he was at the time the confession was elicited. 1 Greenleaf, 255.

We contend that under these rules, the confessions of the prisoner were clearly inadmissible. It is clear that the first confession was induced by fear and the hope of favor. By fear. The prisoner was a slave, and therefore more readily operated upon by the appliance of fear.

At the time his confession was made he was laboring under the greatest terror induced by the presence of an excited crowd, who threatened his life, and who were only restrained from executing their threats by the authority of

293 the mayor; and the prisoner was urged to confess by the mayor, who assured him his guilt was known, and that if he was the only person concerned in the crime he would certainly be hung. 2 Russell on Crimes, 831; Serpentine vs. the State, 1 How., 256.

By favor. The promise of protection made by the mayor was, under the circumstances, a powerful inducement to the prisoner to confess; and he might very naturally have thought it necessary to ingratiate himself with the only protector he had in the multitude around him. Mill's Case, Russell on Crimes, 828-831. When life is in peril, fear prompts us to take any step that may insure immediate safety, even though it may result in an equal though more remote danger.

Again, the promise of the mayor, that if the prisoner "had accomplices, by betraying them he would be admitted as State's evidence, and they would be put on their trial, and not him," was clearly sufficient to exclude the confession. 2 Russell, 828-839. The fact that he discovered no accomplice, and that he was admonished that if he was the only guilty party he would be hung, does not remove the objection. The law cannot measure the force of the influence used, or decide upon the effects it may have upon the mind of the prisoner. 2 Russell, 826.

The second confession was also induced by promise. The prisoner was told it would be better for him to betray his accomplices, so that he might become State's evidence. Authorities above cited.

The mayor, to whom the confessions were made, says he made no threats or promises to elicit the confessions from the prisoner, and such doubtless was his intention. But the question is not whether he intended to excite hope or inspire fear, but whether the language employed might be
294 so construed by the prisoner as to produce those results. 2 Russell, 831.

Archer, for the Attorney General, for the State.

SEMMES, J.:

The first error assigned, is, that there is nothing in the record to show that the Grand Jury found a true bill of indictment against the plaintiff in error, and the case of Holton vs. the State, 2 Fla. R., 476, is relied upon as authority. We have carefully revised the decision in that case. It is certainly distinguishable from the one before us, and we certainly are not disposed to extend any further the principles of that decision. Immediately after the caption of the record, in this case, which contains all the essential requisites, follows this statement: "And on another day, to wit, the fifteenth day of June, in the year of our Lord one thousand eight hundred and fifty-three, the Grand Jurors came into court and presented the following bill of indictment, which said indictment is in the following words and figures, and is endorsed as follows, to wit." Then follows a copy of the indictment, with the finding of the Grand Jury, closing with the usual certificate of the clerk. The record is a complete and perfect one, and a mere statement of the facts is a sufficient answer to the objection.

The second assignment of error is, that the court below left it to the jury to determine whether the confession of the accused was voluntary or not? It was undoubtedly the province of the court to determine in the first instance as to the admissibility of these confessions. There is a manifest distinction between the questions, whether a confession be voluntary or not, and the credit and weight to be given the evidence establishing the confessions. The one is as exclusively a question for the court, as the other

is for the jury, for it is only when the confession is volun- 295
tary that it becomes legal evidence, and can be submitted to the consideration of the jury.

It oftentimes may become a question of no little embarrassment to determine whether the confession is voluntary or not, but still, the law has reposed the exercise of this power in the court, and it cannot be delegated to the jury. Their province is widely different; they are not concluded by the confessions, when submitted to them, for they are to determine not only the weight and credit to be given the testimony of the witnesses, who depose as to the confessions, but the credit to be given to the confessions themselves.

We do not consider this to be an open question. There is no conflict of authorities on the subject, and the doctrine is universally acquiesced in by the English and American Courts. A note by the Editor of Russell on Crimes, is relied on as maintaining a different doctrine. 2 Russell 5 Amer. Edit., 826, n. 2. But it is very evident that the questions, as to the admissibility of the evidence, and the credibility of the witnesses, have been confounded. Otherwise, the note of the Editor is not only at variance with the text but with the authority referred to. In case of Rex vs. Nute, 2 Russell, 832, it is true the confessions were in evidence, and the jury were allowed to pass upon the question whether they were voluntary or not, but on a case reserved, the Judges held that these points were not for the jury.

It is insisted by the Attorney General, that the evidence in relation to the confessions being voluntary, having gone to the jury, it was too late afterwards to object to its admissibility. It is true, the investigation in the first instance, should have been restricted to the motive and influence which may have operated on the mind of the prisoner, in making these confessions; it was a preliminary 296
question, and the judgment of the court should have been invoked on that. But it is none the less true, that it was in the power of the court to have arrested the examination and withdrawn the evidence at any time during the progress of the trial.

The third assignment of error, is, that the court should have ruled out the confessions, because they were not voluntary.

To render a confession voluntary and admissible as evidence, the mind of the accused should at the time be free to act, uninfluenced by fear or hope. To exclude it as testimony, it is not necessary that any *direct* promises or threats be made to the accused. It is sufficient, if the attending circumstances, or declarations of those present, be calculated to delude the prisoner as to his true position, and exert an improper and undue influence over his mind.

The evidence in this case was, that the accused was arrested on suspicion. What the grounds of suspicion were do not appear. He was taken before the mayor of Pensacola, at his office. A large and excited crowd was present, declaring that the accused should be hung, and but for the firmness and determination of the mayor, would have seized upon him. He was informed by the mayor that the crowd was satisfied as to his guilt, that he would be put upon his trial, and would certainly be hung. That if he had accomplices they would be put upon their trial, and not him—that he would become State's evidence. The mayor further testifies "that the accused was greatly alarmed." The city marshal, who was also present, testifies, that the accused was under great excitement, was laboring under great terror, and that he never saw any one more terrified. Under these circumstances, he was urged to confess. When asked what he had to say? he replied,

297 "send for my master and I will tell the whole." Upon his master appearing, the previous statements of the mayor were repeated to the accused, and he confessed his guilt. The next morning he was committed to jail, and upon a second interview with the mayor he again confessed his guilt and accused some one as his accomplice, who on being arrested he failed to identify.

There were no corroborating circumstances in proof, in aid of the confession, though there was evidence to disprove a part of his statement. Upon this state of the facts he was convicted and sentenced to be hung.

There are few cases to be found in the books where stronger influences were brought to bear on the mind of the prisoner to extract a confession than the one before us. That it was made under the influence of fear or apprehension of personal violence, can scarce be doubted. The fact of the assurance of protection, on the part of the mayor; from the threats and violence of the crowd, was but additional inducement to the confession; for, connecting the language of the mayor with the terror inspired by the crowd, it is but fair to presume that the conviction was, that his confession was the only immediate security for his person and his life. The fear of immediate punishment may be as powerful an agent in extorting a confession, as the punishment itself. If, from the situation and character of the accused, the circumstances were calculated to, or did inspire him with, this fear, his confessions came at least within the spirit of the rule excluding them as evidence. The impression and conviction was made—the agency is of no consequence.

The second confession made in prison, it is reasonable to infer, was induced by the circumstances attending the first. The presumption is, that the previous influences continue, and such presumption must be overcome. The
298 State vs. Guild, 5 Halst., 163. Explicit warning of the accused by the magistrate, and length of time intervening, are circumstances which may render the subsequent confessions evidence. *Ibid.* These do not exist in this case.

It is true the precise time when the subsequent confession was made, is not stated, though it is clearly inferable it was the next day. Whether this be so or not, it was incumbent upon the prosecution to have proved the time, and failing to do so, the accused is entitled to all the benefit of the omission. Independent of these confessions, the fact that the accused is a slave, and the confession to, and at the instance of his master, are circumstances entitled to the most grave consideration; the ease with which this class of our population can be intimidated, and the most absolute control which the owner does involuntarily exercise over the will of the slave, should induce the courts at all times to receive their confessions with the utmost caution and distrust. And the facts of this case afford a strong commentary upon the uncertainty and danger of these confessions. In the course of his examination the accused undertook to state the particular part of the house which was set on fire. He says he set fire to the east window of the first story under the gallery, and that he staid there until it blazed up. One of the witnesses is satisfied the fire commenced in the upper story; the shingles he thinks must have been set fire to from the attic—the fire was running out on the shingles. He believes he could have seen the east window had it been on fire, from where he stood.

Another witness says, he discovered the south-east attic on fire, that he went into the gallery, but he saw no fire there; none of the windows were burning. These witnesses, who are unimpeached, and whose testimony is uncontradicted, establish the fact, that the confessions of the prisoner as to the particulars of the burning, were altogether untrue. It is true that the jury were competent to 299
believe his confession as to his guilt and reject the balance of his statement. But the record does not disclose a solitary circumstance from which we would be warranted in believing one statement more than the other.

If the confessions were voluntary, it would be difficult to conceive of a motive for giving this detailed statement of a matter so clearly proved to have been false. We can only reconcile the confessions with the fact that when made, the prisoner was laboring under excitement and apprehension.

Judgment below reversed, cause remanded, and new trial ordered.

WRIGHT, C. J., delivered the following dissenting opinion:

The record in this case presents the following facts:

On the 17th October last the dwelling-house of R. T. Maxwell was burned in Pensacola. On the 21st or 22d of the same month, Simon, the prisoner, was apprehended and taken before the mayor of Pensacola, Mr. Sierra, on suspicion of setting fire to the house. He made confession of his guilt. The witness, Sierra, testifies that no compulsion and no influence was used to extract from the prisoner such confession—that "witness said to Simon that if "he told the truth, and if he was the one who burned the "house, he would be put on his trial and would certainly "be hanged." On cross examination, the witness says, "there was great excitement among the people—there was "a great crowd, but the excitement was out of doors, "and that the people said, he, the prisoner, should be "hanged." And further, that witness "thinks that but for "his protection afforded the prisoner the people would "have taken him into their own hands."

There is much other testimony presented by the bill of 300
exceptions, such as that after Simon had confessed his guilt, the witness urged him to disclose the names of his accomplices, if he had any. Whereupon Simon hung down his head, and requested that his master might be sent for—that on the coming of his master, Simon repeated his confession, being warned by his master, as he had been previously warned by the mayor, viz: that if guilty he would be tried and hanged, and Simon added, that in setting fire to the house "he was by himself. and that nobody was with him."

The next day while in jail, Simon named an accomplice in his crime, who on being apprehended proved not to be the man, &c.

In the court below, the prisoner's counsel moved the court to exclude this testimony from the jury on the ground that the confessions of the prisoner were obtained by undue terror.

Three distinct grounds of error are assigned here. In relation to the first, the court is agreed. The second and third I shall consider together.

The general rule in cases like the present, is, that if there be reasonable ground for presuming that the confession was made under the influence of any promise or threat of a temporal nature, the evidence ought not to be received. 2 Hale, 285; Arch. Crim. Pl., 109. Here it is urged that such a threat was conveyed in the declaration made by Sierra to Simon, "that if he told the truth, and if he was "the one who burned the house, he would be put upon his trial, &c. I think otherwise, and that Sierra's declaration to Simon is to be regarded rather as a warning—an admonition, than as a menace, calculated to overcome the mind of the prisoner, and render his confession unworthy of credit. The kind of threats which the law regards as

301 fatal to confessions of this character, are threats of present or prospective evil, made in order, or with the effect, to *induce* confession. Such would be a threat of prosecution or any other personal harm. In this case, however, the object of the witness, Sierra, was (and such was the obvious effect of his warning,) to put Simon on his guard against disclosing anything but the truth. It is not to be denied that a confession obtained by any undue means should be excluded from the jury. 2 Russ. on Crimes, 645; 2 East. P. C., 658; 1 Phil. Ev., 104.

But in this case no undue means were used. I cannot regard the crowd outside, and their excited declarations, as constituting such undue means. The natural and probable effect of these excited declarations was, not to induce the prisoner to make a false confession of his guilt, but rather to induce him to persist in a denial, though he might be ever so guilty.

The question in all cases like the present, is, "whether the inducement held out to the prisoner was calculated to make his confession an *untrue one.*" Arch. Crim. Pl., 111. In this case there was no such inducement.

I think the court below was right in permitting the confession to go to the jury.

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302 JOHN T. J. WILSON AND JAMES M. CLELAND, APPELLANTS, VS. LUKE LOTT IN HIS OWN RIGHT, AND AS EXECUTOR OF MARY THOMAS, DECEASED.

Where the term of a court is adjourned, after the day appointed for its commencement, to another day, it is but a prolongation of the term; but when the term is postponed by an adjournment *before* its commencement, and in anticipation of the appointed time, to another day, the return thereof is adjourned; and those things which were appointed to be done on the first day of term, are postponed and adjourned also to the deferred time: Therefore, the term of this court appointed by law for the 3d Monday of March, having been, by an order of the 18th February preceding, postponed and adjourned to Monday, the 11th day of July, the transcript of the record in this cause filed on the last named day, was filed in due time.

Motion to docket the cause for argument at the present term. The point presented is set forth in the opinion of the court.

Woodward and *M. A. Long* for the motion.

Campbell and *Hawkins* against it.

THOMPSON, J.:

The appeal in this case appears to have been duly entered in open court, at the last fall session of the Circuit Court for the Western Circuit sitting in the county of Jackson; the transcript of the record however was not filed in the Clerk's office of this court until Monday last, the 11th of July instant, being the first day of this term, held pursuant to the postponement and adjournment ordered on the 18th of February last, by an order made during the sittings at Tallahassee.

The counsel for the appellants now moves that the case

be docketed, and heard at the present term of the court, 303 which motion is resisted by the counsel for the respondents, who contend that the case should be dismissed for want of prosecution, the transcript of the record not having been filed "on or before the first day of the term next succeeding" the allowance and entry of the appeal, as prescribed by § 4 of the Act of February 10, 1832, (Thomp. Dig., 448.)

The term of this court next succeeding the entry of the appeal in this case would have been on the 3d Monday of March last, but as the said term could not be held consistently with a due regard to the public service, it was postponed and adjourned over until the 2d Monday of the present month of July, and on this day the appellant brought in and filed the transcript of the record.

It is contended on behalf of the respondents that this should have been done on the 21st March, the time appointed by the statute for holding the term of court at this place. And this brings us to the question of the effect of the adjournment of the term.

An adjournment is defined in Jacob's Law Dictionary to be "a putting off until another time and place," which definition is in conformity with the meaning of the term as it is used in ordinary and common parlance, according to Dr. Johnson, and other lexicographers. The term then which was appointed to be held the 3d Monday of March having been put off until another time, namely, the second Monday of July thereafter, it would seem to result as a necessary consequence that the things which were to have been done, and which would have been done at the first named time, must necessarily be postponed with the term to the deferred time. Writs of error, citations and other process which had been issued returnable to the first named day, would be returnable at the time specified in and by the adjournment, because the return day was adjourned and 304 postponed. And this view is supported by authority.

It is laid down in Comyn Ab., tit. Adjournment, (A. 3,) that "where the return itself is adjourned, nothing can be done upon the same return; as if the term be adjourned in *octabis mich. usque mens. mich.*, there can be no appearance upon *oct. mich.*, for that was adjourned," and citing 1 Roll. 130, 633, 4 Ed., 4, 21, a.; and again it is laid down, "So every thing to be done at a return which was adjourned, shall be done at the day to which the adjournment was; as if a bond be to appear *oct. mich.* before which, the term is adjourned to another place and day, an appearance there is sufficient." Comyn Dig., tit. Adjournment, (A. 3,) citing Mo., 430, Cro. Eliz., 466.

Upon authority as well as reason, it would seem that the transcript of the record filed on the day to which the term was adjourned, was filed in due time.

There is an obvious distinction between the adjournment of the court on the first or any subsequent day of the term, and the adjournment of the term in anticipation of the appointed time, to another day; in the first place, the term has actually commenced, and the effect of the adjournment is but a prolongation of the term—in the latter case the term being postponed by adjournment before it commences, the return day thereof is also adjourned, and it takes its beginning from the time to which it is adjourned.

Per totam curiam. Let the case be docketed and stand for argument at this term.

Wilson & Cleland vs. Luke Lott—Statement of Case.

305 JOHN T. J. WILSON AND JOSEPH M. CLELAND, APPELLANTS, VS. LUKE LOTT IN HIS OWN RIGHT AND AS EXECUTOR OF MARY THOMAS, DECEASED, APPELLEE.

1. Fraud is not to be presumed, but must be proved; and this is the general rule, as well in equity as at law.

2. In equity, fraud will sometimes be presumed from the nature and subject of the bargain itself, being such as no man, not under some delusion, would make, on the one hand, and as no honest and fair man would accept on the other; and it will be presumed from the circumstances and condition of the parties contracting; and these instances form exceptions to the general rule.

2. Where one greatly indebted, although not actually insolvent, with the avowed design of removing from the country, makes a sale of all his property, real and personal, receiving payment partly in cash, partly in a debt due by him to the vendee, and for the residue the promissory note of the vendee, which were subsequently paid, and possession of the property sold followed and accompanied the conveyance: HELD, Not to constitute evidence of fraud, although it appeared that the vendee was the mother-in-law of the vendor; and that owing to subsequent misconduct of the vendor, the proceeds of the sale were lost to his creditors.

4. Where it appeared that subsequently to the sale, upon the entreaties of the vendee, who was unwilling to be separated from her daughter, and upon her promise to remember her grand children liberally in her will, the vendor yielded to the said solicitations and promises, abandoned his intention of removing, and resided with the vendee, but never assumed any dominion or control over the property sold, it was held that it did not constitute such a possession in the vendor from which a secret trust in his favor would be inferred, so as to make the transaction fraudulent by construction of law.

Appeal from a decree of the Circuit Court for Jackson county.

Wilson and Cleland filed their bill of complaint against Luke Lott in his own right and as Executor of Mary Thomas, deceased, alleging that Lott, in March 1839, conveyed to Mary Thomas his interest in certain lots in Marianna, and
306 also a tract of land situated in Jackson county; that Lott being the owner of an interest in certain pre-emption claims likewise conveyed it to said Mary Thomas in her life time, and that at the date of these conveyances Lott transferred and conveyed to said Mary Thomas all his other property of every name, nature and description. The bill sets forth that at the time of these transfers and conveyances, Lott was largely indebted to many persons, and among them to complainants, who instituted separate suits against him and recovered judgments in March 1840, in each case for $4,434.39; that the executions which issued thereon were, in consequence of the transfers and conveyances which had been made, returned "nulla bona." It charges that the said transfers and conveyances were concocted and contrived in fraud, covin, collusion and guile, to the end and purpose, and with the intent and design to elude and deceive, hinder, circumvent, delay and defraud the creditors of said Lott in general, and especially complainants. That a merely nominal and fictitious consideration, if any, was given or known in these transactions, and that if any money passed it was borrowed for the purpose and immediately returned to the lender, and that if notes were given they have never been enforced, and were given as a pretence to cover the real nature of the transactions.

The bill further charges that Mary Thomas was in no sort of condition, either by age, ability, habit or inclination, to enter into such an extensive engagement, being an aged widow, having neither the time, capacity or disposition for such investments. That she never occupied or improved the town lots, and never cleared, planted or improved the land, but that said Lott had been in the receipt and enjoyment of the profits and income of all; that Lott was the son-in-law of Mrs. Thomas, at whose house he and his family resided without any apparent and real difference or exclusiveness of interest, and that she became the bailee 307
of all his property for its protection, and to cover it from his creditors. It alleges, further, that before her death Mary Thomas made her will, by which she devised and bequeathed to her grand-children, to wit, the children of said Lott, all her property, reserving a life estate to her daughter, the wife of said Lott, and appointing said Lott executor thereof. The bill concludes by praying that the transfers and conveyances referred to be set aside as fraudulent and void as to creditors, and that it be decreed that said Mary Thomas in her life time, was a trustee of the creditors of said Lott, and that said property be held to be subject to their debts and sold to pay the claims of complainants.

Defendant in his answer, states that in the latter period of the year 1838, or early in 1839, he proposed to emigrate to Texas, and that preparatory to this movement he sold all his property, both real and personal, except notes and accounts, to the said Mary Thomas. He declares that his intended movement to Texas was the only inducement with him to sell his property, and in the most pointed and unequivocal terms denies the truth of the allegation in the bill, of an intention on his part to defraud his creditors. He denies that there was any fraud, actual or constructive, in the sale of his property, and asserts that the transfer and conveyance thereof was for a full and valuable consideration, and proceeds to state in detail the valuations placed on the different parts of the property sold; that as soon as the conveyances were completed, the property was delivered to Mrs. Thomas, and she continued to possess and enjoy and control every part of it until her death.

The answer further states that the consideration for which defendant sold the property was paid in the following manner, viz: Mary Thomas paid the defendant one thousand dollars in cash, one thousand dollars in his own notes which 308
he had given her some time previous for a negro man, and two mules—assumed the payment of his stock note due the Union Bank for $1,333.33, and for the balance she gave him two notes which she paid before her death. The money paid defendant, he states he applied in various ways to his own use, but the great part of it he believes he lost at bragg. Defendant admitted that from the time of the said sale to Mary Thomas he and his family resided with her, but for reasons which he circumstantially states. He alleges that at the time he sold his interest in the pre-emption claims (eight in number) he entered into an obligation by which he bound himself in the penal sum of two thousand dollars that the entries of all said pre-emption claims should be effected; that entries could be made of only four of said claims, for the reason that assignments of the other four could not be obtained from the persons entitled to them. That he was also bound by his said obligation to remain with and overseer for the said Mary Thomas until the price of the four pre-emption claims of which entries could not be effected, being $1200.00, should be satisfied by his personal services or those of a person to be hired by him to supply his place, and in compliance with this undertaking he remained with her. That when the time arrived when he was at liberty to leave without violating his engagement, his mother-in-law, Mrs. Thomas, begged him to remain with her until she could settle her affairs, promising, if he would, to accompany him to Texas. That while engaged in settling her affairs the infirmities of age were daily drawing her nearer to the grave, and defendant in consideration of her situation, added to her entreaties, and a promise of a liberal provision by her will for his children, consented to remain with her until her death. The answer further denies that he enjoyed in any way or shared

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309 with Mrs. Thomas, the rents and profits of any part of the property, and that if he intermeddled with the property originally hers or that which she acquired by purchase from him, it was as her agent and overseer.

Allen H. Bush, a witness for complainant, testified that Mary Thomas resided at the place now occupied by Luke Lott from the year 1836 or 1837, to the period of her death which took place in 1847 or 1848. Luke Lott resided at the same place from the same period to the present time, except for a short time in the year 1837 or 1838, when he resided in Marianna. Mrs. Thomas was the mother-in-law of Lott and appeared to be on good terms with him; their personal relations were of the most friendly and confidential kind, and their associations were free and unreserved. That during the years 1836-7-8-9, and 1840, Lott was not a man of much wealth. Witness thinks he was not free from debt, but that he was in embarrassed circumstances, considerably in debt for a greater part if not the whole of the time alluded to. Thinks Mrs. Thomas in 1838 was not wealthy, but was in comfortable circumstances —cannot say in what her property consisted, and cannot say whether her fortune or circumstances were such as to induce her to enter into speculations. The common reputation seemed to be against the fairness of the contracts between Lott and Mrs. Thomas.

Thomas M. White, a witness for complainants, testified that in 1839 Mrs. Thomas lived in the town of Marianna in the family of her son-in-law, Luke Lott—does not know what her occupation was at that time, nor can he say whether or not she was knowing to the indebtedness of Lott. Witness thinks Lott was largely indebted from general reputation.

Michael Lott, a witness for complainants, testified that a most perfect understanding of friendship, respect, good
310 feeling and confidence existed between Mrs. Thomas and Lott, and that there was a great deal of intimacy, confidence and unreserved communication between them, but he could not state whether she knew or was informed of the engagements, bargains and contracts of said Lott, or whether she was apprised of his general or special indebtedness in the years 1837 and 1838, or of his indebtedness to complainants.

Mrs. Sarah Hudson, a witness for defendant, who was a near neighbor of Mrs. Thomas, and intimate with her and Lott, states that she never knew Lott to make use of the property as his own after the sale, or to receive or enjoy the products of the farm or wages of the negroes, or sell any of the personal or real estate until after the death of Mrs. Thomas. She further testifies that she thought it was generally known as she heard both Lott and Mrs. Thomas say it, that Lott sold his property with a view of removing to Texas, and that he was to wait until he could ascertain whether all the pre-emption claims could be perfected, and that finally he was prevailed on by Mrs. Thomas to stay and attend to her business for her. She further testifies that Lott was a favorite son-in-law of Mrs. Thomas, and they were always on good terms—that she always saw Mrs. Thomas exercising control over the property, and that if Lott sold any thing she was told by Mrs. Thomas that he always made a strict settlement with her

John F. O. Thomas testified that he was living near Ochesee at the time of the sale to Mrs. Thomas—that she took possession of the property immediately after the sale, and managed and possessed it for her exclusive benefit, and for her sole right—that Lott, after the sale, never made use of the property as his own, or received or enjoyed the products of the farm, &c., and that if he ever had any thing to do with the property it was as overseer or agent until he, witness, moved to the place, when he, wit- 311
ness, became manager and overseer of the negroes of Mrs. Thomas for about five years. He states that Mrs. Thomas and Lott were very friendly, and that she always placed a great deal of confidence in him, but he does not think that she ever knew anything of Lott's indebtedness. That after the sale Lott lived in one end of a double penned house and Mrs. Thomas in the other, but that Mrs. Thomas managed and controlled the property to suit herself—that he acted as overseer for five years and everything was carried on by her directions. That Lott never assumed any control after the sale, and that when he sold any thing it was by the directions of Mrs. Thomas, and he accounted to her for every thing.

Mrs. Susan C. Carraway testified that she lived with Mrs. Thomas at the time of the purchase by her of Lott's property, and that Mrs. Thomas moved to the place she purchased immediately after and managed and controlled and possessed the property for her own exclusive benefit, and in her sole right. That Lott assumed no control of the property after the sale, or use or sell any portion of it as his own, and that when he had anything to do with it, he acted either as overseer or agent of Mrs. Thomas. She further states that it was generally known that Lott sold his property to Mrs. Thomas for the purpose of removing to Texas; that after the bargain was made Mrs. Thomas sent one of her sons to her house on Stafford Creek (where she resided) for her small trunk which contained her money; that witness saw the money some time before the sale and saw it counted to pay to Lott, but she does not know how much there was. Lott, she says, sold most of the crops, but as soon as he returned he gave Mrs. Thomas an account of the sales and settled with her.

John G. Gamble testified that Lott was the owner of twenty shares of stock in the Union Bank of Florida, and 312
that on the 27th June, 1839, he transferred the same to Mary Thomas. That the bank held Lott's stock note dated 28th December, 1838, for $1,333.33, and that upon the transfer of the shares aforesaid the stock note of Mary Thomas was substituted for that of said Lott.

Joseph Thomas testified that he witnessed the execution of the deeds from Lott to Mrs. Thomas, and that they were fair conveyances, intended to convey absolutely all Lott's interest in the property named, and for the consideration therein expressed; that the transaction was a fair and honest one, and founded on a valuable consideration and that Mary Thomas took possession of the slaves and other property immediately after the sale. He further states that Lott had given his note to Mrs. Thomas for $1,000 for a negro boy and two mules, and that Lott took this note as that much cash in payment for the property sold Mrs. Thomas.

To discredit the testimony of John F. O. Thomas and Joseph Thomas, complainants procured the testimony of Robert L. Harrison, who testified that he was acquainted with both of them, and that their general character or reputation for truth and veracity, was bad in the neighborhood in which they resided in Gadsden county, and that he had no reason to believe it otherwise at the time he testified. That from his knowledge of this general character of John F. O. Thomas and Joseph Thomas, he could not believe either of them under oath in a cause in which they were under the influence of their interest or their affections.

A. L. Woodward for appellants.

1. Fraud is a question of *intent*, arising upon evidence. It may be imputed, ascertained and established by inference and deduction; and it may also arise upon admission

313 or proof of certain facts, as *a presumption of law,* not to be rebutted or repelled.

II. The vendee's sanction or concurrence in the vendor's intent to hinder, delay and defraud creditors, vitiates any agreement or contract, and renders it void as to their claims.

III. The unconditional and absolute sale of a man's *entire estate,* he being largely indebted in proportion, or in amount equal to its full worth or value, his debts remaining wholly or the greater part unpaid, and the greater portion if not all the purchase price having been retained, reserved and appropriated, applied and expended otherwise—such a transaction, with all its surrounding circumstances, creates the presumption of a *fraudulent intent,* which, unless rebutted and satisfactorily explained, becomes *conclusive.*

IV. A secret trust or reservation for the benefit of the vendor or his family, to the exclusion of all or of any of his creditors, renders an agreement or bargain and sale void in *toto,* or so far as their rights may be affected thereby.

V. The participancy, sanction or concurrence of the vendee, in the intent, purpose, or design of the vendor, to hinder, delay or defraud creditors, may be presumed or inferred from the position, character, connection and circumstances, age, habits and pursuits or occupation of the respective parties to an agreement or bargain and sale, and such a presumption being raised, it becomes *conclusive* unless repelled and countervailed.

VI. A sale to pay a *pre-existing debt,* and the continuance of the vendor in possession, authorizes a legal presumption of an agreement or stipulation for the benefit of the vendor, not to be repelled or rebutted by evidence, and is fraudulent *per se,* and therefore null and void.

VII. The weight of evidence and the force of authority
314 are in favor of appellants.—And cited 2 Kent. Com., 515 to 31-32; 1 Story's Eq. Jur., 215, § 190, 297, § 369; 1 American Leading Cases, 55-56; Gressley's Equity Ev., 473-489. How vs. Ward, 4 Greenleaf, 195 ,207; Halbert vs. Grant, 4 B. Monroe, 584; Poague vs. Boyce, 6 J. J. Mar., 70; Harrison vs. Campbell, 6 Dana, 264; Stephen's Adm'r. vs. Barnett, 7 Dana, 257; Herren vs. Morford, 9 Dana, 450; Kendall vs. Hughes, 7 B. Monroe, 368; Brown vs. Force, *ib.,* 357; Brown vs. Smith, *ib.,* 361; Walker vs. Cralle, 8 B. Monroe, 11 Borland vs. Walker, 7 Ala., 269; Borland vs. Mayo, 8 Ala., 104; Farmer's Bank of Virginia vs. Douglass, 11 S. & M., 469; How vs. Camp, Walker's Ch. Rep., 427; Sands vs. Codwise, 4 Johns. Rep., 537; Miller vs. Tollison, Harper's Eq. Rep., 145; Brown vs. McDonald, 1 Hill's Ch., 297; 303; Maples vs. Maples, Rice's Equity, 300, 310; Hansford vs. Archer, 4 Hill, 270; Browning vs. Hart, 6 Barbour S. C. R., 91; Gibson vs. Love, 4 Florida Rep., 217; Barrow vs. Bailey, Fla. Rep., 1853, p. 19.

Hawkins and *Campbell* for appellees.

WRIGHT, C. J.:

In this case the bill charges in substance, that on the 13th March, 1839, the defendant Lott conveyed to Mary Thomas certain property in the town of Marianna, and a tract of Land in Jackson County—that Lott was the owner of certain lands obtained by pre-emption, which he also conveyed to Mrs. Thomas—that about the same time Lott also conveyed to Mrs. Thomas all his property, of every description—that Lott was then largely indebted to many persons in the county, and particularly to the complainants—that in March, 1840, judgments were obtained at law by complainants, and executions were issued against Lott and returned "nulla bona"—that the sale to Mrs.

Thomas was fraudulent as to creditors—that a merely nom- 315
inal and fictitious consideration was paid, if any—that Mrs. Thomas was in no sort of condition to purchase, was an aged widow—that defendant Lott remained in possession of the property—that Mrs. Thomas lived with Lott, who was her son-in-law—that no separate account was kept of their affairs, and that shortly before the death of Mrs. Thomas, she made a will, devising all her estate to her daughter, Lott's wife, and appointed Lott her executor.

The prayer of the bill is, that the conveyance from Lott to Mary Thomas be set aside as being fraudulent, and that he be required to account as executor, &c.

The answer of the defendant, Lott, states, that in 1838 or '39, he had it in view to go to Texas, and with that intent sold all of his property, real and personal, except notes and accounts, to Mary Thomas—that he had no intention thereby to defraud his creditors—that the property sold went over into the possession of the vendee, who continued in possession until her death—that she paid him the purchase money as agreed on, partly in money, partly in his own notes, and that he lived with his mother-in-law after the sale, and attended to her business as an agent or overseer. He denies all fraud and secret trust—in short denies all the facts sets forth in the bill as a ground for the interference of a Court of Equity.

A Supplemental bill was afterwards filed, charging Mrs. Thomas with knowledge of, and participation in, the fraud of the defendant, Lott. To this Lott answers in effect, that he does not believe that Mrs. Thomas knew of his indebtedness at or before the sale to her.

The testimony of a number of witnesses was taken in the cause, but it is sufficient to say that there is nothing in this to cast suspicion even, upon the truth of Lott's answers. The complainants are therefore in this attitude—
they have appealed to the conscience of Lott in relation to 316
the facts on which they rely—he denies the facts charged, and they present no proof to contradict his answers.

It is true, as contended for on the part of the complainants, that fraud is in general, a question of intent, and may be presumed from circumstances, and in some cases the presumption is so strong as to be incapable of being repelled by proof, but in the case before us, the facts disclosed, to-wit, that Lott was largely indebted, that he made the conveyance in question to his mother-in-law, and that he conveyed his entire property, though these may be badges of fraud, yet to say that they constitute fraud in themselves, would be to carry the doctrine beyond the limits of reason or authority, and to shut out the light of wisdom and truth. Here by the evidence brought out by the complainants themselves, we have all these facts explained—all these badges of fraud removed, at least so far as Mrs. Thomas is concerned; for she, it seems, knew nothing of Lott's indebtedness, or of his fraudulent intent, if it existed. She paid for the property purchased, what seems a full and adequate price.

From this state of the case, it follows that Mrs. Thomas must be deemed a *bona fide* purchaser, for a valuable consideration, without notice even of Lott's indebtedness.

Let the decree of the court below be affirmed.

THOMPSON, J.:

I concur in the judgment of affirmance of the decree rendered in this cause in the court below.

The question raised in this case is simply one of fact—whether the parties to the conveyance complained of were guilty of an actual fraud; or, whether those facts and circumstances existed, and attended the transaction, which work the same mischief, and which in contemplation of

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317 law are deemed badges of fraud, or presumptions of ill faith, and from which the law, upon principles of public policy, deduces a fraudulent intent, and declares the contract void as to creditors—in other words, whether the transaction is tainted by fraud in fact, or fraud by construction of law.

It was remarked by Ld. Ch. Elden, in the case of Mortlock vs. Buller, (10 Ves. R., 306,) that the court has never ventured to lay down, as a general proposition, what shall constitute fraud; nor does it seem possible that any fixed and invariable rule can be established on this point, which would not be liable to be circumvented, and utterly defeated by new schemes, which the fertility of man's inventive genius would contrive. The question of fraud is one of *motive and intent*, and can rarely, if ever, be considered as a single fact, but a conclusion to be inferred from all the circumstances of the case. In the proof, however, the same general rule prevails in equity, as at law; it is not to be presumed, but must be proved.

The counsel for the appellants has argued this case upon the assumption, that in a Court of Equity, fraud may be presumed, and that in this a diversity exists between such tribunal and a Court of Law. In this, the counsel has laid down the position too broadly. I am aware that fraud is always secret; that where persons design to commit it, they do not publish their motives and intentions, for this would be to defeat the end they aim at; and I am also fully aware how difficult it is to demonstrate the intention from the overt acts and conduct of the parties; yet these difficulties furnish no reason for the assertion of the power, by a Judge, guided by no more certain rule than his own arbitrary conclusions, to presume a fraudulent intent from what has been called the moral evidence, but which, however, may more correctly be termed his own vague sus-
318 picions of the nature and character of the transaction, unassisted and uncontrolled by any certain and fixed principles. In such case, every transaction would be dependent on the peculiar notions of the Judge, as to what would constitute good or ill faith. The fairest transaction, in the view of a suspicious mind, might be deemed fraudulent, while to another mind of an opposite cast, a course of conduct justly obnoxious to censure, would escape with impunity.

When it is said that fraud may be presumed in a Court of Equity, when the same presumptions will not be entertained in a Court of Law, it is to be understood, that in some peculiar and particular cases there exist exceptions to the general rule before laid down. The subjects of these exceptions will be found in those two species of fraud which are mentioned in the classification of Ld. Ch. Hardwicke in the case of Chesterfield vs. Jansen, (2 Ves. R., 155,) as the second and third kinds of fraud. The learned Chancellor thus classifies the different kinds of fraud:

"First, then, fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition, which is the plainest case.

"Secondly, it may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man accept on the other, which are unequitable and unconscientious bargains.

"3. A third kind of fraud is that which may be presumed from the circumstances and condition of the parties contracting; and this goes further than the rule of law, which is, that it must be proved, not presumed. But it is wisely established in this court to prevent taking surreptitious advantage of the weakness or necessity of another, which, knowingly to do, is equally against conscience as to take advantage of his ignorance; a person 319
is equally unable to judge for himself in one as in the other.

"4. A fourth kind of fraud may be collected or inferred, in the consideration of this court, from the nature and circumstances of the transaction as being an imposition and deceit upon the other persons not parties to the fraudulent agreement.

"5. The last head of fraud on which there has been relief, is that which infects catching bargains with heirs, reversioners or expectants, in the life of the father, &c., against which relief always extends. These have been generally mixed cases, compounded of all, or several species of fraud, there being sometimes proof of actual fraud, which is decisive."

It will be apparent, from this quotation, that the presumptions arising from the intention, or moral evidence, as it has been termed, are alone applicable to those cases which arise under the second and third divisions, and to those under the fifth, which partake of the nature of the two former; in all other cases, the general rule must prevail. And even in the excepted cases referred to, Courts of Equity are as little warranted as Courts of Law in imputing or presuming fraud, upon the mere arbitrary notions of the Judge, but under each head certain bounds and limits have been established, within which the discretion of the Judge is to be exercised, and which are already as widely extended as is consistent with a due regard to the inviolability of the right to contract. It seems hardly necessary to add that this case does not come within any of the exceptions, but is to be determined by the application of the general rule; and those marks, badges or presumptions of fraud, which are inferred by law, are, and must be, deduced from facts, which it allows to be rebutted by evi- 320
dence.

The facts and circumstances of this case, as drawn from the evidence, may be succinctly stated as follows:

It appears that in March, 1839, the respondent, Luke Lott, being then and before that time, largely indebted to the appellants and others, (although it does not appear that he was actually insolvent,) and having determined to remove to the Republic of Texas, made a sale of all his property, real and personal, to Mrs. Mary Thomas, his mother-in-law, for the sum of $9,600, which said sum appears to have been the full value of the property conveyed, and was paid partly in cash upon the execution of the conveyance, partly in the promissory notes of the vendor, and for the residue the vendee, Mrs. Thomas, gave her own notes, which were subsequently paid. That immediately upon the sale and conveyance before mentioned, Mrs. Thomas took possession of the property conveyed, removing her slaves and other property, to the farm purchased of Lott, and exercised dominion and control over the same as owner, and for her sole and exclusive use and benefit, until the period of her death, which occurred in 1846. It further appears, that a part of the property sold consisted of eight pre-emption claims, and that it was stipulated in relation to these by a separate agreement, that if it should happen that any of these claims should not be located and entered, then the vendor, Lott, should indemnify the vendee to the value thereof in serving her as an overseer, or to employ one for her at his expense; that entries of some of these claims were not effected, and that Lott, in conformity with his agreement, reimbursed Mrs. Thomas by services in the capacity of overseer, but the precise times when this service commenced and when it terminated are not stated; it is stated in Lott's answer, that he was so employed for

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several years; and that afterwards he was induced to abandon his design of removing to Texas, by the entreaties of his mother-in-law, and by her promise to provide liberally for his children in her will, which, as it further appears she did, by devising and bequeathing to them her entire estate.

The evidence is full that Mrs. Thomas was most tenderly attached to her daughter, Mrs. Lott, and also to her son-in-law, the defendant Lott, and that she always opposed most earnestly the removal to Texas, especially as she considered herself too far advanced in life to accompany them.

The appellants became judgment creditors in 1841, and filed their bill seeking to set aside the conveyance on the ground of fraud, in 1847, after the death of Mrs. Thomas. The counsel for appellants, besides the argument before referred to, following the allegations of the bill of complaint, contended for an inference of fraud deducible from the following circumstances:—1. The relationship by affinity between the vendor and Mrs. Thomas, the vendee; 2. The large indebtedness of Lott to complainant and others at the time of the sale; 3. The actual or presumed knowledge of Mrs. Thomas of the fact of such indebtedness, and of a design to assist Lott in a fraud upon his creditors; 4. That the sale was not made upon a good and valuable consideration; and 5. That possession did not accompany and follow the conveyance, but continued in the vendor.

The fact of the relationship between the parties is not *per se* a badge or mark of fraud. I am not aware of any principle of equity which regards a sale and conveyance by one relative to another, standing alone, as a circumstance of suspicion. Combined with other circumstances, it may serve to elucidate, explain, or give color to a transaction, such as a sale at a considerable under value, &c., &c. (Copes vs. Middleton, 2 Madd. R., 409,) If it is
322 combined with the ground subsequently alleged, of the large indebtedness of the vendor, it is still not of any importance; nor do the facts taken in connection amount to a badge or mark of fraud. And even if the two preceding facts be combined with an allegation of an actual knowledge, on the part of Mrs. Thomas, of the indebtdness and embarrassment of Luke Lott, (assuming such allegation to have been maintained by proof,) it will not make out a case of fraud. In Barrow vs. Bailey, (5 Florida R. 25,) this court held "that one in failing circumstances, or "even insolvent, has a right to sell or assign his property, "except as against pre-existing liens, for the purpose of "paying his debts; and if he has the right to sell, of course "any one has the corresponding right to purchase. The "only limitation upon the exercise of these rights is, that "the sale and purchase be in good faith, and for a valuable "consideration. If the appellant's purchase falls within "this rule—if he purchased from the vendor in good faith "and for a fair price—it is perfectly immaterial whether "said vendor was embarrassed, or insolvent, or otherwise, or whether the condition of his affairs was or was "not known to the vendee."

But there is no evidence of any knowledge on the part of Mrs. Thomas of the condition of her son-in-law's pecuniary affairs; and if Lott entertained within his own heart any design to defraud his creditors, there is no proof in the record before us that Mrs. Tomas knew of it, much less participated with him in carrying it into execution. It was a fact to be proved by the complainants, and the respondents might well have relied on the maxim, *idem est non esse et non apparare;* but there is affirmative proof, tending to negative the fact of knowledge of Lott's indebtedness—there is proof that at some period subsequent to the sale, she reproached Lott for having kept the circumstance of his indebtedness concealed from her. It is sup- 323
posed by the counsel for complainants that a presumption of knowledge arises from the relationship between Mrs. Thomas and Lott, and he cites the case of Barrowe vs. Bailey as authority for such position. But there is a misapprehension of the decision of the court. In the case cited, there was an admission in the answer of Barrow as to a correspondence between himself and his brother-in-law in relation to the pecuniary embarrassment of the latter, the substance of which correspondence was claimed to have been set forth in the answer, but the letters themselves were not produced in evidence, as they should have been, and the court, in the absence of the letters, assumed that Doggett had been as full and unreserved in his communitions with his brother-in-law as he had been to the witnesses, who were strangers, and especially as Mr. Barrow had during the correspondence, required full and particular information as to his correspondent's pecuniary condition, and what he expected and hoped for. See 5 Florida R., 22, 23.

As to the fourth ground taken, that is fully and flatly contradicted by the evidence in the record. There is no evidence that the property, sold and conveyed was rated at an under value, and the proof is full that the consideration agreed upon was fully paid. That the money paid did not reach the hands of Lott's creditors, in discharge of their respective claims, but was in fact lost at the gaming table, was no fault of Mrs. Thomas, and the consequence thereof, or the punishment therefor, should not be visited or inflicted upon her or her devisees and legatees, the children of Luke Lott.

It is next assumed that the transaction is fraudulent because possession did not accompany and follow the deed, but remained unchanged in Luke Lott. Is this true in
point of fact? The answer of Lott is in strict response to 324
the bill in this particular, and not only stands uncontradicted, but is supported by the testimony of the other witnesses, John F. O. Thomas, Mrs. Hudson and Mrs. Carraway. He avers a delivery of possession by himself, and an acceptance by Mrs. Thomas, immediately upon the sale and conveyance, and that Mrs. Thomas removed her other personal property to the farm purchased from Lott, and continued to occupy and possess it, and all the property thereon and attached thereto, exercising full and complete dominion over all for herself as owner.

It is, however, supposed that the evidence establishes a possession by Lott in common with Mrs. Thomas, continued from the time of sale; but I do not concur with the counsel in this view. Lott having sold off all his property, with the design of going to Texas, it was most natural and reasonable that he should be the guest of his wife's mother until his affairs were so arranged as to enable him to execute his intention. The testimony negatives positively any control over or interference with the property by him until his term of service commenced as her overseer, and then also the evidence is clear that he never exceeded the usual control of an overseer, but always preserved that character, conforming to the directions and orders of Mrs. Thomas.

When this term of service commenced as overseer, I have before remarked, does not appear; but it was to commence, according to the agreement for the sale of the preemption claims, so soon as it was ascertained that the contingency happened of a failure to effect entries of said claims in the land office, or of some of them. From the very nature of the case, some time must necessarily elapse before this could be ascertained, whether he should either serve as overseer, or provide her one, if he did not wish to

325 be detained in the prosecution of his purpose to remove to Texas; and hence it was to be performed at some future time. It does not appear at whose instance this stipulation was inserted in the agreement, but I think the conjecture suggested at the bar, that it was insisted upon by Mrs. Thomas, with a view to retard and put obstacles in the way of, if not wholly thwart, Lott's removal, with his wife and children, a very reasonable and probable presumption. There was no continuance in possession by Lott in the capacity of owner and proprietor, but the change was so open and notorious to the neighbors that it seems to have been observed by all. There was no agreement that Lott was to have any use and benefit from the property as lessee or hirer; no agreement that he should continue in the possession; no *devisum imperium;* no united or common possession; in fact, no such continuation of possession from which a secret trust or reservation in favor of the vendor can be inferred.

In the case of Gibson vs. Love, decided in this court, (4 Florida R., 217,) cited at the bar, a slave had been sold in discharge of a precedent debt due from the vendor to the vendee, but it was stipulated and agreed that the slave should continue in the possession of the vendor, as before the sale, and for his ease and convenience, he promising to pay the vendee a hire equal to the legal rate of interest on the price agreed upon. The court properly held that the continuation of possession by the vendor was not sufficiently explained by the evidence to repel the inference of fraud which, in the contemplation of law, was deducible therefrom; that the appropriate evidence to rebut the presumption, is an explanation of the intention, to show either that it is consistent with the deed, or is unavoidable, &c. The want of analogy between the case cited and the case at bar, is ob-
326 vious. Here there is no retention of possession by the vendor, either alone or jointly with his vendee.

With respect to the allegation in the appellant's bill of complaint of the pecuniary inability of Mrs. Thomas to make the purchase of Lott, it will be sufficient to say that the effort to sustain it by proof was very feeble. One witness only was examined upon the point, and his statement is very vague and indefinite. He says she was not wealthy, but was in comfortable circumstances. The sequel, however, sustains her ability. It is proved that she paid for the property in full, and this is amply sufficient to negative the allegation of the bill.

Upon the whole case, I am perfectly satisfied that the appellants, who were complainants in the court below, have utterly failed to make out a case for relief, and that the court below committed no error in the rendition of the decree dismissing the bill of complaint.

SEMMES, J., in assenting to the judgment of the court, was understood to adopt the reasons contained in the Opinion delivered by Justice Thompson.

Per totam curiam. Judgment affirmed with costs.

THOMAS JORDAN, APPELLANT, VS. HENRY C. PETTY, ROBERT A. WARE, ET AL., APPELLEES.

1. Where a judgment upon a verdict was defectively entered, and the court afterwards, on motion, ordered a new judgment to be entered *nunc pro tunc*, such latter entry, as between the parties to the record, relates back to the date of the first entry, and is to be regarded and treated to all intents as entered at that time; and it will rectify and cure any variance between the original entry of the judgment and the execution issued thereon.

2. When a *fieri facias*, or other execution, is taken out on a judgment within 327
the time limited by law, and which is not executed, the plaintiff may sue out a new writ of execution at any time afterwards without a *scire facias;* provided the first writ be returned and filed.

On appeal from an order quashing an execution issued in favor of the appellant against the respondents, and which had been levied on the goods of respondent, Robert A. Ware. The facts are set forth in the opinion of the court, to which reference is made.

Davis for Appellant.

Hawkins for Appellee.

THOMPSON, J.:

The facts of this case appear to be as follows:

In 1840, a suit was instituted by attachment in the Superior Court of the Apalachicola District of the Territory of Florida, for Franklin County, in favor of Thomas Jordan, against Henry C. Petty, Augustus P. Clayton, William Bilbro, John Bilbro, and the respondent, Robert A. Ware, as the owners of the steamer Alabama, upon a demand for services; which attachment was levied upon the steamboat in April, 1841. The record states that the defendants appeared by Semmes, Campbell and Stone, their attornies, and pleaded the general issue, and a trial, verdict and judgment were had, but the latter did not specify the names of the defendants, simply stating "Henry C. Petty, &c." On the 3d May, 1841, a *fieri facias* issued on this judgment against all the defendants named in the writ and declaration, under which a part of the sum recovered was levied, by a sale of the property attached, and was returned *nulla bona* as to the residue.

No further action appears to have been had until 1849, when an *alias* writ of *fieri facias* was sued out of the Clerk's office of the Circuit Court for the Western Circuit, 328
sitting in Franklin County, likewise against all the defendants named in the declaration, which writ being levied on the goods of R. A. Ware, was, at the April term, 1849, of the said Circuit Court, quashed on his motion, because of the defect in the judgment entered in April, 1841, only one of the defendants being named therein. At the same April term, 1849, and after the order was entered quashing the execution, the plaintiff, Jordan, moved the court for leave to enter up judgment on the verdict rendered in the cause at the April term, 1841, of the Superior Court, "a sufficient judgment having been omitted to have been entered at the time;" upon which motion, after argument of counsel for both parties, as the record states, it was ordered that said motion be granted, and that judgment should be then entered up as of the April term, 1841, which was done accordingly.

On the 23d of February, 1850, the plaintiff sued out another writ of *fieri facias* on the judgment entered up *nunc pro tunc*, at the April term, 1849, which was levied on the 9th of February, 1852, upon the goods of the defendant, Ware. On the 10th of February, on a suggestion of illegality or irregularity in the issue of the execution, the same was, by order of the Judge of the Western Circuit, superseded until the ensuing term of the court, and the goods levied upon surrendered to the defendant, Ware, on stipulation, with security, to abide the judgment of the court. And at the April term, 1853, the affidavit of illegality was sustained on the ground of irregularity, the execution having issued without a previous *scire facias*, sued out, and *fiat* thereon, and the writ was quashed.

The error assigned here is on the order last mentioned of April term, 1853, and the case rests upon the effect to be

329 given to the entry of judgment, *nunc pro tunc*, at the April term, 1849.

The error in entering the judgment of the Court at April term, 1841, it is contended, is a misprison of the Clerk of the Court, and our practice may, possibly, be so considered, although the plaintiff, or his attorney, is not entirely blameless, it being his duty to attend to the entries made by the Clerk in his case at the time of making the entry, and if he is not satisfied with it, should bring the matter to the attention of the Court. But this is a matter properly for the consideration of the Court on a motion to enter judgment *nunc pro tunc*. Here it has been entered, and the propriety of the order directing it, is not before us for review.

The granting of such leave is, in all cases, a matter resting in the sound discretion of the court. Mr. Tidd, speaking of such applications to enter judgment *nunc pro tunc*, against executors and administrators, says that in granting this indulgence, the courts will take care that it shall not operate to the prejudice of the defendant, by imposing terms upon the plaintiff, as that he shall undertake not to disturb intermediate payments made by the defendant, or impeach judgments obtained in the interval. 2 Tidd Pr. 933, citing 6 Term Rep. 11, and Lloyd vs. Howell, Admr., H. 37, Geo. III. R. B., 4 Taunt. R., 702. 1 Young & Jer. R. 368. And he also says, that if the defendant dies in vacation, judgment may be entered after his death, as of the preceding term, when he was living, and it will be a good judgment at common law, as of that term. 2 Tidd Pr., 939. There can be no doubt but that the effect of the judgment entry actually made at the April term, 1849, *nunc pro tunc*, is to make the judgment relate back to the April term, 1841, and is to be regarded as a judgment of that term. If this were not so, and the time of the actual
330 entry could be enquired into, the caution which Mr. Tidd says, the courts always observe, would be a mere idle ceremony, wholly useless and unnecessary. So also the entry of judgment against one who dies in vacation, as of a preceding term when he was alive, would be of little avail to the plaintiff, if the date of actual entry could be enquired into upon a writ of error, *coram vobis*. The judgment must be regarded, certainly for all purposes of the present case, as of the term of April, 1841. It is now contended that, considering this as the date of the judgment, no legal, regular or valid execution issued thereon within three years after the rendition of the judgment; that the plaintiff should have sued out a *scire facias quare executionem non*, to obtain his writ of *fieri facias;* and having sued out the writ on the 23d of February, 1850, without such revival, it was irregular and properly quashed.

At common law it, in a personal action, the plaintiff suffered his judgment to lie for a year and a day without suing out an execution, he could not do so afterwards, but was put to his action of debt upon the judgment. This inconvenience was remedied by the Statute Westm. 2, (13 Ed. I,) c. 45, which gave the plaintiff a *scire facias* in such case, to revive the judgment, and obtain execution thereon.

Our statute has extended this time to three years. The general rule here, therefore, is that if the plaintiff does not sue out his execution within the time of three years after the rendition of his judgment, he must, in order to obtain the fruits thereof, adopt either his common law remedy, of an action upon the judgment, or a *scire facias* under the statute.

This general rule, however, is to be understood with some exceptions, among which is this: When a *fieri facias* or other writ of execution is taken out, within the time limited, and not executed, a new writ of execution may be sued out at any time afterwards, without a *scire facias*, 331 provided the first writ be returned and filed. 2 Tidd. Pr., 1104, citing 2 Wils. R., 82; Barnes Notes 213, S. C. Is not this case within the exception? An execution was sued out on the 3d day of May, 1841; within the regular time after judgment, which has not been executed, and which has been returned and filed in the office. It is said the writ is irregular, because it is upon a judgment against several persons jointly, and the judgment of 1841, when it was issued, was against Henry C. Petty only. But the answer to this is obvious. The judgment entered in 1849 corrected the error, and as it was entered *nunc pro tunc*, it related back, and by intendment of law, is a judgment of 1841, and the execution issued on the 3d of May, 1841, is in conformity with it in all respects, as it now stands upon the roll. The whole error has been in not taking a correct view of the order of April, 1849, correcting the entry of the judgment. As between the parties to the record, it must be regarded consistently, either as of the date 1841 or 1849. It cannot partake of both dates. If of the date of April, 1841, then the case comes within the exception before laid down, and the writ issued in 1850 was a regular and valid execution. If of the date 1849, then the writ was issued within the limitation fixed by our statute of three years, and is, of course regular; so that *qua cunque via data*, it is a good and valid writ, and should have been supported.

It was urged upon the argument, by the counsel for respondent that the judgment entered in this case was voidable for error in fact; that the attorneys who appeared and pleaded for the defendants therein, were not authorized by the defendant, Ware, to make such appearance and file such plea, and that all courts may collaterally pass upon the question whether this opinion be correct or not, as applicable to courts of original jurisdiction. We are perfectly clear that this court, as one of appellate jurisdiction, 332 cannot thus pass upon the question. If the point was made and adjudicated in this case in the court below, which does not, however, appear, the decision must have been against the respondent, as the order of April term, 1853, which is the order appealed from, only avoids the execution, and the omission by the respondent to enter an appeal, would amount to a waiver and acquiescence. But the point does not appear to have been adjudicated in the court below. We can take notice in this court of an error of law appearing on the face of the record, but we cannot do so of an error of fact, unless it is a matter on which an appeal or writ of error is based, and regularly assigned for error in this court. If there is such error of fact existing in the case, it must be brought to the notice of the Circuit Court, by writ of error *coram vobis*, or other appropriate remedy.

For the foregoing reasons, we are of opinion that there is error in the order of the court of April, 1853, which is appealed from, and the same should be reversed and set aside, with costs.

Per totam curiam. Order reversed and set aside.

JAMES GRIFFIN, SHERIFF, AND EX-OFFICIO ADMINISTRATOR OF THE ESTATE OF SEWALI, APPELLANT, VS. THOMAS ORMAN, APPELLEE.

1. The 3 § of the 5th article of the Constitution, giving power to the Judges of the Circuit Court, *or a majority of them*, to preside in the Supreme Court, and hold the sessions thereof, was temporary and special, and does not apply to the court as it is at present constituted, so far as to authorise a majority of the Justices to hold a term.
2. The 5th section of the act of January 11,1851, by necessary implication, re-

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333 quires the action of three Judges in every case, who must all hear the argument, and confer together upon the judgment, although two being a majority, may pronounce the judgment of the court.

On motion, raising the question whether or not two Justices of the Supreme Court constitute a quorum for the purpose of hearing and deciding causes.

Baltzell for the motion.

Bush and *Campbell* contra.

THOMPSON, J.:

The motion made in this case raises the question whether two Justices of this court do or do not constitute a quorum for the purpose of hearing and deciding causes pending therein; and as it is desirable that the opinion of all the Justices should be had upon this point, as a question of general importance, I have consented to hear the argument and express my opinion thereon, although I am disqualified, by reason of having been of counsel for one of the parties in the court below, from taking any part in the adjudication of the merits of the controversy.

It is not controverted that, though there be no express words in the act of January 11, 1851, entitled "An Act to organize the Supreme Court of the State of Florida," (Pamp. Laws 5th Session, 1850-'51, pp. 121, 122,) which requires the action of three Judges upon every case tried before it, yet that such joint action is rendered absolutely necessary by implication from the terms of the 5th section. That section provides "that whenever, from any cause, any "one or two Justices of the Supreme Court are disqualified "or disabled from hearing and determining any cause "brought before them, it shall be the duty of the Justices of "the said court to notify the same to any one or two Judges
334 "of the Circuit Court, as the case may be, and the time "and place when such causes shall be set or hearing; and "it is hereby made the duty of such Circuit Judge or "Judges, upon receiving such notice, to attend at the time "and place designated, and he or they shall be and are "hereby invested with full authority, in conjunction with "the remaining Justice or Justices of the Supreme Court; "to hear and determine the causes of which they were no-"tified as aforesaid."

Nothing can be plainer than this language. If one Justice is disqualified, one Circuit Judge is to be notified, and so, if two Justices are disqualified, then the attendance of two of the Circuit Judges is to be called for, and the court, thus constituted, is to act, in the one case with two Justices, and in the other, with the remaining Justice of the Supreme Court. In all cases one Justice of the Supreme Court must be upon the bench, for there is no provision for the case where all the Justices of this Court are disqualified.

It being clear that the act of the General Assembly contemplates the action of three Judges, to constitute a court for the trial of every cause, it follows that the three Judges must all be present when the act is done, though it is not necessary that they should all concur in the judgment to be pronounced. See 2 East. R. 244; 8 East. R., 319, 327, n. (a); 6 John. R., 41

But it is argued that this requisition, or provision of the act before referred to, is inconsistent with the 3d section of the 5th Article of the Constitution, which, it is supposed, confers all the powers of the Court upon a majority of the Judges. I have examined the section, and given to the argument based thereon, the most attentive consideration, and I am satisfied that the interpretation contended for cannot be sustained. The section in question is clearly temporary in its character. It provides that for five years from the election of the Circuit Court Judges under its au- 335
thority, and thereafter, until the General Assembly shall otherwise provide, the powers of the Supreme Court shall be vested in and its duties be performed by the Judges of the Circuit Courts, and directs that they, or a majority of them, should hold sessions of the Supreme Court at such times as should be directed by law. It seems to me that it is utterly impossible to render this more plain and intelligible by argument or illustration. The whole section applies to a provisional organization of the court, and the power to discharge the duties appertaining to the office of Justices, was delegated to the Circuit Judges, or a majority of them, expressly by the title of their offices, and has no reference to the permanent organization which, it was contemplated, would be made at a future period. There was, also, a substantial reason why a majority of the Circuit Judges should be so authorized. The province of the Supreme Court is to correct the errors of the Circuit Courts, sitting as courts of original jurisdiction in the several Circuits; and if the authority had been given to the Judges of the Circuit Courts simply, and not to a majority of them, the whole number, by the rules of the common law, would be compelled to act jointly in the execution of the power, although a majority would govern as to their judgments; and thus the provision would have been brought in direct conflict with the 18th section of the same act, which directs that "no justice of the Supreme Court shall "sit as Judge, or take part in the Appellate Court, on the "trial or hearing of any cause which shall have been de-"cided by him in the court below." The design of the convention, in the provisional constitution of the court, would have been utterly defeated, but for the clause vesting the power in a majority of the Circuit Court Judges; there would have been a Supreme Court, but it could not pro-
ceed in any case, for each one, by the 18th section, was 336
disqualified to sit upon and determine the cause he had decided as a Circuit Court Judge, and if he retired, the residue were powerless to act, because the authority was jointly to the whole number. But it is sufficient to say that the 3d section can have no reference to the court as it is at present organized, by the acts of January 11th and January 23d, 1851. The present organization is under the authority of the 1st and 2d sections of the 5th Article of the Constitution, which merely creates the court, with the outlines of its jurisdiction, leaving to the General Assembly the power and duty of regulating such jurisdiction within the limts of the Consttution, and leaving also to that department the power of fixing the number of the Judges. The act of 1851, before referred to, does not, as before remarked, declare that any number less than the whole number of the Justices shall form a quorum, but seems to contemplate a joint action, and such has been the interpretation hitherto put upon it, and acquiesced in until the present time.

No reference was made upon the argument to the act of July 25, 1845, in relation to the Supreme Court, (Thom. Dig. 51, art. 12,) the 8th section of which provides that three Justices shall be a quorum to transact the business of the court, and if three do not attend on the first day of the term, the Sheriff shall adjourn the court, from day to day, for a week, and then if three do not attend, to adjourn it for the term. Some portions of the act of 1845 is undoubtedly repealed by the provisions of the acts of 1851, but this section has been considered as untouched by the latter statutes, and has been repeatedly acted upon since, as will be seen from the records of this court at Tallahassee, Jacksonville, Tampa, and at this place. At each point, owing to various unavoidable accidents, the Justices

337 of this court have been prevented from assembling on the day appointed by law for the opening of the term; and but for this section of the act of 1845 the terms would have been lost, and much delay and inconvenience would have resulted, in ordering extra or special terms.

In my opinion, there is but one course to pursue, and that is the one provided for by the act of 1851. The Justices of this Court must notify the fact of the disqualification of one of their number to one of the Circuit Court Judges, and to inform him of the time and place appointed for the hearing of the cause, and that the case be continued until that time.

WRIGHT, C. J., and SEMMES, J., concurred in the views, and adopted the conclusions announced by Justice Thompson.

JOSEPH FORSYTH AND EZEKIEL SIMPSON, APPELLANTS, VS. GEORGE PERRY, APPELLEE.

1. In all relations and in all matters, except as to crimes, a slave is regarded by our law as property; and therefore the rule that the principal is not liable to one agent, or employee, for damages occasioned by the negligence or misconduct of another agent or employee, is not applicable to slaves.
2. The contract of hiring of a slave, between the owner and the hirer, constitutes a bailment of the slave, and the hirer is bound to take ordinary care of him.

Appeal from a judgment of the Circuit Court for Santa Rosa County.

This was an action of trespass on the case, instituted by the Appellee, to recover the value of a negro slave who 338 was drowned in the attempt to execute an order of the Mate of a Steamboat belonging to Appellants. The negro slave was hired to the Appellants, to be employed as a hand on board their Steamboat, and whilst in their employ the order was given which resulted in the loss of the slave to the Appellee.

Campbell for Appellants:

Both the mate and the negro being in the employ of the Appellants, and engaged in the same business, and the loss of the negro having been caused by the misconduct of the mate alone, the action cannot be maintained. Story on Agency, 564, 565, 566, 567, 568; Priestly vs. Fowler, 3 Mees. & Welsh, 1; Farwell vs. Boston & Worcester R. R. Co., 4 Met., 49.

The law is that the master is liable to *third* persons for the misfeasances, negligences and omissions of duty of his servants and agents. Story on Agency, 564. But, according to the above authorities, where one servant is injured by another engaged in the same service, and whilst transacting the business of the common master, the servant, so injured, is not such third person as to bring the master within the rule. The servant's remedy in such a case is against the wrongdoer himself.

With regard to injuries to third persons the responsibility of the master springs from the duty he owes to society so to conduct his business that third persons shall not be injured thereby. But there is no obligation on the part of the master that the agent or servant shall suffer no injury from the negligence of others employed in the same service. The relation of the parties is created by contract, with a full knowledge of the risks and responsibilities of the business; and it is to be presumed that those risks and responsibilities are provided against by the contract.

The law of master and servant applies to this case, and 339 not that relating to the hiring of chattels. Story on Bailment, 571, '72; Boyce vs. Anderson, 2 Peters' R., 150.

As between a master and his slave, the latter is property, and nothing but property; but he may, as to third persons, occupy the same relation as a freeman. There is no difference between the relation which a slave, employed as a mariner, holds to the owners and officers of a ship, and that existing between the latter and a freeman before the mast. In the case of Booth *et al. vs.* Schooner L'Esparanza, Bee. Rep., 92, it was held that a master could sue in the District Court of the U. S. for the wages of his slave as a mariner.

The true test of the responsibility of the appellants is, whether the owners of a vessel are responsible for injuries received by a sailor, in consequence of the negligence or misconduct of the mate. To apply any other would be to throw greater safeguards around the person of a slave than a freeman, and to permit the master to enjoy the profits of an avocation, and yet relieve him from an important risk incident to it—the danger to his property from the misconduct of subordinates.

Hawkins for Appellee:

First. Forsyth and Simpson are liable by force of the general rule, that the principal is liable *civilter*, in all cases, for the negligence, misfeasance, malfeasance or omissions of duty on the part of his agent, in the course of his employment, although the principal did not know of, or authorize or participate in the act, &c.

The principal of *respondeat superior* is founded on public policy, justice and convenience. See Story on Agency, 554, 555, §452.

2. Perry, as to Forsyth and Simpson, must be considered as a *third person;* he did not hire *himself*—he hired his *property.* 340

Negro slaves are regarded as property in all civil suits; as *persons,* only when held amenable for crimes. 5 S. & M., 609; 6 How. Miss. R., 35.

3. Being property, reasonable care should have been had of the slave hired. See Boyce vs. Anderson, 2 Pet. U. S. R., 150; 4 Porter, 434.

The exception to the general rule, viz: where different agents are employed in the same business of a common employer, in case one agent receives an injury from a *co-agent,* he must seek his redress against the co-agent and not against the principal or common employer, has no application here. Story on Agency, 564.

First. Because, as before stated, the hiring of the slave was a bailment, the *"locatio conductio rei,"* with ALL its incidents, attributes and responsibilities.

Second. Because the negro was under the direction and control of the captain of the boat, an *employee,* and the agent of Forsyth and Simpson. (See *Ohio case,* where the co-agent was free and not a slave;—this, therefore, is an *a fortiori* case.—Newspaper.)

Third. The exception to the rule applies to *persons* and not to *property.*

The negro slave cannot hire himself—possesses no free-will, option or discretion as to his employment—he cannot, if he would, leave the service of his employer in case of harsh treatment. He cannot be a spy or check upon the other *employees,* give notice of their dereliction from duty, or correct it in any way.

A slave cannot be an *agent.* The exception contemplates free white agents, *ex necesistate rei.* Interest of the owner, and humanity to the slave, forbid the application

Forsyth & Simpson vs. Perry.—Opinion of Court.

341 of the rule as contended for. See Scudder vs. Woodbridge. 1 Georgia Rep., 195.

SEMMES, J., delivered the opinion of the court.

This was an action of trespass on the case, brought by the respondent against the appellants, as owners of the Steamboat "General Hamer," to recover the value of a negro slave, the property of respondent, and who was hired on board said boat, and alleged to have been lost through the carelessness and misconduct of the mate. The slave was ordered to jump on board said steamer from a flat-boat lying along-side. In the attempt to do so, he struck the guards of the steamer, fell into the water and was drowned.

On the trial of the cause, upon the plea of the general issue, the court below instructed the jury—*First.* That a principal is liable civilly for any act of his agent, when there was negligence, if done within the scope of his authority; and, *Secondly,* That if the jury were satisfied that the mate was in the employ of the defendants, and he gave an order to the slave which no ordinarily prudent man would have given, and that in consequence of this order the negro was lost, they should find for the plaintiff; but if on the contrary, they were satisfied that the order was not an unusual one, under the circumstances, and that there was not gross negligence in giving the order, they should find for the defendants.

The jury returned a verdict for the respondent, and thereby established the fact of gross negligence on the part of the mate in giving the order which resulted in the death of the slave.

Appellants' counsel, in excepting to the charge of the court, contends, that the right of action was against the mate, and not the owners of the boat; that by reason of
342 the mate and the slave being at the time in the employ of the Appellants, and engaged in the same business, and the loss of the slave having been caused by the misconduct of the mate alone, this action cannot be maintained.

The rule of law cannot be questioned, that *civiliter,* the principal is liable to *third* persons for the misfeasances, negligences and torts of his agent, in the course of his employment, though he did not authorize, justify or participate in the act, or misconduct of the agent. In all such cases, says Judge Story, the rule applies, *respondeat superior,* and it is founded on public policy and convenience. Story on Agency, § 452. The justice and propriety of maintaining this responsibility on the part of the principal, results from the implied guaranty on his part, not only as to the qualifications of the agent, but that within the scope of his agency he will act with fidelity and a due regard to the rights of others. The force and application of this principle is sought to be evaded in argument, by insisting that the owner of the slave is not to be considered in the light of a third person, entitled to compensation for his loss against the Appellants; and the exception to the rule is relied on, as supporting this view of the relative rights and liabilities of the parties to this suit. The exception is, that when different agents are employed in the same business, the principal is not liable for any injury done to one agent by another agent, while engaged in the same common employment, and the reason assigned is, that the mere relation of principal and agent creates no contract, and therefore no duty on the principal that the servant or agent shall suffer no injury from the negligence of others employed by him in the same business, and that in such cases the servant or agent takes upon himself the hazard of every such injury, and his remedy, therefore, lies solely against the immediate wrong-doer. Story on Agency, §453. 343

The principle here asserted is doubtless as true as the rule itself. But while the facts of this case bring it within the rule, they necessarily exclude it from the exception. The effect of the argument, as will be seen, is to destroy the identity of the slave, and substitute the owner in his place. But the owner does not hire himself. He is not in the employ of the party, and in no light can he be regarded as his agent. The sole relation he occupies to the common employer is, as bailor of the property, and his right of action for any wrong done the slave, either against the immediate wrong-doer or his principal, grows out of the fact that the slave is property and he the owner. The words servant and agent, used in the exception to the rule, and in the authorities relied on, are relative terms, and must in the very nature of things, have no reference to free white persons; for it cannot be seriously contended that a slave is to be considered, in any legal sense, the agent of his employer. In a limited sense, it is true, he is a servant, but he certainly does not occupy the higher relation of agent. The doctrine of agency is founded upon reciprocal rights and duties. The slave has none of these. The fact of his being a slave, places him beyond the operation of this law. The very position he occupies, and is recognized by the law, renders it impossible to embrace him within that class of persons referred to. Unlike white persons, the slave does not, upon entering into the service of another, voluntarily incur the risks and dangers incident to such service. He has no power to guard against them by refusing to incur the peril, or by leaving the service of his employer. He is but a passive instrument in the hands of those under whose control he is placed.

The exception to the rule applies to *persons* necessarily —those who are competent to contract, and who, while 344
they are responsible for the consequences of their own misconduct, having the same rights and remedies as their co-agents. Why comprehend slaves, when it is manifest they have none of those rights or remedies against others, and are not liable in a civil suit for their own acts and misconduct? In all relations, and in all matters, except as to crimes, the slave is regarded by our law as *property;* and being so considered, the case before us is governed by the law of bailments. The contract of hire in this case constituting a bailment of the property, and it being reciprocally beneficial to both parties, something more than mere *good faith,* on the part of the bailee, is requisite. The owners of the boat were bound to take ordinary care of the slave, and failing to do so, through their agent, they are responsible for the consequences.

The fact of the slave being a human being, while it does not impair the rights of the owner, would rather increase than diminish the liability of the employer.

In the case of Boyce vs. Anderson, 2 Peters' R., 156, Chief Justice Marshal, in delivering the opinion of the court, says, "Supposing the strict rule introduced for gen-"eral commercial objects does not apply to the conveyance "of slaves, the ancient rule, 'that the carrier is liable only "for ordinary neglect,' still applies to them." In this case, the jury have found gross negligence, on the part of the mate, in his conduct to the slave, which would render the employers liable in any event.

Apart from the views we have presented, considerations of public policy, the interest of the master, and humanity to the slave, require that he should be excluded from the exception to the rule, and that he should be shielded from the unrestricted control and oppression of irresponsible subordinates. The liability of the employer, *civiliter,* for

345 the misconduct of his subordinates, will naturally add to the personal security and protection of the slave. Public policy emphatically demands, that the owners of boats, railroads, and other public conveyances, should employ careful and capable agents in their respective business.

Let the judgment of the court below be affirmed.

JOHN T. MYRICK, APPELLANT, VS. BENJAMIN D. BATTLE, APPELLEE.

Tht act of March 15, 1844, changing the rate of interest, does not affect a contract made before, but which became due and payable after it was passed. The rate of interest on every contract is to be regarded by the law as it existed at the time such contract was made.

Appeal from Jackson Circuit Court.

This was an action of assumpsit, instituted by Battle against Myrick, on a promissory note dated 14th March, 1844, and payable one day after date. On the day following, to-wit: on the 15th March, 1844, by act of the Legislature, the rate of interest was reduced from eight to six per cent. The court below ruled that interest on the note should be calculated at the rate of eight per cent., from which the defendant appealed.

Bush for Appellant:

The only error alleged in this case is, that interest should have been calculated at six per cent. instead of eight. The suit was on a note dated 14th March, 1844, and due at one day after date. It contained no agreement as to the rate of interest. The last law on the subject was approved 15th
346 March, 1844. I can find no authorities directly in point, but think there is an analogy between the present and the cases which decide that the rate of interest is governed by the law of the country where the note is to be paid. Story's Conf. Laws, 241, § 291, 292; Scofield vs. Day, 20 J. R., 102; Cooper vs. Sandford, 4 Yerger, 452; Fanning vs. Consequa, 17 J. R., 511; Boyce & Henry vs. Edwards, 4 Peters, 112, 123. And this notwithstanding that well established principle of the law, "that all questions affecting "the validity of a contract, are to be governed by the law "of the land where the contract is made."

The decisions are, that interest follows of course, after the debt falls due, *as an incident to it.* Washington vs. Planter's Bank, 1 How. (Miss.,) 230; McConnell vs. Thomas, 2 Scam., 313, cited in Supplement 2 U. S. Digest, 209, 210, Nos. 60, 75.

Incident means to fall out, to happen, &c. Now, by what law is an event to be governed other than that in force when the event happens? Webster defines it to be "something which happens outside of the main design." It is separate from, and forms no part of the contract. The contract is the act of the party: interest, its incident, results from the law. They may well be governed by different laws.

Another analogy. The merchants at the South give their notes to those of New York, payable at certain periods after date, *with the current rate* of exchange on New York. This exchange is calculated by the rate at the time the note falls due. Why should not interest be assessed by the same rule?

Another analogy. At common law, judgments did not bear interest. It exists by statutory provisions. The law is changed between the date of the note and the rendition of the judgment. Which law governs? Certainly the latter; and this because it is competent for the Legislature 347
to change the rate at any time before it begins to run.

And again. The measure of damages for the violation of a contract for delivery of property at a certain future time, is the value of the property at the time of the breach, with interest from that time. This is a contract for the payment of money: there is no difference in principle.

It sometimes happens that between the date and maturity of a note, a change takes place in the value of the coin or currency in which it is payable, even in the same country. It will be discharged by due payment in any coin which, by law, is made of equivalent value at the time of payment. Sedgwick on Damages, 237; Story on Prom. Notes, 511, § 390.

In the cases quoted and the one now before the court, the action of the Legislature was between the date of the note and its maturity. If legitimate in those cases, it must certainly be so in this.

As to the time when this note fell due, adding the days of grace, it became due on the 18th, or three days after the law was passed.

All notes payable at a certain time after date, are, by the law, entitled to grace. Story on Prom. Notes, 272, § 224. The prospective words in the statute apply only to conventional rules agreed on by the parties.

As to the Constitutional question, the only answer is, that interest is an incident to a contract, but forms no part of it; that the act left the contract entire in all its parts, untouched and unimpaired; that it only operated upon "something outside of the main design."

Hawkins for Appellee:

The court below was correct in its decision.

1. To rule otherwise, would impair the obligations of a 348
contract. Constitution of State, Bill of Rights, § 19.

A contract is a compact between two or more persons, executed or executory, evpress or implied. No distinction as to these, and all embraced in the Bill of Rights. See 3 Story on Con., § 1371.

What is deemed impairing the obligation of contracts? See *ib.*, § 1379, p. 250.

The note in this case was made in reference to the *laws existing* at the time of its creation. See Duval, 78. Rate was eight per cent. if not expressed on the face of the note.

The law gives interest as matter of right in all cases of commercial paper, and is implied, though contract silent. Chitty on Contracts, 645, 646; Woodward vs. Curtis, 7 Wend., 112; Boddam vs. Riley, 2 B. C. C., 3.

There being a *right*, it became a *vested* right, and accrued immediately on the breach of the contract, and no after legislation can impair it. Story, § 1379. To apply the law of 1844, (*six* per cent. act,) would give it a retrospective operation, changing and affecting vested rights: *void.* 1 Kent, 456; 2 Pet., 656.

2. The laws regulating interest operate on the *contract,* and do not affect the remedy. Declaratory Statutes. If remedial, they cannot operate retrospectively, if they impair contracts. 3 Story Con., § 1379.

3. The interest is an *entirety.* Anomaly to calculate under both statutes. I cite—2 U. S. Digest, 616, § 16; Smedes' Dig., 291, § 3; Lee vs. Davis, 1 A. K. Marsh., 397.

SEMMES, J.:

The only question presented by the record in this case is, the rate of interest which should be allowed on the note sued on.

349 The note of the Appellant is dated the 14th of March, 1844, and payable one day after date. At the date of the note, our statute provided that where no rate of interest was expressed in the contract, no higher rate than eight per cent. should be charged. Duval, 78, § 1. On the day after the execution of the note, this statute was altered, reducing the rate of interest to six per cent. per annum. Thomp. Dig., 234.

It is contended, that inasmuch as the law was amended before the maturity of the note, and, of course, before interest had commenced running, the judgment of the court below, allowing eight per cent. interest, was erroneous. We do not think so. Upon both principle and authority, the respondent was entitled, as of right, to recover eight per cent. interest. All contracts for the payment of money bear interest after maturity, though silent on the subject, unless there is an express stipulation to the contrary. When the contract is silent as to the interest, as in this case, the law will imply an understanding, on the part of the debtor, to pay the legal rate, and this implied understanding is not only supported by mercantile usage in all commercial instruments of a negotiable nature, but because interest is considered as a legal incident to every debt, certain in amount, and payable at a certain time The rate of interest is to be determined by the law of the place where the contract is to be executed, and when, as in the contract before us, no place is indicated, it is to be presumed where it is made. 1 Am. Lead. Cases, 519.

The interest, though an incident to the debt, is impliedly a part of the contract, and the contracting parties are to be presumed to have had reference to the law as it existed at the time the contract was made, and, as a consequence, no statute altering the rate of interest can be made to af-
350 fect contracts entered into before its passage, otherwise the obligation of the contract would be impaired, for the Constitution, in this respect, recognizes no distinction between express and implied contracts.

No analogy, in our opinion, exists, and therefore no argument can be drawn, from the right of the Legislature to alter the rate of interest in reference to judgments after a contract is made. A judgment is a part of the remedy, and carries such rate of interest as is legal at its date, whatever rate was recoverable on the contract. The contract is merged in the judgment rendered, and the judgment is controlled by the statute, and not by the contract.

It has been expressly determined in the case of Lee vs. Davis, 1 A. K. Marsh., 397, that the rule of interest on a note is to be regulated by the law as it exists at the time the contract was made. We see no reason to depart from the principle decided in that case. See also Bryan vs. Moore, Minor 377.

Let the judgment be affirmed.

ALPHONSE LOUBAT, APPELLANT, VS. ABIGAIL A. NOURSE, APPELLEE.

1. The widow is not entitled to be endowed of real estate purchased by her deceased husband and his partner, with the partnership funds, for partnership use and convenience, and held and owned as part of the joint stock or property of the partnership, when her claim comes in conflict with that of the surviving partner or a creditor.

2. Although such estate be conveyed to the partners, so as to vest in them a legal estate as tenants in common, yet in the absence of an express agreement, or of circumstances showing an intent that the estate is to be held for the separate use of the partners it will be considered, in equity, as vesting

in the partners in their partnership capacity, subject to an implied trust 351
that they shall hold it until the purposes for which it was purchased have been accomplished, and that it shall be applied, if necessary to the payment of the partnership debts.

3. At law, upon the death of the partner, his share or interest in the realty held and owned by the firm, is cast by descent upon the heir, and he becomes tenant in common with the surviving partner; and so at law, the widow may have dower assigned her in such share or interest; but both heir and widow will take the same estate the ancestor and husband held therein, clothed with the same trust in equity, for those who are entitled to the beneficial interest, whether surviving partners or creditors.

Appeal from a decree of the Circuit Court for Franklin County.

Appellee filed her bill of complaint against the Appellant and others, and among other things alleges, that her late husband, Hiram Nourse, in his life time, together with one Hiram W. Brooks, on the sixth day of October, in the year eighteen hundred and forty, purchased from the Trustees of the Apalachicola Land Company, Wharf-lot No. 23, in the City of Apalachicola, and received from the said Trustees a deed in fee simple for the same; that the said Hiram Nourse, being so seized in fee of the said premises, did, during the coverture of complainant, sell and convey his interest in said Wharf-lot to Lawrence O'B. Branch, by deed bearing date the ninth of December, 1843; that the said Branch, on the seventh of December, 1844, conveyed said lot to Lowel Holbrook, and that said Holbrook, on the 15th of December, 1845, conveyed the same to appellant, who holds the same and receives the rents and profits.

Appellee further alleges in her bill that she has not in any manner renounced or relinquished her dower in and to the said lot, and claims one third part of the interest of her late husband therein, with a like proportion of the rents and profits since the day of the death of her husband, which occurred on the twenty-first day of August, 1850.

In his answer, the appellant admits that he is the holder 352
in fee of said lot, and that he acquired it in the manner stated in the bill. He also admits the marriage of complainant and the death of Nourse at the time mentioned, but alleges that the said Nourse, during his life time, was engaged in a general copartnership business, as a merchant, with Hiram W. Brooks, under the style of Nourse & Brooks, and at another time in copartnership with said Hiram W. Brooks and John D. Howell, under the name and style of Nourse, Brooks & Co.; that the said lot was purchased by said Hiram Nourse and Hiram W. Brooks with the monies of the partnership, and was by them held, used and enjoyed as partnership property and for partnership purposes, as joint tenants, and not tenants in common; that they improved said lot by the erection of a wharf, at great expense, which improvement was made with the funds of the copartnership. He further alleges that the said Nourse & Brooks, and the said firm of Nourse, Brooks & Co., during the time of their copartnership, received the rents arising from said real estate as partnership funds and assets, and that the same were carried into the amount of the general partnership business, and used and employed as part of the means of the same; that said Nourse and said Brooks did not in any way receive such rents, or use or employ the same, as the individual property of either of the partners, and that although a separate account was kept on the books of the firm with each partner, yet no part of the rents arising from said real estate was credited to the individual account of either of them.

Further answering, the defendant alleges that said copartnership of Nourse & Brooks, and of Nourse, Brooks & Co., during their continuance and up to the time of their dissolution, contracted large debts, and finally became insolvent; that at the time of their dissolution, their effects

353 were entirely insufficient to pay their debts; that among other debts was one due and owing to the Southern Life Insurance and Trust Company, of eight thousand dollars, which was assigned to Lawrence O'B. Branch and N. C. Robbins in trust for certain creditors of said company; that said Branch and Robbins compromised the said claim with the said Nourse and Brooks, and as a part of the said compromise, said Nourse & Brooks, in part payment of the sum due by them, conveyed to said Branch the Wharf-lot so held and possessed by respondent.

But one witness was examined who proves that Nourse & Brooks were commission and forwarding merchants, and that accounts were opened on their books between the wharf and the firm, the rents being carried to the credit and the cost of erection and repairs to the debit of the wharf account. The wharf property was paid for by notes which Nourse had against the land company. These notes were debited to "bills payable." The style of the firm was that of Nourse & Brooks. Afterwards Howell was admitted as a partner, and it was then changed to that of Nourse, Brooks & Co. A large amount of claims was held by the Southern Life Insurance and Trust Company against Nourse and Brooks, amounting to something like fifty or sixty thousand dollars, which were assigned to Mr. Branch as trustee, who settled with Nourse & Brooks by accepting property. At the time of the settlement the property was necessary to pay the debts of the firm, and the Wharf-lot was conveyed to Mr. Branch for that purpose. Nourse and Brooks were under protest, having stopped payment. They did not discharge their debts in money. When Howell entered, there was no alteration of the business. The firm was embarrassed by Howell, who promised capital and business, but failed in all respects. The dower of Mrs. Nourse was a matter of discussion; the
354 parties solicited a relinquishment of her dower, but Nourse refused to exert his influence with her for that purpose. The conveyance of the lot in question was made after the dissolution of the partnership.

The court below decreed that dower be assigned to complainant, according to the prayer of the bill, from which appellant prayed an appeal to this court.

Davis for Appellant.

Hawkins for Appellee

THOMPSON, J.:

It has been said by a distinguished jurist, and afterwards reiterated by others, that the claim of dower is highly favored in equity; that the right which a dowress has to her dower, is not only a legal right, and so adjudged at law, but it is a moral right, and she is to be provided for and have a maintenance and sustenance out of her husband's estate to live upon; that she is in the care of the law, and a favorite of the law. These observations have been most zealously and eloquently pressed upon the consideration of this court by the able counsel for respondent, as landmarks and guides, and to be kept steadily in view in passing upon the questions involved in this controversy; and certainly we can have no disposition to depart from the liberal and generous views so expressed in regard to the sex, which is in every respect so justly entitled to the favorable consideration of individuals as well as courts, or to withhold the application of the most liberal rules of equity to the claim here presented. But we have a duty to perform, and that duty is a plain though stern one. We must separate the feelings and inclinations of the man from the office of the Judge. The maxim of all the courts is, *jus dicere et non jus dare;* we are not authorized to

pronounce a new law, but to ascertain and declare what 355
the law is. If, as has been justly remarked by Ld. Loughborough, there is a general hardship affecting a general class of cases, it is a consideration for the Legislature, not for a court of justice. If there is a particular hardship from the peculiar circumstances of the case, nothing can be more dangerous or mischievous than, upon these particular circumstances, to deviate from a general rule of law, for *misera servitus est, ubi jus est vagum aut incertum.* See Broom's Max., 62. We must confine our discretion, in every case, within those sound limits established by the rules and principles of equity. The liberality and favor with which the claim of a dowress is regarded in a court of equity, must not be understood as extending to the subversion of a settled rule of right or property, but rather to the extension of the peculiar process and powers of the court in ascertaining and enforcing her right, whenever it is equitable and proper it should be done; and perhaps going to the length of enforcing discovery and relief in her favor, against a purchaser for value, who is also a favorite in this court. Within these limits of equity, there is no disposition to regard her claim otherwise than with favor.

In the case before the court, the property in which dower is claimed by Mrs. Nourse, is a wharf-lot in the City of Apalachicola, which, as she alleges, was owned by her said husband, and one Hiram W. Brooks, as tenants in common, and which was, in the life-time of Mr. Nourse, conveyed by them, and the title to which, by various mesne conveyances, is now vested in the appellant, Alphonse Loubat. The claim is resisted on the ground that the husband of respondent and Brooks were partners; that the property was owned and held by them as partnership property, and was conveyed by them in satisfaction and discharge of a partnership debt, they having become insol- 356
vent.

However distressing the doubts may be whether real estate, held as part of the partnership funds or stock, ought to devolve upon, or descend as real estate to, the heirs or devisees, or ought to belong as personalty to the executor or administrator, upon the death of the partner, in cases where it is not required for the payment of the joint debts, yet, so far as partners and their creditors are concerned, we are satisfied that the rule is clear and free from doubt, and that such real estate, belonging to the partnership, is, in equity, to be considered as mere personalty, and is to be governed by the general doctrines applicable to it in the latter character. Story on Part., §§ 92, 93, cases cited in the margin; also Coll. on Part., p. 117, 141, (Perkin's Ed.) The cases decided in the English Courts of Equity, as to the character of real estate held as partnership property, have mainly arisen from a contest between the heir and the personal representative, in consequence of the difference in the English law between the canons of descent and the law of distribution, and they have all turned upon the actual or presumed intention of the party, whether the real estate was to preserve its specific and legal character, or an equitable conversion into personalty was intended. When, however, the question has been as to the applicability of such real estate to the payment of the partnership debts, we do not understand that there is any conflict of judicial decision, but that the courts of equity have been consistent in holding that, for this purpose, the equitable conversion into personalty is complete; and this is founded, not upon any actual or presumed intention of the party, but upon the equities between the partners, that all the joint stock or fund shall be applied to the purposes of the partnership. *Ibid.*

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357 In the United States, the Supreme Court of Massachusetts held, in the case of Dyer vs. Clark, that when real estate is purchased by partners, with the partnership funds, for partnership use and convenience, although it is conveyed to them in such a manner as to make them tenants in common, yet, in the absence of an express agreement, or of circumstances, showing an intent that such estate shall be held for their separate use, it will be considered and treated in equity as vesting in them in their partnership capacity, clothed with an implied trust that they should hold it until the purposes for which it was so purchased shall be accomplished, and that it shall be applied, if necessary, to the payment of the partnership debts. Upon the dissolution of the partnership, by the death of one of the partners, the survivor has an equitable lien on such real estate for his indemnity against the debts of the firm, and for securing the balance that may be due to him from the deceased partner, on settlement of the partnership accounts between them, and the widow and heirs of such deceased partner have no beneficial interest in such real estate, nor in the rents received therefrom, after his death, until the surviving partner is so indemnified. 5 Metc. R., 562; see also to the same effect, Howard vs. Priest, 5 Metc. R., 582, 585. Burnside vs. Merrick, 4 Metc. R., 527; Sigourney vs. Munn, 7 Conn. R., 11; Pierce vs. Trigg, 10 Leigh R., 406; Winslow vs. Chiffelle, 1 Harper Eq. R., 25; Divine vs. Mitchum, 4 B. Monr. R., 489; 1 Sumn. R., 180, 181. There is some diversity in the decisions of the American Courts upon the point, but the current of decisions may very certainly be considered as in accordance with the doctrine laid down in Dyer vs. Clark, above quoted, and which, in our opinion, is in strict conformity with the principles of equity and justice.

The case of Thornton vs. Dixon, (3 Bro. c. c., 166,) Bell
358 vs. Phynn, (7 Vesey R., 453,) and Balmain vs. Shore, (9 Vesey, 500), cited and relied upon by counsel for respondent, do not conflict with the rule thus laid down. The rights of creditors of the partnership were not involved in any of them. Indeed, in the case of Bell vs. Phynn, Sir Wm. Grant, M. R., puts his doubt whether the consequence of the estate being partnership property was a conversion, on the ground that there was no occasion to call for it for any of the purposes of the partnership, but that it remained clear. And so the case of Smith vs. Smith, (5 Vesey R., 190,) is upon its own peculiar circumstances. The estate in that case, though purchased with partnership funds, was conveyed to one of the partners, under a specific agreement that it should be his, and he be a debtor for the money, and therefore the claim of the widow for dower therein was allowed. It was argued that the rule was established in England because the partners held in joint tenancy, and therefore could have no application here, where the distinguishing property of that estate, the *jus accrescendi* had been abolished by our statute; but it will be seen from a reference to the authorities that this is founded in a mistake, for though conveyances of real estate to partners, in England, are generally to hold as tenants in common, yet that if it be conveyed to them as *joint tenants* expressly, in equity there will be no survivorship in such property, notwithstanding the form of the conveyance and the rule of law. In all cases the legal estate descends to the heir and he becomes tenant in common with the survivor; but equity, regarding the substance rather than the form, declares that he holds subject to a trust in favor of the surviving partner, for the application of the joint property to the purposes and uses of the partnership.

Recurring now to the facts of this case, the question is whether it is within the rule. It appears that Nourse & Brooks were in partnership together, and were engaged in 359
business in the city of Apalachicola, and commission and forwarding merchants; that they entered into a contract with the Apalachicola Land Company for the purchase of the Wharf-lot in question, went into possession thereof, erected a wharf, the cost of which erection, and the subsequent repairs thereof, together with all the income and profits arising therefrom, were regularly entered on the books of the firm, to the account of the wharf; and the firm becoming embarrassed and insolvent, discharged a debt due the Southern Life Insurance and Trust Company, of upwards of six thousand dollars, by the conveyance of this property to Mr. Branch, the assignee or trustee of said creditor. It further appears from the evidence, that the Apalachicola Land Company, being indebted to Nourse, one of the partners, and the husband of respondent, the debt due the company for the purchase of the wharf-lot was discharged, either in whole or in part, by using the notes or debts due Nourse, and a conveyance in fee was made to the two partners, in conformity with the previous contract. Upon these facts it is denied that the property was bought with the funds of the partnership, but with the private funds of Nourse, having been paid for with the debt which he held against the Land Company. The firm might have preferred to use the debt, and pay the money to the partner, or it may have been a loan of the debt by Nourse to the firm, for which he was to have credit, and did receive such credit, upon the partnership books, and this would seem to be the true state of the case from the statement that the notes were charged to the account of "bills payable" on the books of the firm. The testimony is evidently not as full and perfect as it might have been, but we must infer from the statement, that the notes received from Nourse were charged to bills payable and credit-
ed to Nourse, thus cancelling so much of the former ac- 360
count as represented the notes given for the purchase money of the wharf-lot, and placing the same to the credit of Nourse. At all events, he accepted a conveyance from the Land Company to himself and partner, in conformity with the original contract of purchase, and the rents and profits of the wharf were carried into the accounts of the partnership as part of its assets. All this is wholly inconsistent with any pretence of a sale or exclusive ownership, or indeed any claim of right adversely to the partnership, and indeed it does not appear that any such was ever asserted by him in his life-time. Nor is there sufficient evidence from which a resulting trust can be raised in favor of Nourse individually.

It is also contended upon the evidence, that because the conveyance is to the partners as tenants in common, although the property was paid for out of the joint fund, yet it would be, in effect, a division of the joint-stock *pro tanto*, and therefore not partnership property, and Goodwin vs. Richardson, 11 Mass. R., 469, is cited in support of the position. It will be a sufficient answer to this case to quote the remarks of Shaw, C. J., in relation thereto, made in Dyer vs. Clark, before cited. "The court," says the learned Judge, "were dealing solely with a question of law "in determining a legal estate, and intimate that a court of "equity might make joint real estate applicable as person-"al to the payment of partnership debts;" and he does not consider the decision as opposed to the conclusion of the court in the said case of Dyer vs. Clark, on the equitable principles there laid down.

And so it is contended that the property not being absolutely necessary for the partnership purposes, but only used incidentally in the prosecution of their business, the consequences of the rule do not flow therefrom. We are

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361 not aware of any such limitation. The rule applies whenever the joint funds have been applied in the purchase for the use or convenience of the partnership, and there is no express agreement that the property shall be the individual property of the partners, each standing as a debtor to the joint fund for the cost, but it remains as part of the joint stock or fund, whether absolutely necessary to carry on the business or purposes of the partnership or not. We do not attach any importance in this case to the fact of the admission of Howell into the partnership, subsequent to the acquisition of the property; or that the debt, to discharge which it was conveyed, was contracted after he came into the concern. The witness who was examined says that Howell was admitted as a partner in the firm on his promise to bring money and business, and that no change was made except in the style of the firm, to that of Nourse, Brooks & Co. No settlement of the previous business took place, and the same books of account were continued. Now, although Howell may have failed in the performance of his promise to bring money and business to the concern, as it is stated he did fail, and while it might furnish a ground for the senior partners to rescind their agreement, yet having been admitted as such partner, during the time he continued a member of the firm, the real estate standing in the names of the two senior partners, became subject to a trust for the new partnership, consisting of themselves and the incoming partner. It is never necessary that the conveyance should be taken in the names of all the partners. It is sufficient if it be in the name of one, or more, or in the name of a stranger. Hoxie vs. Carr, 1 Sumn. R., 173, 182, 183.

The facts of this case bring it within the equitable rule before laid down. The Wharf-lot was purchased, and the Wharf erected thereon, out of the joint or partnership
362 funds; it was held and owned as joint property, for the use and convenience of the partnership, the partnership alone having the perception of the rents and profits issuing therefrom; and therefore the application of it to partnership purposes, such as the satisfaction of creditors, against the dower of the widows of the partners and the claims of the heirs at law, is clear beyond a doubt.

The remaining point to be considered is as to the effect of the act of November 7, 1828, entitled an act concerning dower, (Thomp. Dig.,) which provides that when one dies intestate, or testate, without making provision for the wife which shall be satisfactory to her, she shall be entitled to be endowed of "one third part of all the lands, tenements "and hereditaments of which her husband died seized and "possessed, or had before conveyed, whereof said widow "had not relinquished her right of dower, as heretofore "provided by law, which third part shall be and enure to "her proper use and behoof, in and during the term of her "natural life." This act is in affirmance of the common law, and indeed, from the use of the term *"as heretofore provided by law,"* it is evident the Legislature designed to exclude the idea of any new law, or to make any change in the quality or quantity of interest which a dowress would take in the estate of her deceased husband. As a statute, we do not think it has any greater effect upon the equitable rule laid down herein, than it had standing as a rule of common law. She is to be endowed as theretofore provided by law, and no new right or interest is created. In other words, the old law is simply re-enacted.

But we are not dealing with a question at law in determining a legal estate. We are deciding how far a Court of Equity will control a legal estate for the purpose of doing equity. As upon the death of one member of a partnership. his share or interest in the real estate held and owned by the partnership, as a part of the joint stock or fund, 363 is, at and by the strict rule of law, cast by descent upon the heirs at law, and such heir at law becomes tenant in common of such property with the surviving partner, so the widow of a deceased partner may at law be endowed of one third of his interest; yet in both cases, though seized at law, they will hold the lands precisely as the ancestor and husband held them, clothed with the same trust, and they will, in a Court of Equity, be deemed to be trustees for those who, in equity and conscience, are entitled to the beneficial interest—the surviving partner, or creditors, or both. And such must be the case here. If Mrs. Nourse had preferred her claim at law, and dower had been assigned her, a Court of Equity, on the complaint of the parties beneficially interested, would cause her to execute the trust. But she having sought the aid of a Court of Equity to enforce a supposed legal right to dower, although she may have had that right, yet the court, finding it subject to a trust for the surviving partners or creditors of the partnership, and finding also that the property has in fact been used and applied to the purposes of the trust, namely, the satisfaction of a partnership debt, her application must be denied. The creditor took the property conveyed, in the consideration of a Court of Equity, free from claim of dower.

The conclusions we have arrived at, show that the court below erred in the decree rendered in this cause on the 9th February, 1852, and the same should be and is hereby reversed and set aside; and proceedings to render such decree as the court below should have rendered, we order and decree that the respondent's bill of complaint, as against the appellants, and seeking to be endowed of the Wharf-lot mentioned in the proceedings, be and the same is hereby dismissed with all costs.

Per totam curiam. Decree reversed and bill dismissed, 364 so far as it seeks dower of the Wharf-lot.

ANTONIO COLLINS, APPELLANT, VS. NICHOLAS H. MITCHELL, APPELLEE.

1. In an action against C. as a surety for S. in a replevin bond, conditioned for the re-delivery of the property attached, to abide the final order of the court, he pleaded that at the time of, and prior to the institution of the original suit by attachment, S. the defendant therein, and the principal in the replevin bond, was dead: HELD, That the matter set up in such plea does not constitute a sufficient bar to the action; that C. is estopped by the bond, as well as by the judgment in the original suit, to aver the death of S. prior hereto.

2. Estoppel, *by deed*, concludes the party executing it, not only as to the very point intended to be effected by the instrument, but also as to any fact stated or recited in it.

3. Judgments and decrees, as estoppels, conclude parties and privies only. The ground on which persons standing in the relation of *privity* to the litigating party are bound by the proceedings to which he was a party, is that they are identified with him in interest; and whenever this identity is found to exist, all alike are concluded. Where, therefore, one binds and obliges himself that the defendant in an attachment suit would cause the property levied upon, and replevied by the said bond, to be forthcoming to abide the final order of the court in the said suit, he connected himself *in privity* with the proceedings therein, and made the record of the judgment conclusive evidence against him.

4. Wherever the matter of the estoppel is apparent on the face of the record, advantage may be taken thereof upon demurrer.

5. The death of a party defendant pending the suit and before judgment therein, does not render such judgment void, but merely voidable, upon a writ of error *coram vobis*.

Appeal from Escambia Circuit Court.

This was an action of debt upon a replevin bond, insti-

365 tuted by the appellee against appellant. The material facts presented by the record will be found in the opinion of the court, to which reference is made.

Long and *Baker* for appellant.

Campbell for appellee.

THOMPSON, J.:

This was an action of debt, which was prosecuted in the court below by the respondent against the appellant, as one of the sureties in a replevin bond. The original suit was brought by the appellee against the firm of John N. C. Stockton & Co., and the attachment issued therein was levied upon certain slaves, as the property of the defendants, which slaves were replevied upon a bond executed by the said firm of John N. Stockton & Co., by their attorney W. T. Stockton, and by Hanson Kelly and the appellant as sureties thereon. The declaration in the present case is in the usual form, setting forth the issue and the levy of the attachment upon certain slaves, specified by name; the release of the property upon the bond; the prosecution of the original suit to find judgment and execution; a return of *nulla bona* by the proper officer on the writ of *fieri facias,* and the breach of the condition of the bond, "that the said John N. C. Stockton & Co. did not "cause the said slaves (therein named) to be forthcoming, "to abide the final order of the Superior Court for the "County of Walton, according to the tenor and effect of "the writing obligatory, &c., although often requested, &c."

The appellant, *inter alia,* craved oyer of the bond, and the same being set out, pleaded "that at the time of and "prior to the institution of the said suit by attachment, in "the said Superior Court of Walton county, to wit: on
366 "the 20th day of November, A. D., 1839, the said John "N. C. Stockton had departed this life; *absque hoc,* that "there was any other suit or proceeding in the said Supe-"rior Court of Walton county against the said John N. "C. Stockton," and concluded with a verification.

To this plea the plaintiff below replied, "that Richard "C Stockton and William B. Stokes, as surviving part-"ners of the firm of John N. C. Stockton & Co., appeared "and pleaded to said attachment suit in the plaintiff's "declaration mentioned, and that the judgment in the "said plaintiff's declaration mentioned was rendered in "the said attachment suit against the said surviving part-"ners, in and by the name and style of John N. C. Stock-"ton & Co." To this replication there was a demurrer and joinder therein, on which the judgment of the court below was against the demurrer, and it is upon alleged errors in this judgment that the present appeal is founded.

No attempt is made in this court to sustain the replication against the force and effect of the appellant's demurrer; but the respondent, invoking the familiar principle that a demurrer opens all the previous pleading, avers that the plea is insufficient upon various grounds, some of which will be noticed hereafter.

In like manner the counsel for appellant, in addition to his support of the plea, contends that the declaration does not show a sufficient cause of action, because of the uncertainty and consequent invalidity of the defeasance or condition of the bond, which point being considered first in order, will be first disposed of.

It is argued that as the recital in the condition of the bond does not mention the number, names, sex or ages of the slaves levied upon, but simply recites "that whereas "the said Nicholas H. Mitchell has sued out of the Supe-"rior Court of Walton county an attachment against the

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"said J N. C. Stockton & Co.," it is void for uncertainty. 367
We do not regard this objection as well taken. The slaves levied on were sufficiently described by their names in the levy of the officer, which was endorsed upon, and as his return, to the writ of attachment, and according to the familiar rule of logic, as well as law, in the interpretation of all writings, *id certum est quod certum reddi potest.* The condition of the bond is made perfectly certain and definite by a reference to the return to the writ of atttachment, which shows what slaves and how many were levied upon. The writ of attachment, the action of the officer endorsed thereon, and the replevin bond, when executed, are all integral parts of the record of the suit, and the former may be referred to, for the purpose of rendering certain anything which is uncertain or indefinite in the latter.

We now proceed to the consideration of the plea. It is urged by the counsel for the appellant, in support of the plea, that the fact alleged therein, namely, the death of John N. C. Stockton, before the institution of the suit, renders the judgment void for want of notice; that if void as to him, it is void as to his co-partners, even if they had been sued in the original action properly, by their individual names, and not under the terms "& Co.," as he supposes the record to be, and therefore there has not been any "final order of the court," which, according to the condition of the bond, the appellant had covenanted to abide by. And on the other hand, it is contended, on the part of respondent, that the appellant is estopped by his bond, as well as by the judgment rendered, to allege the fact of the death of John N. C. Stockton before the institution of the suit; and that, if he is in a position to make the defence, still it does not render the judgment void, but voidable only; and that the effect of the judgment cannot be voided thus collaterally, but only the regular modes of examination which are provided for the investigation of 368
real or imputed error in judicial proceedings.

The law of estoppel, says Mr. J. Taunton, in Bowman vs. Taylor, (2 Add. El. R., 278,) is not so unjust or absurd as it has been too much the custom to represent. The principle is, that where a man has entered into a solemn engagement, by and under his hand and seal, as to certain facts, he shall not be permitted to deny any matter which he has so asserted. And not only is the deed conclusive, on the party executing it, as to the very point intended to be effected by the instrument, but also as to any facts stated or received in it. 2 Smith Lead Ca., 456, and authorities cited. The party is denied the right of setting up the truth whenever it is plain and clear contradiction to his former allegations and acts.

The appellant here, on the 13th January, 1840, and after the institution of the original suit, and the levy of the attachment, joins with John N. C. Stockton & Co., and as one of the sureties, in the making and delivery of the replevin bond, as if the said John N. C. Stockton was in life and being, and thus procures the release of the property levied upon under the attachment; and shall he be permitted now to aver that the same John N. C. Stockton was not only then dead, but was so before the institution of the suit? The inconsistency and contradiction between this allegation and the act of joining with John N. C. Stockton in the execution of the bond, is so glaring that it need only be stated to be apparent. Counsel have endeavored to avoid the effect of this estoppel by urging that the bond does not profess to be executed by John N. C. Stockton in his proper person, but that John N. C. Stockton & Co., executed it by their attorney, W. T. Stockton. This fact makes no difference. A dead man can no more have an attorney in fact that he can be a party to a suit

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369 in court. As a prudent man, it is to be presumed the appellant was careful to see that the agent or attorney was duly constituted to act for his principal, and ignorance of the rule of law, that death revoked the power, will not excuse him. Such an excuse is not permitted to be alleged in a Court of Justice.

The doctrine of estoppel by deed is generally recognized and enforced in the United States, as well as in England. See cases collected in 2 Smith Lead. Ca., 555. Thus in Cutler vs. Dickinson, 8 Pick. R., 387, the obligors in an administration bond were held to be estopped by the recital therein that their principal had been regularly appointed administrator. The replevin bond being the foundation of the action, and the declaration alleging, in the terms of the instrument, that it was made and delivered by the defendant, and the other obligors, the estoppel is apparent on the fact of the record, and advantage may therefore be taken of it on the demurrer. Browman vs. Taylor, 2 Ad. & E. R., 278; Hill vs. Manchester Water-works Co., 2 Barn. & Ad. R. 244; and see Veale vs. Warner, 2 Wms. Saunders R., 325, a. n. The conclusion therefore, which we have reached is, that the appellant is estopped by his deed from asserting the fact, although it may be true, that before and at the time of the execution of the bond, John N. C. Stockton was dead. And this relieves the court from the necessity of considering the question so elaborately discussed at the bar, whether the judgment of a Court of general jurisdiction may be collaterally impeached by matters *dehors* the record, as to its jurisdiction of the person of the parties; or whether the defect of jurisdiction of the person must appear on the face of the record, to entitle it to consideration; or whether, if such court of general jurisdiction assumes authority to act, and pronounces a judgment, such authority can be inquired
370 into at all, but is absolutely binding on the parties, &c., until set aside by the tribunal in which it was rendered, or regularly reversed on error. We therefore pass them by, without intimating any opinion how far the decisions of the American Courts have innovated upon the rule of the common law, and to what extent they should be considered as persuasive arguments in the estimation of this court. We will simply remark that the decision of this court in Carter vs. Bennett, (4 Fla. R., 345,) cited and relied upon by counsel for appellant, does not, in our opinion, touch the question discussed. In that case the question was whether a decree rendered in a foreclosure suit against the mortgagor was conclusive against Bennett, who claimed to be the assignee of the right or equity or redemption in the mortgage property, and who was not a party to the suit. Judgments and decrees are conclusive only as against parties and privies, and the court in the case cited, deeming the assignee *a stranger* to the record, held that the proceedings were open to his impeachment. The difference, is too obvious to need further remark.

The appellant being estopped by his deed from asserting the death of his co-obligor, John N. C. Stockton, before and at the time of its execution, and as the Superior Court of the late Territory of Florida was a court of general jurisdiction, this court, acting upon the maxim, *omnia presumuntur rite esse acta*, must presume a jurisdiction of that court over the persons of John N. C. Stockton & Co., up to the time of the execution of the replevin bond, and we will now proceed to the consideration of the plea, as an averment of the death of John N. C. Stockton, intermediate the execution of the bond and the rendition of the judgment in the attachment suit. It is considered by respondent's counsel that in this view the plea is liable to two objections.—1st. That the appellant is estopped by the judgment; and 2d. If he is not so estopped, the fact 371
asserted as to the death of John N. C. Stockton before the judgment, does not render it void, but voidable merely.

Both objections we think well taken, and either would suffice to prove that the plea in this regard is bad in substance. It is true as urged by the counsel for the appellant, that he was not a party to the judgment, but it is equally true that he was *in privity* with the defendants therein, and concluded with them by its force and effect. The ground upon which persons standing in the relation of *privity* to the litigating party are bound by the proceedings to which he was a party, is, that they are identified with him in interest, and whenever this identity is found to exist, all are alike concluded. Thus, if one covenants for the results of consequences of a suit between others, as if he covenants that a certain mortgage assigned by him shall produce a specific sum, he thereby connects himself in privity with the proceedings, and the record of the judgment in that suit will be conclusive evidence against him 1 Greenl. on Ev., §523; Rapelye vs. Prince, 4 Hill N. Y. Rep., 119. So, in the case at bar, the appellant bound and obliged himself to the respondent, and covenanted with him, by the writing obligatory sued upon, that the said defendants in the attachment suit, John N. C. Stockton & Co., would cause the said slaves levied upon, and replevied by said bond, to be forthcoming to abide the final order of the court in the said suit, and thus connected himself in privity with the proceedings herein, and made the record of the judgment conclusive evidence against him. In Bacon's Abr., tit. Error, A., it is laid down, "if a man recovers against "the principal, and sues a *scire facias* against the bail, "they cannot say the principal died before the judgment, "and so by plea avoid the judgment, for it is against the "record."

The death of a party before the judgment rendered, does 372
not make the judgment void, but it is an error of fact, for which the same may be recalled or revoked by writ of error, returnable to the same court where the record remains, called a writ of error *coram vobis*, or *qua coram vobis resident*, for error in fact is not the error of the Judges, and reversing it is not reversing their own judgment. 2 Tidd Pr., 1136-7; Com. Dig. Pleader (3B. 1:) Day vs. Hamburg, 1 Browne Pa. R., 75, 82; Dewitt vs. Post, 11 Johns R., 460. The distinction between a thing, whether record or deed, &c., which is void and that which is voidable, is familiar to every one. The judgment which is voidable, is a subsisting judgment, good and effectual until revoked or reversed, which cannot be done collaterally, but only by a direct proceeding instituted for the purpose. "If a judgment is only voidable, the party shall not void "it without writ of error; as if in a *cui in vita* the tenant "dies, and afterwards judgment is against him, which is "erroneous, and execution is sued against the heir, he "shall not avoid the judgment in assize without error. 1 "Rol. 742, l. 12; so, in a *scire facias* by executor upon a "judgment in ejectment by his testator against B., execu- "tion shall not be avoided, nor judgment stayed, by say- "ing that the tenant died *pendente lite;* for he ought to "avoid it by error. 1 Rol. 742, l. 18; so, error in the "principal judgment is no plea in a *scire facias* against "the heir or bail. 1 Rol. 742, l. 26, 30." See Comyn's Dig., Error (D.)

There are other objections to the plea, some of which have been presented in the argument, and others have suggested themselves to the court in the consideration of the case, but as those which we have passed upon go to the very substance of the matter pleaded, it is deemed unne-

373 cessary to notice any other. There is no error in the judgment of the court below, and it should be affirmed.

Per totam curiam. The judgment of the Circuit Court of the Western Circuit, sitting in the county of Escambia, rendered in this cause, is hereby affirmed, with costs.

RICHARD MCGRIFF, ADMINISTRATOR OF THE ESTATE OF RICHARD DAWSON, DECEASED, APPELLANT, VS. WILLIAM G. PORTER, JOHN G. RUAN AND RICHARD G. PORTER, APPELLEES.

1. Where, to secure a loan of money, the borrower executed an instrument of writing authorizing the lender, upon default in payment of the money borrowed, to enter upon the premises of the borrower, and take and carry away certain slaves specified therein, and sell and dispose of them, and from the produce of the sale to pay himself the money due, and all expenses, returning the overplus, if any: HELD, That such instrument was not a mortgage, but a power.

2. A power is simply collateral, and without interest, or a mere naked power, when to a stranger, authority is given to dispose of an interest, in which he had not before, nor has by the instrument creating the power, any estate whatsoever; but when the power is given to a person who derives, under the instrument creating the power, or otherwise, a present or future interest in the property which is the subject of the power, it is then a power coupled with an interest: HELD, therefore, in the present case, that the power given or created is a mere naked power, unconnected with any interest or estate in the property, the subject of the power; and though founded upon a consideration, and therefore irrevocable by the grantor in his life time, yet that it was revoked by his death before the execution thereof.

3. The act of January 30, 1838, entitled an act to amend an act to regulate the foreclosure of mortgages, (Thomp. Dig., 376. ch. 3, §1,) considered and interpreted to be intended to limit and restrict the operative force of certain classes of conveyances therein mentioned, and not to extend or enlarge the effect of others.

The appellant filed his bill in Franklin Circuit Court,
374 against the appellees and the Sheriff of Franklin county, as ex-officio administrator of the estate of Archibald R. Ridley, deceased, to foreclose as a mortgage a certain instrument, which is set out at length in the opinion of the court delivered in this case.

It appears from the record that Archibald B. Ridley, in his life time, executed a note, payable on the first day of January, 1836, to Richard Dawson, since deceased, of whose estate said appellant is administrator, for eleven hundred dollars, and at the same time executed and delivered to said Dawson the instrument of writing which is set up as a mortgage, and claimed to have been intended as a security for said note.

The property mentioned in the instrument of writing remained in the possession of Ridley till his death, and there is no evidence that any effort was made prior to the death of Ridley, to execute the power granted to Dawson by the instrument in question.

To establish the character claimed for this instrument, the appellant examined John J. Edwards, one of the subscribing witnesses, who stated that he and Thomas Edwards, the other subscribing witness, arrived at the house of Dawson, and found Dawson and Ridley there alone; that they were informed by Ridley that he had borrowed or wished to borrow money from Dawson, and had made a mortgage to secure its payment, and asked them to witness the execution of the instrument, then already prepared, which they did. Here, another witness for appellant, says, Ridley, in a conversation with him, told him that he had mortgaged the slaves mentioned in said instrument to Dawson.

The appellees claimed title to the slaves in their possession through one Isaac Brown, and assert that they had no knowledge or notice of any incumbrance, by way of mortgage, or otherwise, on said slave. The court below dis- 375
missed the bill of complaint with costs.

Davis for Appellant.

Baltzell and *A. H. Bush* Appellees.

THOMPSON, J.:

This is a suit for foreclosure of mortgage, which was instituted by the appellant, who was complainant in the Circuit Court, and the decision of the case turns upon the character of the instrument set up in the bill, and a copy of which is exhibited therewith, whether it is a mortgage as is asserted by the complainant, or a mere naked power as contended for by the respondents.

The instrument is in the following terms, viz:

"Alabama, Henry county. To all to whom these pres-
"ents may come, greeting: Know ye, that I, A. B. Rid-
"ley, for and in consideration of the sum of eleven hun-
"dred dollars, forever defend by these presents, and it is
"hereby agreed by the parties to these presents, that if I,
"the said A. B. Ridley, my executors or any of us, do and
"shall well and truly pay, or cause to be paid, unto the
"said Richard Dawson, his executors, the sum of eleven
"hundred dollars, according to a certain bond bearing
"even date herewith, given by me to Richard Dawson,
"then these presents, and every thing herein contained,
"shall be void; and I, the said A. B. Ridley, for myself,
"my heirs, executors, administrators and assigns, do agree
"with the said Richard Dawson, his heirs, executors, ad-
"ministrators and assigns, that in case default shall be
"made in payment of said sum of money, at the time lim-
"ited for the payment, then it shall and may be lawful for
"the said Richard Dawson, his executors, administrators
"and assigns, with any person or persons he or they shall
"think fit, to enter into the dwelling house and premises 376
"of said A. B. Ridley, wherein said negroes may be lodg-
"ed, to-wit: Isabella and her two children, Mary and her
"two children, and John, a mulatto boy, about fifteen
"years old, thence to carry away the said negroes, and
"sell and dispose of them for the best price which they can
"obtain, and of the money to arise by such sale thereof to
"pay and return to him and themselves the said sum of
"eleven hundred dollars, and all charges touching the
"same, they returning to me, the said A. B. Ridley, my
"heirs, executors, administrators or assigns, the overplus,
"(if any such shall be,) any thing herein to the contrary
"notwithstanding; and until default be made in the afore-
"said sum of money at the time fixed for the payment
"thereof, I, the said A. B. Ridley, my executors, adminis-
"trators and assigns, are to remain in the quiet possession of
"the aforesaid, and to the full and free enjoyment of the
"same."

This instrument was executed under the hand and seal of the said Archibald B. Ridley, on the 16th January, 1835, and the execution thereof is attested by two witnesses, Messrs. J. J. Edwards and Thomas Edwards. There is no doubt but that the instrument was executed simultaneously with a bond of eleven hundred dollars made by Ridley to Dawson, and that it was intended to be a security for the repayment of the money so borrowed, but it is equally clear that, although the said instrument was spoken of by the parties thereto at and after its execution, and since by the attesting witnesses, as a mortgage, yet it cannot be regarded as such a security. A mortgage of personalty is a conveyance of the absolute property and interest therein, defeasible on the performance of some condition subsequent, such as the payment of money, doing some act by the mortgagor, or the like. By the common

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law, possession being regarded as the *indicium* of ownership of personal property, it was required that it should accompany and follow the mortgage, and on default of the mortgagor in the performance of the condition mentioned in the defeasance, the estate or interest of the mortgagee, became absolute at law, the mortgagor having nothing left therein but a right in equity to redeem, if asserted and claimed within a reasonable time. In this and other States of the Union the rule of the common law has been so far changed as to permit the mortgagor to retain the possession of the mortgaged property, upon a record of the conveyance in mortgages, in which case, in default by the mortgagor, the mortgagee is driven to his suit for foreclosure, or other appropriate remedy, to obtain satisfaction out of, or the possession of, the mortgaged property. In the instrument under examination, there are no words of transfer or conveyance of the property mentioned, or of any interest therein; neither does it provide that the creditor shall have the possession thereof, but on the contrary, it is expressly stipulated that the possession is to remain with the owner, the debtor, until, by default in the payment of the money, the authority and power shall accrue to the creditor to enter upon the premises of the debtor and take and carry away, and sell and dispose of, the property, pay himself the debt due, and all costs, &c., and return the overplus, if any. The instrument confers simply an authority, unconnected with any right in the property which is mentioned and specified therein.

It is, however, argued with much ingenuity by the counsel for the appellant, that whatever may be the construction of this instrument, at and by the rules of the common law, yet when it is interpreted with reference to the act of our Legislature of January 30, 1838, amendatory of the act regulating the foreclosure of mortgages, &c. (Thomp. Dig. 376, ch. 3, § 1,) it amounts to a mortgage. The act referred to is in the following terms: "All deeds of conveyance, bills of sale, or other instruments of writing, conveying or selling property, either real, personal or mixed for the purpose or with the intention of securing the payment of money, whether such deed, bill of sale or other instrument, be from the debtor to the creditor, or from the debtor to some third person or persons, interested for the creditor, shall be deemed and held as mortgages, and shall be subject to the same rules of foreclosure, to the same regulations and restrictions as now are, or hereafter may be prescribed by law, in relation to mortgages." This act was so designed to operate on and control mortgages with power of sale, and deeds of trust to third persons with like powers of sale, which, at the time of the passing of this statute, were much used in some parts of the then Territory, and which was considered to operate oppressively upon the debtor, the provisions of such deeds of conveyance ordinarily stipulating that after default made by the debtor in the payment of the debt, the mortgagee in the one case, and the trustee on the requisition of the creditor in the other, should proceed upon some short notice to sell the property conveyed and hypothecated for cash, and to apply the proceeds to the satisfaction of the debt. But independently of this consideration, the particular mischief which this statute was intended to remedy, and considering the instrument in question as if made in Florida, and with reference to its laws, it seems very clear that it cannot and does not receive any aid from this statute. The act mentions "deeds of conveyance and bills of "sale," and although it uses the terms, or "other instru-"ments of writing," yet these terms, upon a familiar rule of interpretation, must be taken to mean instruments *ejusdem generis*, of a kindred character to those which are specifically designated, and this is fully sustained by the description which is contained in the statute, which shows that it was designed to operate on those instruments alone which have the effect of "conveying or selling property, 'real, personal or mixed, for the purpose or with the in-"tention of securing the payment of money." The instrument of writing which is attempted to be set up in this case as a mortgage, neither conveys nor sells the property mentioned and specified therein, for the want of any operative words of conveyance or transfer, any form of expression, which, without wresting the language employed from its fair and legitimate import, can be construed to evince any design whatever, on the part of Ridley to divest himself of the legal title and vest in Dawson, or any other person. Hence the instrument is not within the act, which, from its whole scope, is clearly designed to limit, restrict and control the operation of certain classes of conveyances described therein, and not to enlarge or extend the operative force and effect of others.

As before remarked, the instrument before the court creates a power only, not coupled or connected with any interest in the property. A power is simply collateral and without interest, or a naked power, when, to a mere stranger, authority is given to dispose of an interest, in which he had not before, nor has by the instrument creating the power, any estate whatsoever; but when the power is given to a person who derives, under the instrument creating the power, or otherwise, a present or future interest in the property, the subject on which the power is to act, it is then a power coupled with an interest. Co. 1st Inst., 342, l. n. 1; Bergen vs. Bennett, 1 Caine's Cas. in Er., 1. It is true that Dawson had an interest in the money which was to be produced by the power, and which was to be applied to the discharge of the debt due him by Ridley, the donor of the power, but as is justly remarked by C. J. Marshall, in the case of Hunt vs. Bousmaniere, (8 Wheat. R., 174, 5 Peters' Cond. R., 405,) in such a case the power and the interest can never be united. The power to produce the interest must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and therefore cannot, with accuracy, be said to be coupled with it. This power, however, forming part of the contract of loan between Dawson and Ridley, and having the security provided for its re-payment is founded upon a valuable consideration; and although there is no stipulation that it shall be irrevocable by the grantor, or constituent, yet it is deemed in legal view to be beyond his control, and to be irrevocable by him in his life time. But Ridley, the grantor, having died, the question here arises as to the effect which that event had upon the power so created.

That a mere naked power, whether founded upon a valuable consideration or not, is revoked by the death of the party creating it, is not only well settled upon authority, but it results as a necessary consquence from the nature and character of such power. Thus in the case at bar, an authority is given to Dawson to dispose of an interest and property in the slaves specified, which he had not before, and which has not been conferred upon him by the instrument which gives or creates the power. Apply now the test. If the power is executed by the donee or grantee thereof, it must necessarily be executed in the name of the donor or grantor, who alone possesses the title and estate in the property, he not having parted with it by any transfer or conveyance thereof, and he being dead it would be simply an absurdity to execute a sale and conveyance in the name, and as the act of a dead man. The death of the party, therefore, in such case, operates as a revocation, be-

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381 cause, by the happening of this event, the power has become impossible to be executed.

The only exception to this is the case of a naked power or authority given by one by his last will to his executors to sell his estate for the payment of debts, &c., in which case the authority is expressly given, to be executed after his death, and the act may be done in the name of the executors, and not in the name of the testator. The case of Hunt vs. Rousmaniere's administrator, before cited, is precisely analagous. In that case a power of attorney was executed by Rousmaniere to secure a loan of money, which authorized Hunt, the lender, to sell the vessels mentioned therein, on default in the payment of the debt, and pay himself the amount due, &c., and Rousmaniere having died before the execution of the power, it was held to have been revoked by his death.

The case of Knapp vs. Alvord, cited from 10 Paige R., 205, by the counsel for appellant, is readily distinguished from the case before cited, as well as the case at bar. A person who was indebted, upon going abroad *put an agent in possession of his stock in trade,* and gave him a written power to sell, &c., any part of the goods, &c., and apply them to the payment of the debts, and to the security or payment of any notes for which such agent might become responsible on his account. The principal having died, it was held that the power of sale given to the agent was a power coupled with an interest, and that he had power to sell and retain for the amount of his advances, notwithstanding the death of the principal.

The court has not had access to the report of the case, so as to ascertain the grounds of the decision, but presume it must have been for the reason that the property, which was personalty, being delivered to the agent simultaneously with the creation of the power, was a sufficient transfer
382 thereof to create an interest in connection with the power. Such would have been the effect in the present case, if the slaves had been delivered by Ridley to Dawson at the time of the execution of the instrument; the latter would have acquired, by such tradition of the property, an interest commensurate with the power which was created, and in the execution thereof he would have acted in his own name.

Upon these considerations, it is clear that the prayer of the bill cannot be sustained. The instrument set up is not a mortgage, but a mere power, not coupled or connected with any interest in the property which is the subject thereof; and having arrived at this conclusion, it becomes necessary to examine and pass upon the position assumed by appellant's counsel, that it appearing from the evidence a mortgage was intended by the parties, but which failed through the ignorance of the draftsman, the court should not affirm the decree of the court below, but should modify the same by granting leave to appellant to amend his bill so as to obtain a reformation of the instrument.

The principle is undeniable that where an instrument of writing which proposes, or is intended to carry into effect a previous agreement between the parties, but which, by some mistake in its preparation, either as to fact or law, does not fulfil, or which violates, the manifest intention of the parties to the agreement, equity will correct the error so as to make the instrument conform to the agreement, such imperfect execution being considered as no execution at all. Without adverting to the frame and structure of the appellant's bill of complaint, and considering whether he is justly entitled, in view thereof, to claim the favorable interpretation of the court, as is contended for, the court cannot satisfactorily ascertain from the evidence in this record, that the instrument which was executed does not fulfil, or that it violates the intention of the parties thereto. 383
There is very little testimony in relation to the execution of the instrument, and none as to the previous agreement between the parties, or the negotiations which led to the execution of the deed, save what may be derived from the brief statement of John J. Edwards, one of the subscribing witnesses. He states, that having arrived at the house of Dawson, in company with Thomas Edwards, the other subscribing witness, they found Dawson and Ridley there, and alone; that they were simply informed by the latter, that he had borrowed, or wished to borrow, money from the former, and had made a mortgage upon negroes to secure its payment, and requested them to attest the execution of the instrument, then already prepared, which was done. Another witness, (Hare,) detailing a conversation with Ridley, says he told him he had mortgaged said slaves to Dawson. No witness speaks of the negotiation between the parties, as to the precise character of the security which was stipulated for. Indeed it appears that no one was present during the treaty for the loan; nor is there any evidence showing by whom the instrument was prepared, whether by one of the parties, or by another person by the direction of both or either of them. The witnesses found it already prepared to be executed, and it was executed in their presence.

Stress is laid upon the use of the term "mortgage" by the witnesses. Indeed the hypothesis of a mistake in the preparation of the instrument, is wholly founded upon this fact. But if reliance could be placed upon the accuracy of the recollection of the witnesses, as to the use of the precise terms employed by the parties, after the lapse of thirteen years, which had intervened between the date of the transaction and the time of their examination, still the court cannot conclude that in this case the term "mortgage" was used in its technical sense. This identical in- 384
strument is called a mortgage, and we have no assurance that the term is not used as a generic term, and in the contemplation of the witnesses would be considered to embrace every species of security, whether a technical mortgage, a *vivum vadium,* or, as in the present case, a power to seize and sell the property. We may add here that the instrument is termed a mortgage by lawyers as well as laymen. The attorney employed in Alabama, in his deposition, calls it a mortgage, and the counsel for appellant not only sets it up in the bill of complaint as a mortgage, but gives it that appellation in the interrogatories propounded to the witnesses in relation thereto; and it is possible the latter may have been thus inadvertently led to the use of the term, supposing them to be sufficiently acquainted with the legal character of the different securities before enumerated to distinguish between them.

If conjecture is to be resorted to as to what the parties intended, it may just as fairly be presumed that, inasmuch as it is evident Ridley did not design to part with the possession of the property during the time the loan was running to maturity, and as, in such event, if a mortgage had been executed, the creditor, in case of default, as we have before seen, would be put to his suit for foreclosuse, he may well have considered that the power to seize and sell the slaves, to redress himself by his own act, without resort to litigation, would be the best form in which the security could be framed, the remedy thus provided being so simple and so summary in its character as to compensate most amply for the risk incurred of the contingencies of the death of the grantor, or constituent, before the execution of the power, or of a sale by him to *bona fide* purchasers, for value, without notice of the existence of such power.

385 As there is not sufficient evidence to satisfy the court that the instrument in question violates the manifest intention of the parties, or that it is not the precise security which they contemplated, and conforming in every respect to their agreement, and as the court deems it hopeless that at this late day, eighteen years having passed away since the date of the transaction, and both the parties dead, there is any possibility of obtaining further and more precise information, and as the decree rendered herein will oppose no obstacle to the prosecution of the appellant's claims as a general creditor against the estate of Ridley, the court feels constrained to deny the application to modify the decree of dismissal rendered by the court below.

Per totam curiam. The decree of the Circuit Court of the Western Circuit, sitting in equity in and for the County of Franklin, is in all things affirmed, with costs.

THOMAS ORMAN, ADMINISTRATOR OF SIMPSON, APPELLANT, vs. J. & D. J. DAY AND THE APALACHICOLA LAND COMPANY, APPELLEES.

The building of a party wall by the owner of a lot gives him no right to claim contribution from the owner of the adjoining lot, without express agreement of the parties.

Appeal from Franklin Circuit Court.

The facts presented by the record will be found em-
386 braced in the opinion of the court, to which reference is made.

Baltzell for Appellant.

At the sale of *front or water lots* in the City of Apalachicola in the year 1836, the purchasers of lots, with the sanction and approval of the owners of the city, (the Apalachicola Land Co.,) agreed upon a plan by which the owners of adjoining lots should so build as that each should have the benefit of his neighbor's wall—in other words, that instead of each owner of a lot erecting two full side walls, in brick, on his own lot, one wall should be erected, covering a portion of each lot, at the joint expense. In other words, party walls made. As the buildings were to be of brick, three stories high, fire-proof, and only thirty feet in front, the arrangement was highly advantageous, giving a greater extent of front, enlarging the building, and diminishing very greatly the expense and cost of the construction.

Simpson built after this mode. The Land Co. owning the adjoining lot on the Western side, lease to Day and afterwards sell to him, providing, however, in their deed for the contingency of a recovery by Simpson. The Days build, uniting their roof and outer walls to those of Simpson, and the party wall erected by him is made and used as one of the walls of their building.

They refuse to pay him any portion of the expense of the erection of the party wall, and both he and the Apalachicola Land Co. resist the claim on the ground of its injustice and illegality—the statutes of fraud and of limitation are also relied upon. There is no dispute about the right of Simpson to build upon the lot of the Land Co.; no dispute as to their right and that of Day to the support of Simpson's building—both these have been conceded and are admitted. The sole question is whether the Land Co. 387
and Day, using and having the benefit of the wall erected by Simpson at his own expense, thus enhancing the value of their property by relieving them of the expense of the erection of a separate wall, shall pay for the benefit and advantage thus derived. The right of Simpson's estate then accrues. If there is merit in the decision of Chan. Kent in 4 John. Chy. R., 334, then there is in our case *Qui sentit onus debet sentire commodum.* The cases in Sanford and from Alabama are of owners in severalty, having no privity, unconnected with each other and wholly inapplicable. Our case comes rather under the denomination of "disposition of the owner of the tenements," as treated by Gale and Whatley, in their work on Easements, 157, 38, 39, 49, 53; 3 Kent, 436.

It is said, however, that the Land Co. did not know, nor sanction, nor approve this arrangement as to the mode of building—a supposition only maintainable on the ground that they were grossly negligent, ignorant or stupid, both as to their rights and interests. They had sold near $100,000 of these lots, reserving the ownership of some of them. They were the owners of nearly two-thirds of the remainder of the city unsold; they are proved to have had an agent on the spot, Mr. Nourse, superintending, arranging and directing. The contract as to the peculiar mode of the construction of these buildings shows that their mind was specially addressed to the subject. How, then, could they know nothing of it? Nor is the assertion of the defence made by them in that case calculated to elevate their character greatly in the moral scale. They have done and are doing what no respectable purchaser of their lots in that city, merchant or not, has ever done. They are the lords of the city—its founders!

Davis for Appellees. 388

The bill seeks to recover the half of the value of the wall standing on the land of defendant.

The relief sought is based upon an agreement asserted to have been made between Curtis and Delafield, the vendors of Simpson's lot, by which Simpson was to build his wall partly on his own land, and partly on that of C. & D. adjoining, and C. & D. covnanting to use the wall so built, and pay Simpson for its use.

The agreement set up amounts, first, to a covenant by C. & D. to permit Simpson to erect a part of his wall on the land of C. & D., and if valid at all, gave Simpson such an interest in the land as would protect him from a trespass suit.

This kind of agreement is of itself void as being against the statute of frauds. 4 Sanford, 485.

The agreement set up is void, because it seeks to establish in Simpson a greater interest in land than that conveyed by his deed and the contract of purchase.

The evidence which was offered to sustain the agreement was illegal, because it was offered to enlarge the estate of Simpson beyond the terms of the deed. A condition was attempted to be proven, which was repugnant to the written contract.

If the agreement as to the wall and its use was a valid one, and in writing, it would be a covenant running with the land, and would continue forever. Can there be such a thing as a covenant running with land, resting upon parol? If it was such a covenant, it would bind purchasers, and this cannot be where there is no writing and no record. In this case, the agreement set forth claims a right to payment for the wall from the time at which the building is erected by Day. Suppose the wall had been

389 built for an hundred years, how absurd would be an attempt to establish by parol and enforce such an agreement after so long a time.

If the agreement set up does not amount to a covenant running with the land, and as such to be performed by the assignee or purchaser, then it was the personal covenant of C. & D., and if so it is void, because it was in writing, and is barred by the statute of limitations.

The covenant on the part of Simpson to erect a house, was a part of the consideration of the sale. The contract is that he shall build on the lot sold him, and not on that of C. & D. There is no covenant by C. & D. as to any right or benefit to accrue to Simpson, as a duty to be performed by C. & D., other than such as is expressly confined to the lot sold Simpson.

Suppose that the wall, when built by Simpson, was erected under an agreement such as made it a party wall. In such case each would own the half of the wall standing on his own land, without regard as to which one paid for the work. If the whole price was paid by one, the other would be debtor to him for half the cost.

But secondly, the agreement set up, if sustained, conveys to C. & D., and their assigns, an interest in the land of Simpson so long as the wall stands. This sort of agreement is also void, for the reason before given.

Thirdly, the agreement not only protects Simpson's occupation of the land of C. & D., and affords him a defence to any action of ejectment or trespass, but it goes still further, and limits and controls the use and enjoyment by C. & D. of their land. But for the agreement, C. & D. could build on their land and use all erections upon it—*"cujus est solum ejus est usque ad coelum,"* the well known maxim of law, excludes all right to control the use of land by its owner.

390 By the agreement, C. & D. can only use their land, and all standing upon it by paying to Simpson a sum of money. This amounts to a conveyance to Simpson of an interest in land, by parol agreement, and as such is void.

WRIGHT, C. J.:

This is a cause brought up on appeal from a decree in the Circuit Court of Franklin county, dismissing the bill of complaint therein. The facts disclosed by the pleadings and the evidence are as follows:

On the 18th April, 1836, the Apalachicola Land Company, by their directors, entered into a written agreement with Samuel Simpson, since deceased, whereby they undertook to convey to Simpson lot No. 2 in the plan of the city of Apalachicola, complete and perfect titles to the said Simpson to be made, on his paying for the property the purchase money agreed on, and on condition also that Simpson should erect upon the lot in question a substantial brick building of a size, character and description particularly set forth.

On the 13th of January, 1838, a complete and perfect title was made to Simpson, he having in the meantime performed the conditions imposed by the above written agreement. Lot No. 3, adjacent to Lot No. 2, remained undisposed of by the Land Company until 1st October, 1846, when a lease was made of Lot No. 3 to Jeremiah Day and Daniel J. Day, by which lease this lot was demised for the term of seven years, at an annual rent of $300. The Days proceeded at once to erect a brick store-house on lot No. 3, using the wall of the building previously erected by Simpson as the partition wall between Simpson and themselves, which partition wall had been built six inches on each of the lots Nos. 2 and 3.

The relief sought by the bill is that the Apalachicola 391
Land Company, or the Days, whichever may be liable therefor, should be decreed to pay to the complainant the one half of the expense of the building of said partition wall.

The depositions of a number of witnesses were taken in the cause, and the substance of the evidence thus obtained is, that the buildings erected on Water street, (where lots 2 and 3 are situate,) were of uniform size, 30 feet front by 80 feet deep, and three stories high; that party walls were left in a rough, unfinished state for the adjacent owner to build against, and that such was the case with the wall between lots 2 and 3; that adjacent builders paid each one half the expense of the partition wall; that by the conditions of sale, buildings were required to be of brick; that the Land Company had an agent at Apalachicola, who was cognizant of these arrangements; that the usual mode of building was to place half of the partition wall on the adjacent lot, &c. Each of these witnesses had himself built on Water streeet.

The use intended to be made of this evidence is not very clear. If it was designed to establish an usage in the matter of building partition walls at Apalachicola, in 1836 and '7, and thereby to show that there was an implied obligation upon the Land Company, or their lessees, to contribute to the party wall erected by Simpson, it is scarcely necessary to say that no such obligation could arise—certainly not upon the Land Company, whose business was the selling of lots, not building on them; and certainly not upon the other respondents, the Days, for nearly eight years elapsed after the building of Simpson's store before the date of the lease to the Days, and there is no proof that they had any notice of such usage. Judging from the course of the argument, however, the object of this testimony would seem to be to fix upon the Land Company a participation, agency and control in these building arrangements, *out-* 392
side of their written contracts. But the evidence proves nothing of the sort, and if it did it would be met by the familiar principle, as true in equity as at law, that no parol evidence can be received to alter, vary or contradict the terms of a deed. It is upon the deeds, then—the conveyance to Simpson and the lease to the Days—that we are to consider this case.

Reduced to its simple elements, the case made for the consideration of the court is this: Simpson was owner of lot No. 2. He built on his whole front, and encroached six inches on lot No. 3. The Days afterwards leased and built on lot No. 3, and availed themselves of the partition wall which Simpson had thus supplied.

The principal authority relied on for the complainant, is the case of Campbell vs. Mesier & Dunstan, 4 John. Ch. R., 334. In that case an old party wall, standing between two houses which were in a ruinous condition, was taken down by the owner of one of the houses, to enable him to build his house anew. He gave notice of his intention to the owner of the adjoining house, and requested him to contribute to the work. It was decided by the learned Chancellor that the owner of the newly built house was entitled to contribution in the building of the wall.

By a careful comparison of the case above cited with the case at bar, it will be seen that there is but little analogy between the two. The mere existence of an old party wall between two adjoining lots, in a town or city, built equally on both lots, carries along with it the idea of joint ownership in the wall, and a common obligation to keep it in repair; for though upon the principle that the owner of the soil owns all above it, the property in the wall follows the property in the land, yet the common users of a wall adjoining lands belonging to different owners, is *prima*

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393 *facie* evidence that the wall and the land on which it stands belong to the owners of the adjoining lands in equal moities as tenants in common. See Gale and Whatley on Easements, 296. And this is in effect the principle established and enforced in the case of Campbell vs. Mesier & Dunstan. But it by no means follows from this that when the owner of a lot builds upon it a new party wall, and places one half of it upon the lot of his neighbor, he thereby acquires any right to claim contribution for the building of the wall. It is every way right to build upon his land or not to build upon it, and to permit or forbid any other person to build upon it; and if it be built upon in any way or to any extent, without the consent of the owner, such building upon it is a trespass. It is alleged, however, that the Land Company had their agent on the ground, and that he made no objection to the building of the wall in question. This makes no difference, whatever may have been the relative rights of the purchasers of lots who built in 1836 and '37, under the general consent proved in the case in regard to party walls. That understanding could not affect the Land Company, whose business, as has been already said, was the selling, not the building on, the vacant lots of the city, and who, so far as appears, gave their agent no authority in the matter. The case of Sherrod vs. Cister, reported in 4 Langford, 480, is full upon the point involved in this cause, and its reasoning commands the entire assent of this court. The principles of law and equity arising in that case, were, in all respects, identical with those which govern the case before us. There the decision of Chancellor Kent in Campbell vs. Mesier is carefully reviewed, and it is clearly shown that its reasoning has no application to a case like the present.

Cases were cited in argument to show that where the owner of the adjoining lot was applied to by the person who 394
was about to build a party wall, to contribute to the expense, and such person assented, and signified that he would pay his proportion, the same might be recovered at law. Of this there cannot be a doubt. The mutual convenience of the parties would be an adequate consideration for such a provision; but then the promise must be express. Upon the whole, it seems very clear that the Apalachicola Land Company was at no time bound to contribute to the expense of erecting the party wall built by Simpson, and it follows with stronger reason that the other respondents are not responsible. The lease to them covered the whole of lot No. 3, and upon the principle of law that the owner of the soil is the owner of everything built upon it, carried with it also the one half of the wall.

Other points were made in the record and in the argument, and numerous authorities were cited to sustain them. It is sufficient to say, however, that the whole case is against the complainant, on the merits.

Let the decree below be affirmed.

DECISIONS

OF THE

Supreme Court of Florida,

AT

JANUARY TERM, 1854.

HELD AT TALLAHASSEE.

DANIEL LADD, APPELLANT, VS. THOMAS B. CHAIRES AND JAMES L. TOMPKINS, APPELLEE.

Misrepresentation in a material point, innocently made, will vitiate a contract, and be ground for setting it aside, or giving compensation to the extent of the mistake.

This was an appeal from a decree of the Circuit Court of the Middle Circuit for Leon county, Hon. J. Wayles Baker presiding.

The appellees, who were complainants below, filed their bill, alleging that they applied to the appellant to purchase three eighths of land in Wakulla county; that the appellant agreed to sell said land to them, but stated that with these three eighths they must also purchase another eighth immediately adjoining, the title to which he held; that appellees objected to the taking of this additional eighth, but appellant representing that said eighth was attached
396 to the other eighths by a title that made it necessary to sell them altogether, they were finally induced to include this additional eighth in the bargain. They further allege that this additional eighth was not desired by them for the purpose that moved them to the purchase, and that but for the representations of said appellant, they would not have included it in their purchase; that appellant, after entering into the contract for the sale of said land, and after having given bond for titles to the same, in order to obtain a title to said additional eighth, entered the same at the U. S. Land office at Tallahassee; that as soon as it was ascertained by appellees that appellant had no title to said additional eighth, except that acquired as aforesaid from the United States, they remonstrated with him upon the manner in which he had induced them, against their will and wishes, to include said additional eighth in their purchases, and at the same time proposed either that they should not be required to take said tract at all, or that said appellant should, in good faith, let them have it at the price it cost him, both of which propositions he declined. They charge that, under the facts and circumstances, it would be a fraud upon them to require them to pay the full amount agreed upon, and that it would be aiding appellant, against good consecience and fair dealing, to take advantage of his own wrong.

The bill further alleges that in the bond for title given by said appellant, there is included a small tract of land on which was a valuable mill seat, but to which appellant could make no title, the same being the property of other parties; that as it was not intended to include this tract in the purchase, appellees procured an endorsement to be made on said bond, after its delivery, excluding said tract from its operation; but they claim that it is not binding in law upon them. Nevertheless, they are not disposed to

397 avail themselves of this mistake, and are willing to release appellant from so much of the bond as pertains to said parcel of land, but insist that they cannot be required to do so save in a Court of Equity, and they submit that before such relief would be granted, the court would require appellant to do equity, by allowing an abatement equal to the difference between the contract price of said additional eighth, and the amount paid for it at the U. S. Land Office. The bill concludes with a prayer that the contract be reformed so as to require the appellant to execute titles to all said lands, excepting the mill seat parcel, upon his being paid the amount of the purchase money, less the difference between the contract price of said additional eighth and the amount paid for it by appellant at the U. S. Land Office.

The appellant, in his answer, states that he did represent that he was authorized to sell all said lands, for the benefit of J. and N. Hamlin, who had held the title, and were largely indebted to him, and desired him to sell the lands for their benefit. To this end, they had made a deed to appellant, conveying said lands to him, with a view to enable him to make sale of them; that in the negotiations for their sale, he was governed by a map in his possession, prepared by N. Hamlin for his private use, which represented all the lands included in the aforesaid bond for titles as the property of J. and N. Hamlin; that N. Hamlin was and is a man remarkable for accuracy in all business transactions, and especially in matters of this nature, inasmuch as he was a practical Surveyor, and well acquainted with all the country in and about and including the lands referred to; that appellant was ignorant at the time that the title to the additional eighth was in the United States, and acted in good faith in all his negotiations; that some time after the execution of his bond for titles, he
398 ascertained to his surprise that the title to this additional eighth was in the United States, and that therefore, to enable him to convey the same, he entered it at the U. S. Land Office.

The appellant, in his answer, further alleged that two eighths of the land were intersected by the St. Mark's River, and were deemed valuable in consequence mainly of the water power and privilege which appertained to the same; that the object and design of the appellees was, as commonly understood, to erect a factory upon part of these lands; that these lands had been held by the Hamlins at ten dollars per acre, and only through the agency of appellant could appellees have effected a purchase on the favorable terms agreed on; that he refused to sell the two eighths upon the river without including the eighth not so intersected, because, in point of fact, the outside eighths were worth nothing, except in connection with the others; that appellees did propose to exclude one of the eighths from the contract, and pay him for the remainder, and that he refused to accede to such a proposition because he was ready to comply with his contract in good faith, and because the eighth objected to was not worth an equal proportion of the purchase money, and because appellant could, at the time of the sale, have sold the lands at the same price to other persons, and because, also, the accident with reference to the title to the additional eighth resulted in no damage to appellees, and furnished no ground for any complaint on their part.

The principal facts stated in the bill and answer were admitted to be true by the parties, and the Circuit Court pronounced a decree in conformity to the prayer of the bill, from which appellant took an appeal to this court.

James T. Archer for Appellant.

Mariano D. Papy for Appellees. 399

BALTZELL, C. J., delivered the opinion of the court.

The contest in this case arises from an alleged misrepresentation in the sale of a tract of land Complainants, Tompkins and Chaires, assert that they made application to Ladd for the purchase of a tract of land containing 240 acres, which he expressed a willingness to sell, but insisted upon their taking with it a tract of eighty acres adjoining, which he said he owned. This they objected to, alleging that it is not suited to the objects they had in view —the erection of a mill and factory. Ladd insisted on the sale of the entire tract, and refused to sell unless the whole was taken; that they purchased, under these circumstances, and afterwards finding that he was not the owner, as he had represented, of this 80 acre tract, they applied for an abatement of the price on the last note remaining unpaid, and he refusing, their application is now to a Court of Equity for relief. The court below sustained the bill, and decreed in their favor, from which Ladd has appealed to this court.

It is distinctly admitted that Ladd represented himself authorized to sell the contested eighth, being described by a map in his possession, prepared by a former proprietor, whose accuracy he had reason to confide in, and that it did not belong to him. After discovering this fact, he bought the land, and insists on their taking it agreeably to the bargain. He resists their claim for release on the ground of their having sustained no damage or injury, and that the subject in contest was not material or essential to the agreement. We do not think the latter objection comes with propriety from a party who made the sale of this tract the turning point of the bargain, in express terms—complainants being told he would not sell any unless the entire tract was sold. It was to buy this with the other, or buy none. 400
If not material, why insist upon this condition to the sale? The only motive we can conceive, was to prevent the loss of the 80 acre tract, which might be the case if the other part was sold without it. We can regard the sale of this tract as immaterial and indifferent only on the supposition the defendant could have got as much without its sale as with it, which is not very likely, considering that the whole tract was sold at five dollars per acre. The price of the 240 acre tract, upon that supposition, would have been $6.66 per acre, and the price of the former proprietor, who held it at $10 per acre, would have been $13.33 per acre for the 240 acres, which we must presume he would have asked, if not the owner of the 80 acre tract. So that we think the addition of this tract must have been regarded as essential and material by the parties in framing their contract. A mistake, then, having been made, of a material character, in the formation of the contract, the question arises as to its effect in point of law.

"Where there is an error in the thing for which an individual bargains, by the general rules of contracting the contract is null, as in such cases the parties are not to be supposed to have given their assent." 1 Fonb. Eq., 114; Allen vs. Hammond, 11 Peters, 72.

"Contracts made in mutual error, under circumstances material to their character and consequences, seem, on general principles, invalid." 1 Story Eq., 154.

The same principle will apply to all other cases where the parties mutually bargain for and upon the supposition of an existing right. Ibid 164, § 143; Hitchcock vs. Giddings, 4 Price, 135.

The case in 11 Peter's Supreme Court reports illustrates the rule. There the parties bargained for the collection of a claim vs. the Portuguese government, and under the ex-

401 pectation that very great expense, trouble and delay would attend the business, a very extraordinary compensation was agreed upon. It turned out that the claim was allowed eight days before the agreement, though unknown to the parties. The court say: "The contract was entered into through the mistake of both parties, it imposes great hardship and injustice on the appellee, and is without consideration." Nevertheless they allowed him compensation for services rendered. Mr. Webster, one of the counsel, puts the doctrine, with great force, in this language: "Where a fact of leading importance to parties entering into a contract was supposed to exist, and did not exist, the contract formed in the belief that it was in existence, should be set aside." P. 68.

The rule appliles to cases of purchases where the parties have been innocently misled under a mutual mistake as to the extent of the thing sold. 1 Story, 166, § 144.

In the present case, Ladd no doubt was under the honest and sincere conviction that he was the owner of the eighty acres, and acting on that belief, it was not improper for him to treat it as his, by making it the subject of sale. With a knowledge of the fact that he was not owner, it would have been improper for him to represent himself as such, and a contract so made would be regarded as fraudulent. Having induced complainants to bargain with him, under an impression discovered afterwards to be false, can he hope to hold them to the agreement? We think not. If no agreement as to this tract was originally made, as we have seen by the authorities was clearly the case, it was not for Ladd, by a change of his position, to give validity to it. This would be to make a new bargain; to allow him to contract for them. But this cannot be. The error was his, and his must be the loss, according to every principle of right and propriety. We have alluded to ca-
402 ses in which the contract was rescinded on account of the mistake. This is not asked by complainants. Indeed, it is questionable whether they would be entitled to it, as they got what was the main object of their contract—the site on the river, and the land they bargained for and desired to buy.

The party may be relieved on the principles of compensation, which is thus explained: "Where there are no *indicia* of fraud, and the misdescription goes only to part of the estate, and is of such nature as not to prejudice the full enjoyment of the residue, or the objects the purchaser, had especially in view in making the purchase, then the court will enforce the contract, with compensation." Atkinson on Titles, 100.

In our view the agreement must be regarded as if the eighty acre tract had not formed part of the sale, and the 240 acres had been sold without it. This would have been the case if there had been no mistake as to the ownership.

An abatement of the price should then be made to the extent this tract entered into the consideration agreed to be paid. This is the damage complainants would sustain if compelled to pay for the whole tract. Although the rate was five dollars per acre, we by no means conceive that this should be the rate of deduction. The tract containing the site was the one of value, and the eighty acre tract comparatively of much less value. So far as its addition extended the price that would have been given for the other tract, if it can be ascertained, the complainants are entitled to have a credit for on their note. We do not perceive in the record the materials for ascertaining it. Possibly it may be done through means of a Master, to whom the matter may be referred by the court below, with power to call for the estimate and papers, and examine the parties and witnesses.

The court below, concurring in disaffirming the sale of 403 the contested eighth, allowed the difference between $1.25, the price paid for it per acre, and $5, with directions that title should be made to them for the entire tract. We are of opinion that complainants are under no obligation to take it, and should not be compelled to do so by decree of the court.

Complainants insisted that the contract as to this eighth was illegal and invalid, on account of champerty. We think they are not entitled to raise this question; for giving judgment at law by consent, they reserved their equitable rights. If this defence be available, it is legal, and not equitable.

The decree of the court below will be affirmed so far as it declares the contract invalid as to the eighty acres, but will be reversed and set aside so far as it directs title to be made thereto, and fixed the damage at the sum of $300.

And the said court will proceed to appoint a Master, whose duty it shall be to proceed, in conformity with this opinion, to ascertain, as near as may be, the sum or amount for which a deduction should be made from the contract price of the land sold in consequence of the addition of the 80 acres, with power to call for estimates and papers, and examine the parties and witnesses, and for such other proceedings as may not be inconsistent with this opinion, and the rules and principles of equity and justice

DuPONT, J., delivered the following dissenting opinion:

I concur with a majority of the court in overruling the decision in this cause pronounced by the Chancellor in the court below, but dissent from so much of the order as directs the case to be sent back for further proceedings.

It is admitted by the defendant below that he did make a misrepresentation in regard to his ownership of the land in controversy, at the time of and during the treaty for the 404 sale to the complainants; but he expressly states in his answer that this misrepresentation was the result of an innocent mistake, and there is no charge or pretence in the bill that he *meditated* any fraud in the transaction. "Mistake" is one of the well defined and admitted grounds of Equity jurisdiction, but it is not every mistake of fact that will induce the equitable interference of the court. The doctrine upon this subject is so lucidly stated by Story, in his admirable Treatise on Equity Jurisprudence, that it seems impossible to mistake it. He says: "The rule as to ignorance or mistake of facts entitling the party to relief, has this important qualification, that *the fact must be material to the act or contract;* that is, that it must be essential to its character, and an efficient cause of its concoction. For though there may be an accidental ignorance or mistake of a fact, yet if the act or contract is not *materially* affected by it, the party claiming relief will be denied it." Story Eq. Ju., §141, 5.

Applying the rule to the facts in this case, the question arises, what was the fact in reference to which the mistake occurred? The allegation and admission is that Ladd represented himself to be the owner of the eighth of land in controversy, when in fact and in truth the title was in the government. Was the mere fact as to *who held the title* at the time of the treaty, a matter "material" to or the "efficient cause" of the contract? It would seem not, for the purchasers took good care to provide against a *failure of title,* by taking the covenant of the vendor to perfect the same, and he is now able and ready to comply with that covenant. Wherein, then, consists the *"materiality"* of the mistake? I am at a loss to perceive It certainly did not affect the value of the purchase, for it is strongly intimated in the bill, if not expressed in so ma-

405 ny words, that the particular eighth of land in controversy was wholly valueless. Now, upon the subject of *"materiality,"* I take the rule of equity to be this: that no misrepresentation or mistake of fact will be deemed *"material"* which does not affect the *value* of the thing contracted for. The representation that he had the title to this particular eighth, was doubtless a potent argument in the mouth of Ladd why he would not consent to separate it from the other three; but as a matter of argument merely, I do not think it comes up to the rule. At most, it can only be received as *"damnum absque injuria,"* and equity never interposes except to remedy or prevent injury. Story Eq. Jur., §151; 2 Bibb, 474, Crittenden vs. Craig.

But the rule of equity proceeds further, and sometimes refuses its interference even where the mistake is of a *material* fact. This occurs when there has been a strict observance of perfect good faith between the parties, and the mistake complained of is the mistake of all. Story Eq. Ju., §147; Fonb. Eq., Chap. 2, §7, (note v.)

"Where the mistake is not the occasion of the promise, the act is valid, there being nothing wanting of the true assent on all sides." 2 Pow. on Con., 263.

I can discover nothing in the facts of this case which calls for the interference of a Court of Equity. A vendor, supposing himself to be the owner of a tract of land, contracts to sell the same, and executes a covenant to perfect the title. He afterwards discovers that he was mistaken as to his ownership, and that the title is in fact in another. He forthwith purchases the title, and thus puts himself in a position to comply with his covenant, and it is now claimed that instead of thus acting, he ought to have communicated the fact to the vendees, and left it to their option to have rescinded the contract. I do not think he was bound by any principle of equity or good morals voluntarily to
406 place himself within the power and consequently at the mercy of the vendees, who held his covenant for title, and might, upon a demand or refusal, have proceeded against him for damages, in a court of law, or for a specific performance in a Court of Equity. In cases where there appears no meditated fraud, equity is as observant of the mutuality of *rights* in the enforcement of contracts, as it is of the mutuality of *assent* in their concoction, and a very simple *test* of the principle involved in this controversy is this: Might the vendor have been compelled to respond in damages for a non-compliance with his covenant for title? Evidently he might. If, then, he might have been thus compelled, I am at a loss to discover the principle upon which it can be ruled to be *iniquitous* in him to place himself in a position to make good his legal *obligation*. The vendees are now tendered all they contracted for—the title—and with that I think they ought to be satisfied.

I am the more decided in my dissent in this cause because of the apprehension that by making the Courts of Equity Jurisdiction too easily accessible, parties may be induced to abate that vigilance and caution in the concoction of their contracts, which affords the surest guarantee against litigation. Whilst Courts of Equity should be ever open to rebuke *fraud* in all its aspects, they should nevertheless be careful not to encourage *negligence* by a too ready interference in the business transactions of individuals. Pothier has expounded this subject with his usual force and sterling sense, and given to us a well defined line of demarkation. "As a matter of conscience," says he, "any deviation from the most exact and scrupulous sincerity, is repugnant to the good faith that ought to prevail in contracts. But in civil tribunals, a person cannot be allowed to complain of trifling deviations from good faith in the party with

whom he has contracted. Nothing but what is plainly in- 407
jurious to good faith ought to be there considered as a fraud sufficient to impeach a contract." With how much greater force is this doctrine applicable to a mere *mistake of fact*, unaccompanied by any pretence of fraud. I am of opinion that the facts of this case do not afford sufficient ground for the interference of equity, and therefore think that the bill ought to have been dismissed.

JOSEPH DAWKINS, PLAINTIFF IN ERROR, VS. CURTIS CARROLL, DEFENDANT IN ERROR.

An Appeal or Writ of Error does not lie to an order granting a new trial in a common law case.

This was a Writ of Error, under the act of 1852-'3, to an order of the Circuit Court of Leon county, granting a new trial to the defendant in error. The Writ of Error was issued, and the cause taken to the Supreme Court, before it was finally decided in the court below upon the new trial granted.

Archer and *Papy* for Plaintiff in Error.

D. S. Walker for Defendant in Error.

BALTZELL, C. J., delivered the opinion of the court.

It was not the design of the Legislature, as we conceive, in the passage of the act of 1852-'3, "in addition to and amendatory of the several acts concerning Writs of Error and Appeals to the Supreme Court," to allow a Writ of Error to an order granting a new trial. That act provides "that orders and judgments wherein the Circuit Court shall 408
allow and grant, or shall refuse to allow and grant any motion for a new trial, or any motion to amend the pleadings, or to file new and additional pleadings, or to amend the record of any cause during the term of the court at which it was determined, or shall refuse to allow and grant a motion for the continuance of the cause, *shall and may be assigned for matter and cause of error*, upon any writ of error sued out, or appeal taken to the Supreme Court."

By the original act, an appeal or Writ of Error lies only to a final judgment, and it is upon the trial of a case so brought up that the grant or refusal of any or all these motions may with propriety be determined. To allow the appeal during the progress of the case, as the pleadings are amended, or a motion for a new trial, or a continuance is granted or refused, would be to protract and delay a case, at the caprice of either party, to the almost entire defeat of justice. We are not aware of any such course in any of the States where these orders are the subject of revision; indeed, are confident that the opposite practice universally prevails.

In the succeeding section of the same act, we find a provision *"that appeals may be taken and prosecuted from an interlocutory order*, decision, judgment, or decree of the Circuit Court, sitting as Courts of Equity." Why this change of language, unless to intimate a different purpose on the part of the Legislature in the two classes of cases?

The Writ of Error will be dismissed, with costs.

409 THE UNION BANK OF FLORIDA AND CHARLES MORRISON, APPELLANTS, VS. RICHARD K. CALL, APPELLEE.

1. Instructions not excepted to at the trial, nor referred to nor introduced in the bill of exceptions, will not be noticed by the Supreme Court.

2. A deed signed by the President, and under the seal of a corporation, *prima facie* is valid, and the burthen of showing that it was done fraudulently, or without authority, devolves on the party contesting it.

3. The admission of a deed in evidence, after its rejection by the Judge, is not error, unless prejudice or injury is shown.

4. Books of account of the cashier of a bank not evidence as to strangers.

5. It is not proper to ask a witness his designs in making a deed, or his construction of it.

6. A release under seal is good without a full consideration.

7. A deed by a President of the Bank should conform to the order of the Board of Directors, but it is not, on account of a deviation, void, especially after a lapse of ten years, and the bank has received and retained money under it: nor does it lie with a stranger to raise the objection.

8. It is not error to refuse an indefinite instruction.

9. Notice to an agent is notice to the principal.

Appeal from Leon Circuit Court.

This was a motion in the nature of an *audita querula* to quash an execution issued on a judgment in favor of the Union Bank, against R. K. Call, on the ground of a release subsequent to the rendition of the judgment. Morrison, who claimed to hold this judgment by assignment from the bank, appeared and opposed the motion.

On the twenty-fifth day of February, 1842, the Union Bank recovered against Richard K. Call a judgment for $4080 40.

The notes upon which this judgment was obtained, were secured by a mortgage, executed by R. K. Call and George K. Walker, dated 14th April, 1840, and also by a mort-
410 gage executed by R. K. Call, President of the Tallahassee Railroad Company, dated 20th April, 1842.

On the fourth day of April, 1843, an indenture was entered into between the Union Bank of Florida, of the first part, Daniel Meinertzhagan, (as partner of the commercial House of Frederick, Huth & Co., in London,) in behalf of himself and said house, of the second part, and Richard K. Call and George K. Walker, of the third part, by which said bank assigned to Meinertzhagan sundry notes of Call and Walker, amounting to $88,292.24, for a full and valuable consideration, and also assigned to said Meinertzhagan the mortgages executed by Call and Walker on the 14th April, 1840, and by Call, as President of the Tallahassee Railroad Company, on the 20th April, 1842. By this indenture, the bank, for the purpose of making the security of Meinertzhagan full and complete for the payment of the notes so assigned, agreed to release and did thereby release all lien, whether created by judgment, mortgage, or otherwise, on the property embraced in the said mortgages so assigned, and every part thereof, to secure any other liability whatever of Call and Walker, other than the liabilities so therein transferred to Meinertzhagan. And it was further agreed that the bank would look to the other parties on the notes described in the mortgages aforesaid, whether they have been prosecuted to judgment or not, for which Call and Walker are responsible as endorsers or sureties, in any manner, and in case it became necessary, on failure to collect said notes from the principal parties thereto, to resort to the securities thereon, the bank agreed to receipt to said Call and Walker for their proportion of each of said notes, according to the number of endorsers respectively, &c. Under this deed, Call claimed to be released from the judgment in question.

Union Bank of Florida and Morrison vs. Call—Statement of Case.

On the 22nd day of February, 1843, the Union Bank of 411
Florida, by an instrument signed by John G. Gamble, President, assigned to Charles Morrison the notes upon which this judgment was obtained. By this instrument, it appears that R. K. Call, with several other parties, were endorsers of these notes, and that judgment had been recovered against them respectively by the bank.

Call, by his attorneys, moved the court to exclude this deed of assignment from the consideration of the jury, because there was no proof to show that John G. Gamble was authorized to execute the same, and to affix thereto the seal of the bank, by any resolution of the Board of Directors, and the court thereupon refused to allow said deed to go in evidence, without such proof, to which Morrison, by his attorney, excepted. Morrison, by his attorney, thereupon renewed his offer to introduce said deed in evidence, in connection with certain testimony which it was expected would be given in evidence, to show that said deed was executed by authority of the Board of Directors, or that the said board ratified the same subsequent to its execution; whereupon the said deed was then permitted by the court to be read to the jury, subject to its charge as to its legal effects as evidence.

Morrison then offered in evidence the following entries in the minute book of the proceedings of the Board of Directors of said Union Bank, for the purpose of proving the authority to Gamble, the President, to execute the assignment to Morrison, or its subsequent ratification:

Extract from minutes of Stockholders of Union Bank of Florida, in General Meeting, in the year 1843, commencing first Monday in February, (6th,) and continued by adjournment.

THURSDAY, February 9th. 412

The General meeting convened on Thursday, the 9th February, pursuant to adjournment, and the Chairman having called the meeting to order, the minutes of the General Meeting from its commencement, were read and adopted.

"The resolution reported by the committee again coming up, it was adopted, after being amended so as to read as follows:

Resolved, That the directors of the bank be authorized and instructed to transfer and assign any of the assets of the bank, other than the stock notes, in payment of any of its endorsed liabilities: *Provided,* That any of the holders of any such liabilities, shall, upon receiving such assets, for any part of their debt, surrender an equivalent amount of Territorial bonds, which they may hold as collateral security.

"The meeting after deliberating on other matters, adjourned over to the next day, the 10th, at the conclusion of the session on which day, the minutes read as follows:

"The General meeting having disposed of all the business before it, on motion, adjourned to meet again on the 1st day of March, next.

(Signed) JOHN C. MCGEHEE,
Chairman.

(Signed) C. F. MERCER,
Secretary.

Extract from the minutes of the Board of Directors of the Union Bank of Florida, at a meeting held at the banking house, in Tallahassee, on the 1st of January, 1843.

"The following resolution was moved and carried, viz:

"*Resolved,* That the President, C. H. DuPont, R. W. Williams and R. H. Bradford be appointed a committee

(any two of whom to act,) to confer with the partners of the House of Huth & Co., of London, on the subject of their claim upon the Union Bank of Florida, and in their absence, with the agent of the house in Tallahassee, to ascertain and report upon the sum due on the 1st of January, 1843, and to arrange some mode of paying the interest now due, and providing for the payment of the principal and interest of said claim hereafter, and that the same committee have power in like manner to confer with any representative of the house of Morrison, Sons & Co., in relation to their claims upon the Union Bank.

"The Board then adjourned.

(Signed,) "C. F. MERCER."

Wednesday, 22d February, 1843, the President submitted the following resolution to the Board, which, after they had unanimously stricken therefrom the proviso requiring the guarantee of the Cashier, was, by a majority, adopted, viz:

"Resolved, That on the certificate of the Cashier of the Union Bank of Florida, that the endorsed sterling bonds and the hypothecated Territorial bonds, held by the house of Morrison, Sons & Co., of London, are committed to the care of their agent, Samuel Jaudon, of the city of New York, the order of Charles Morrison, representative of that house, now in the city of Tallahassee, upon Samuel Jaudon, for the delivery of said bonds, or any part thereof, to John Palmer, President of the Merchant's Bank of New York, for the use and benefit of the Union Bank of Florida, shall be taken from the representatives of the house of Morrison, Sons & Co., as equivalent to the delivery of said bonds, or such part thereof as the said order may comprehend, to this bank: *Provided,* the Cashier of this bank shall guarantee the delivery of the bonds for which such
414 order may be given to the said John J. Palmer, on the presentation of the order to S. Jaudon, Agent as aforesaid of the house of Morrison, Sons & Co."

Extract from the minutes of Board of Directors:

"On Thursday, 11th January, 1844, we burned the following sterling bonds, which were received from James Morrison & Sons, viz:

"28 bonds of £500, Nos. 158 to 185 inclusive, dated 1st October, 1841, payable 1st July, 1845, endorsed by John G. Gamble, D. C. Wilson, William P. Craig, W. Wyatt, T. P. Chaires, C. H. DuPont, A. M. Gatlin, B. W. Gause, H. W. Braden, Sam. Parkhill, B. F. Whitner, C. Rouse, G. T. Ward, J. Parkhill, F. Eppes, M. Walker and C. F. Mercer.

(Signed)

ROBT. W. WILLIAMS.
JOHN G. GAMBLE."

"WEDNESDAY, 21st February, 1844.

"The President read and signed the minutes of the last meteing of the Board. He then exhibited to the Board the receipt of R. K. Call, Governor of the Territory of Florida, for seventy-one bonds of the Territory, which the President of the bank had delivered to him, for the purpose of being cancelled, each bond being for one thousand dollars, dated 1st of January, 1838, signed R. K. Call, Governor, and countersigned T. H. Austin, Treasurer, of which bonds there were of

"Letter A, No. 1497 to 1500, both inclusive, 4 bonds 1st January, 1864, 34 bonds.

"Letter B, Nos. 1936 to 1969, both inclusive, payable payable 1st January, 1862.

"Letter C, No. 2468 to 2500, both inclusive, payable 1st January, 1866, 33 bonds—Bonds 71."

NOTE.—These bonds are entered in register, received 415
from Charles Morrison.

"10th July, 1844, the Board also burned the coupons of interest upon the following Territorial bonds, which bonds have been received by the bank from various parties, viz: Nos. 2, 11, 22, 246, 247, 287, 288, 289, 402, 414, 434, 435, 666, 667, 689, 705, 711, 712, 713, 720, 721, 722, 723, 731, 732, 733, 861, 1497, 1498, 1499, 1500, 1827 to 1862, inclusive, 1936 to 1969, *both inclusive,* 2359 to 2395, inclusive, 2468 to 2500, inclusive, 2855 to 2865, inclusive, 2889 to 2913, inclusive.

In the book which contains a register of the bonds received from the Territory, will be found minutes of what relates to the reception, cancelling, &c., of said bonds, in full detail.'"

Morrison then offered to read in evidence, for the same purpose, certain entries in the book of accounts of said bank, accompanied by the testimony of a witness, to prove that said books of account were at all times subject to the inspection of the Board of Directors, and that an examination of said books had been made by a committee of the said Board, and that said book and its entries had never been disavowed by said Board; to the introduction of which, said Call, by his attorney, objected, and the court sustaining said objection, said Morrison, by his attorney, excepted.

Morrison then offered the deposition of Charles F. Mercer, who testified that as attorney of Charles Morrison, he received an assignment, from the Union Bank to said Morrison, of certain notes and judgments, which was made to satisfy a debt due to said Morrison, and that said assignment included two notes of C. E. Bartlett, endorsed by Call. These are the notes upon which the judgment in question was rendered. That he accepted the trust of Morrison with 416
the intention of performing all its obligations in good faith, and that he believes he gave all the notices which his duty as such attorney required of him, and doubts not that R. K. Call knew at the time, or shortly after, of the said assignment to Charles Morrison. He gave written notice of said assignment to George K. Walker. He was appointed attorney of Charles Morrison in February, 1843, at the date of the assignment to him as aforesaid. He was appointed attorney of Frederick Huth & Co., in London, sometime in October, 1842, and regarded himself as such until he instituted a suit against them. On his return to Tallahassee, he immediately entered into negotiations with G. K. Walker, acting for himself and R. K. Call, for the payment of a debt due to Huth & Co., from the bank. Pending this negotiation, Meinertzhagan, a partner of the house of Huth & Co., arrived in New York, and instructed him, witness, to await his intended journey to Tallahassee, and to take no steps in behalf of the house prior to his arrival, so that, although appointed attorney, his functions ceased, in the opinion of Meinertzhagan, and he afterwards so insisted.

George K. Walker, a witness on the part of Morrison, testified that he had, for a long time previous to the transaction spoken of, acted as the general agent of R. K. Call; that as such agent, he transacted almost all kinds of business for account of said Call; that he had less to do with the real estate of Call than his other interests; that he had once received a power of attorney, thinks it was in 1838 or 1840, which was produced, and read as follows:

Power of Attorney.

Know all men by these presents that I, R. K. Call, of the County of Leon and Territory of Florida, hath constituted and appointed George K. Walker, of the County and Ter-

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417 ritory aforesaid, my true and lawful attorney, for me and in my name to transact for me all and every kind of business whatever; to purchase or sell for me, in my name, all kinds of property, real and personal; to sign my name to any note, bond, draft, deed, or any other instrument, and to bind me thereby in as full and ample a manner as I myself could do, were I personally present and signing the same.

I hereby authorize my said attorney to fix my seal to all and every kind of instrument which he may think in any wise necessary or proper.

Hereby ratifying and confirming whatever my said attorney may do touching the premises.

R. K. CALL.

Witness further stated that he acted as the agent of Call and for himself in conducting the negotiation with the Union Bank and Meinertzhagan, which resulted in the execution of the deed signed by himself, Call and Meinertzhagan, in April, 1843; that he, witness, from time to time during the progress of the negotiation, communicated with call in relation thereto, and advised and consulted with him as to the terms thereof, and that Call took no active part in the making of said arrangement, but consented to the terms of said deed, and signed it without objection; that prior to the time at which such negotiation had commenced, he, the witness, had received notice from Charles F. Mercer, as agent of Charles Morrison, that the notes which are the foundation of the judgment in question, and on which he, witness, and Call were endorsers, together with the judgment thereon, had been assigned to said Morrison.

Witness further stated that at the time of said negotiation with Meinertzhagan, he knew of said assignment to
418 Morrison, but does not know that the fact was made known to Call at that time.

Morrison then proposed to prove further by said Walker that at the time of the execution of said deed with Meinertzhagan, and during the negotiation referred to, he, the said Walker, did not contract with the said Union Bank for a release of the judgment against him, said witness, and said Call, on the notes referred to; to which evidence so proposed to be given, Call, by his attorney, objected, and the objection being sustained, an exception was taken.

Call offered in evidence certain correspondence between Huth & Co. and C. F. Mercer, on the appointment of the latter as the attorney of the former, in October, 1842, by which it was agreed that in consideration of the allowances to said Mercer, he was to give up the whole of his time, as far as it might be necessary, to the prosecution of the claim of Huth & Co., and not to take charge of any other business which could in any way interfere with their's.

The following entries from the minute book of the proceedings of the Board of Directors of the Union Bank, were read in evidence by said Call:

"At a meeting of the Board of Directors of the Union Bank of Florida, on Wednesday, the 5th of April, 1843, present, John G. Gamble, President, R. W. Williams, R. Hayward, H. W. Braden, John G. Anderson, D. C. Wilson, Esqrs., Directors.

"The President, as one of the committee appointed last week to confer with Messrs. Meinertzhagan and Huth, reported the following memoranda of what had been agreed upon by the committee:

"MEM.—The committee and G. K. Walker have agreed 'That upon Call and Walker, paying to the bank, in its endorsed Sterling Bonds, the sum of $88,292 24, the amount due for principal and interest upon nine notes described below, and upon payment by them, (in bonds of the 419
Territory of Florida, which have been sold by the bank, or by the payment in any other of its liabilities,) of five notes of Samuel Reid, amounting $8,711 70, and one note of R. K. West, amounting $1491 16, with the interest due upon said notes, upon which said notes said Call and Walker are endorsers, the bank agrees to look to other parties, (payers and endorsers,) upon other notes endorsed by said Call and Walker, now belonging to the bank, described in the mortgages which were executed by the Tallahassee Railroad Company and by said Call and Walker, on the 20th of April, 1842, for payment of said notes; and in the event of the failure to collect the amount of said notes or obligations from the original parties thereto, and recourse to the endorsers and securities thereon becomes necessary, the bank will receipt to said Call and Walker for their proportion of each of said notes or obligations, said Call and Walker covenanting and agreeing to assign and transfer to the bank all the securities under their control, given for the security of the payment of said endorsed notes, and at all times to give their aid in the collection of said endorsenotes.

"The notes referred to above are:

"Call and Walker, due	1st January,	1843,	$12,688	00
"	"	"	1844, 414	00
"	"	"	" 26,571	45
"	"	"	" 3,388	50
"	"	"	" 21,829	21
"	"	"	1846, 3,132	39
"	"	"	" 20,323	74
Call, Walker and others,	15th Oct'r.,	1839,	6,000	00
R. K. Call, President,	1st April,	1841,	1,693	00

(Signed) JOHN G. GAMBLE, *President.*
G. K. WALKER.

At the close of meeting signed, 420
"JOHN G. GAMBLE,
"President."

The foregoing is correctly extracted from the book of minutes of the Board of Directors of the Union Bank of Florida, by C. G. ENGLISH,
Solicitor.

Call further produced Thomas Brown as a witness, who stated that he, witness, was a party endorser on the notes of C. E. Bartlett, on which the said Call and Walker were also endorsers, and on which the judgment in question was rendered against said Call and Walker, and that he was not notified by Charles Fenton Mercer, or by any other person, of the assignment of said notes to said Morrison, by the Union Bank of Florida, by the deed of , 1843.

No other testimony being introduced, the said Morrison, by his attorney, moved the court to instruct the jury as follows:

1. That the release given in evidence is upon its face not binding on the corporations, and unless there is proof that some other security was given than that stated in the deed, it does not amount to a release to Call and Walker of the debts covenanted in the deed to be released, because the directors could not lawfully release the debts due the bank, unless the debtor gave some consideration for the release.

2. If the deed of release was not made in conformity with the resolution of the Board of Directors, and not upon the consideration required in the resolution to be paid by Call and Walker, then such release is not binding on the bank, without evidence to show that the Directors consented to the deed of release in the form in which it was made.

421 3. A resolution framed by the Board of Directors, authorizing the release of Call and Walker from notes and judgments, which resolution contained the words "now belonging to the bank," does not authorize the execution by the president of the bank, under the seal of said corporation, of a release, without any exception, such as the resolutions contain. The words, "now belonging to the bank," if found in such resolution, are to be considered as being intended by the Directors to have the legal effect to exclude from the release all notes and judgments which had been assigned by the bank, if any such had been assigned.

4. If the jury find that Mercer has sworn, on his cross-examination, that he never did agree to any release of the judgment against Call, such evidence is entitled to more credit than any inference drawn from any agreement made by Mercer with Huth & Co. The positive testimony of Mercer that he did not assent to any release of the judgment, is entitled to more weight than inferences based upon promises of Mercer to Huth & Co., to do no business for any other person.

5. The books of account of the corporation, with proof that they are such books, and without evidence to show that the entries were improperly made, are evidence to prove the acts by the entries in such books stated to have been done. Such entries, when shown and proved to have been made before the date of the deed of release to Call and Walker, are competent testimony for the jury to consider in determining whether the assignment given in evidence, was made by authority of the directors.

6. If the jury find from the evidence that Walker acted as the agent of Call in making the negotiation and arranging the terms, which are evidenced by the deed of the 14th of April, 1843, signed by said Call and Walker, and others,
422 and given in evidence, and the jury find from the evidence that Walker had knowledge at the time he made such negotiation, and whilst he so acted as agent of Call in respect thereto, that the judgment in question had been assigned to Morrison, such proof of knowledge on the part of Walker, is evidence of knowledge by Call of the assignment aforesaid.

Which instructions the court refused to give to the jury, as prayed for, and said Morrison by his attorney, excepted.

The jury having returned a verdict in favor of Call, judgment was rendered thereon, from which Morrison appealed.

T. Randall for Appellants.

J. T. Archer and *M. A. Long* for Appellee.

BALTZELL, C. J., delivered the opinion of the court.

On the 25th day of February, 1852, the Union Bank recovered judgment against Richard K. Call for the sum of $4080 40, on which an execution issued the 29th day of February, 1851. On the day of , Call filed his *audita querela*, claiming that the judgment was released and the execution discharged, and praying that it might be so declared.

The bank disclaimed any interest in the judgment and execution, having, as they stated, resigned the same to Charles Morrison. He files his answer and states that on the 22d February, 1843, the bank, for a full and ample consideration, actually paid, assigned to him the said judgment, with other claims; so that the controversy is, in fact between Call on the one side, claiming under his release, and Morrison under his assignment, and it has been so treated on both sides.

The case was tried by a jury, who found for the plaintiff,

Call. On the trial, Morrison excepted to various rulings 423
of the court, which are now presented for consideration. His assignment of errors embraces the instructions given to the jury, but we are of opinion that these are not properly before the court, and cannot be considered. Although copied into the record, they form no part of it, as they were not excepted to at the trial, nor embodied or referred to in the bill of exceptions. It is perhaps not very material in this case, as the instructions refused and the other rulings properly objected to, present the material questions in the case.

Morrison offered in evidence a deed of assignment from the bank to him, signed by the President, and under the corporate seal, which the court rejected, because there was no proof that it was authorized by the Board of Directors, but afterwards permitted to, on the representation of the defendant that he expected to show that the deed was executed by authority, and that the board ratified it subsequent to its execution; the court saying it might be read, subject to its charge as to the legal effect. This is complained of as erroneous. It is difficult to perceive the injurious effect this ruling had during the progress of the trial, as no further notice was taken of it. No instruction of the court was given in reference to it, and defendant seems to have had the benefit of his assignment before the jury. There is no question, we think, that the deed should have been admitted, without qualification, as conveying the right of the bank *prima facie*, throwing upon the adverse party the burthen of showing that the seal was fixed improperly—surreptitiously as some of the authorities say; through fraud and without authority, according to others. Angel & Ames, 194; 6 Paige, 56, 60.

Morrison then offered in evidence certain entries in the book of accounts of the bank, admitted to be kept by the Cashier and other officers of the bank, which the court re- 424
jected, and this is assigned for error. We think the court decided correctly. Whatever weight these may have as against the bank or its members, they are no evidence of right against strangers; it was not a public but a private entry. Angel & Ames, 606-'7; Archd. Pl. and Ev., 415; 1 Greenl., 415.

Nor do we think the court erred in rejecting the questions proposed to George K. Walker that were objected to. The contract was for the construction of the court, and not of a witness, however intelligent; nor was it proper to ask his designs in its execution. The object of reducing the deed to writing, was to prevent a reference to parol testimony, so that the instrument should speak for itself, according to the fair construction of its terms.

The counsel for Morrison then proposed certain instructions to the jury, which were refused, which we now propose to consider.

The first instruction is for want of consideration on the part of Call, in the part of the contract embracing this judgment, and the want of authority of the Board of Directors to release debts without consideration. The instrument is under seal, and this imparts consideration. "If a creditor signs a release to his debtor, this is sufficient." Bull. N. P., 153; Forsyth Comp. Cred., 17.

"A creditor cannot preclude himself, by simple agreement (not under seal,) to take less than the whole amount of his debt, from using the whole of his demand. But if a man acknowledge himself to be satisfied by deed, it is a good bar, without anything received." Pinnel's Case, 5 Coke, 117; Forsyth, 17.

In this case, Call paid $88,200 for his own debt, and secured $10,000 for the debts of Reid and West. Now what is to prevent this from operating as a consideration for the

425 whole? There is no evidence that he was able to pay more, or that more could have been made by the rejection of this arrangement, and a course of greater severity and exaction. It may have been to the interest of the bank to accept this much, even if it were one third or one half only of the indebtedness, in preference to a resort to legal proceedings. We take it for granted the Board of Directors were acquainted with the facts, and competent to judge of the propriety of the act, and as they do not complain, and have not alleged any exception, that there is in truth no valid cause of objection. We do not think there was error, then, in refusing this instruction.

The second instruction is predicated upon the difference between the resolution, or rather the report of the committee to the Board of Directors, and the deed of the President, the latter providing security for payment of the debts of Reid and West, whilst the former directs their actual payment. There is no proof of non-payment of these, nor of dissatisfaction by the bank on their account. It is supposed, and the instruction is based on the ground, that the deed of the President is void, because it does not pursue the order of the Board. We do not think so. It is not every deviation that makes such a deed void. It might have justified the Directors, perhaps, in rejecting or refusing to execute and declaring it a nullity. But it is their option to do so, or they may act upon and adopt the contract in its new shape. The presumption from receipt of the $88,000, from call, and the release of the bank as to the $10,000, is that it was not disagreeable to them, and they ratified it. Certainly after the lapse of near ten years, this would be the case. The bank could only disaffirm the contract by dissent in a reasonable time, and returning the amount received. But there is a very decisive answer to a declaration of the court that the deed is "not binding"
426 at the instance of Morrison. It is not for him to set up the invalidity. The bank is the party making the complaint, and if she waives or surrenders her rights, it is not for others to assert them. Whilst satisfied with the view thus taken, it may be appropriate to refer to authorities on the subject. In Burnett vs. Nahant, the Directors "authorized two of their Board to *sell and transfer* any estate or property of the bank," and they mortgaged the banking house, which was objected to as unauthorized. The proof was that there was no vote of the Board, and the witness, an officer of the bank, understood from the Directors individually that they were to make the mortgage; that they received from the party a bond not to put in circulation a certain sum in bills of the bank, and that the Cashier paid costs of suit as part of the adjustment, but that the bills were not given up. The court say that "this shows a ratification, without enquiry whether the act pursued the authority." 2 Met., 167.

Clarke vs. Imperial Gas Light Company, was the case of contestation of a corporate seal, on the ground of want of authority, and other irregularity. The court, Denman C. J., say: "It is enough, however, to observe that proof of this irregularity does not appear in plain terms upon the case, and the company, seeking to set aside its own formal act, on the ground of irregularity in the preliminary proceedings, ought to make out such a defence by the most cogent proof. If this (alluding to same act,) were regularly done, before affixing the seal to the instrument, all would be right, and inasmuch as the seal was set by those who had the power of affixing it to an instrument, to give effect to a bargain which the company had power to make, and *no fraud is found in the case* to attach to the plaintiff, and there is a *"possibility,"* upon the facts set forth, that the apparent irregularity may not have occurred, we think

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the plaintiff is entitled to judgment." 1 Neville & Mann, 427
218.

In Lowell vs. Steam Mill Company, the court held the mortgages executed by the President, who had the legal custody of the seal, were *prima facie* evidence that the whole amount secured thereby was justly due, and it lay on the defendant to establish the fact by legal proof that there was fraud in obtaining it, or that the seal was improperly placed on the bonds and mortgages, without authority. 6 Paige, 61. These are cases between the party and a corporation.

The third instruction is too indefinite. Admitting that the deed executed was not authorized by the resolution, and that the construction of the words "now belonging to the Bank," was as contended for, what follows? Were the jury to find for defendant, or to infer that on this account it was void, or passed no interest? If given, it might have misled the jury, without enlightening them. Even if asked in the manner supposed, we do not think, for the reasons already assigned, the instruction should have been given.

The sixth instruction relates to notice by Call of the assignment of Morrison, and is predicated on the evidence in the record to that point.

G. K. Walker deposes that "he was general agent of Call, and transacted all kinds of business for him, and produces a power of attorney to that effect, authorizing him to purchase and sell for him all kinds of property, real and personal, and to sign his name to any note, bond, draft, deed, or any other instrument, and to bind him thereby in as full and ample a manner as he could, if he were present." He, Walker, was party with Call in the deed with the Bank, and equally bound with him in its covenants; was defendant in the execution and judgment obtained on the 428
notes of Bartlett, and alike interested to procure its release; was joint mortgagor of the property mortgaged to the Bank which was assigned to Huth & Co.; was joint promisor and endorser on other notes enumerated in the deed of the Bank, which were transferred to Huth & Co. He says "that he acted for himself and as agent for Call in the negotiation, and communicated with him in reference thereto, and advised and consulted with him as to the terms of the negotiation; that *Call took no active part* in making the arrangement, but adopted and consented to the terms of the deed when finally settled, and signed it without objection. He says further, that he, Walker, prepared the deed himself."

It appears further, that Walker's name was signed, with that of Gamble, to the report made to the Bank of a Committee appointed to adjust the terms of the settlement. He also proves that prior to the time at which the negotiation commenced, he, Walker, received notice from Mercer, attorney of Morrison, of the assignment of the judgment on the Bartlett notes, and produces the notice, but does not know that he made the fact known to Call. Under such a state of facts, would a jury have been justified in finding, as prayed by the instruction, that Call had knowledge of the assignment? We think very clearly they would. "The general rule is that notice to an agent is notice to the principal himself." Story on Agency, 132.

It has been argued that Call was on the spot, and was able to and did in fact attend to the business himself, by signing the deed, and on that account is not subject to the operation of the rules applicable to agencies. We do not think so. It may be a question, indeed, whether he is not held more strictly liable for failing to use the diligence a prudent man should exert in the conduct of his

429 affairs. If attending personally to the negotiations, he could not have failed to inform himself of the assignment of this judgment equally with Walker, who conducted the negotiation.

The principles of law are too well settled to admit of a doubt even on the subject. The leading case is that of Le Neve vs. Le Neve, decided by Lord Hardwicke, after very mature consideration. In this case, the party was held liable to notice on account of information possessed by her solicitor, although there was no proof of knwledge on her part; and he notices the decision of a previous case of a contract made by an agent who was cognizant of a previous settlement, and his principal was held liable, although there was no proof of any communication to him of the fact. 3 Atkins, 646. Again, Walker was co-obligee with Call as to the covenants in this deed, and notice to him is sufficient. White & Tudor Case Eq., 214; 2 C. & M., 231 2 Keen, 35.

It is a material fact that the report of the Committee of the Board of Directors, appointed to negotiate the terms of settlement, agreeing in other respects with the deed made by the President, has the words, "Notes endorsed by said Call and Walker *now belonging to said bank,* described in the said mortgages." They are omitted in the deed. This report is adduced by the plaintiff, Call, himself, in its support, and it is contended that these words are without force or meaning, and would not have varied the deed, if introduced into it. We do not think so. The effect of the omissions is not before us. We are clear in the opinion, however, that it is important as far as the question of notice is concerned. It is signed by Walker, and may be regarded as additional notice in the course of a transaction in which he was acting on behalf of his principal. The fair presumption is that it was communicated to
430 Call, as the omission to do so would hardly comport with the duty of the agent or the natural desire of the principal to inform himself of the terms on which the bank was willing to contract.

We are of opinion, then, that the 6th instruction should have been given to the jury, and that the court erred in rejecting it.

The question of preference of a subsequent purchaser, or release without notice, over a prior assignee of a judgment and execution, has been argued before us with masterly ability, but as the question is one of great difficulty, and there is a painful conflict of authority about it, we have thought it most prudent to defer its consideration and decision to a more appropriate occasion, especially as this case may be decided in the court below without it.

It is therefore considered by the court that the judgment of the court below be reversed and set aside, and the cause remanded, with instructions to the court below to give the sixth instruction, as asked by the defendant, and for further proceedings not inconsistent with this opinion.

HANNAH S. CRAIG, BY HER NEXT FRIEND, &C., APPELLANT, vs. JAMES B. GAMBLE, APPELLEE.

1. A debtor in embarrassed circumstances will not be permitted to make a voluntary assignment or gift of his property, to the injury and detriment of his *bona fide* creditors.

2. The case of Mercer vs. Hooker, (5 Florida Reps., 277,) referred to, and the doctrine of the same sanctioned and affirmed, viz: "That where a bill of sale for property was taken in the name of the wife, but the purchase money had been paid by the husband, in the absence of proof that the money so paid belonged to the wife, neither her title nor the title of any one claiming

through her, will be permitted to defeat the lien of an execution against her 431
husband."

This is an appeal from a decree of the Circuit Court of Leon county sitting in chancery.

The appellant filed her bill in the court below, alleging that she owned and possessed, in her own right, fifteen hogsheads of sugar, which were levied on by the Sheriff of Leon county, under and by virtue of an execution in favor of James B. Gamble, against William P. Craig; that the said sugar was stored in the ware house of the Tallahassee Railroad Company, in her own name, and while there, was taken by the Sheriff. She claimed that the same was not subject to said execution, and prayed for an injunction, and that the levy might be dismissed.

The defendant, Gamble, in his answer, denied that the sugar was the property of complainant, and he insisted that if she did own the sugar, she did not own it *to her separate use,* free from the marital rights of her husband, (William P. Craig;) that William P. Craig raised and made the sugar, and originally owned it, and if any pretended sale or transfer of it to complainant was made by him, it was voluntary and without valuable consideration, or it was intended to hinder and delay creditors. The defendant further alleged, by way of demurrer, "that by complainant's own showing, the said sugar being her property, and not being alleged to be held by her to her separate use, became by law vested in her husband, subject to his debts."

The complainant offered in evidence a bill of lading, acknowledging the receipt, of William P. Craig, at Manatee, in South Florida, by William Blakeney, of nineteen hogsheads sugar, for and on account of Mrs. William P. Craig, care of Beard & Denham, St. Marks, and also an assignment by John G. Gamble to Hannah S. Craig and John 432
A. Craig, of certain judgments against William P. Craig.

At the hearing of the cause, the following agreement in writing was entered into, viz: "That the sugar in controversy in this cause, was raised by William P. Craig, husband of complainant, at Manatee, with the labor of himself and servants; that it was shipped by him to Mrs. Craig, complainant, and was stored in her name at the railroad depot at Tallahassee; that it was shipped in 1852, and reached the Tallahassee depot before the 3d day of December, 1852; that John G. Gamble, who executed the transfer (in evidence) of judgments to John A. Craig and Hannah S. Craig, was duly empowered to transfer those judgments, and that the title and right thereto was and is legally vested in said John A. and Hannah S. Craig.

The court below dismissed the bill, and the complainant prayed an appeal to this court.

Archer and *Papy* for Appellants.

Simon Towle for Appellee.

DUPONT, J., delivered the opinion of the court.

This cause is brought up by appeal from a decree pronounced therein by the Hon. J. Wayles Baker, Judge of the Circuit Court of the Middle Circuit of Florida.

The complainant, Hannah S. Craig, by her next friend, Henry L. Rutgers, filed her bill in the Circuit Court of Leon county, on the 18th day of June, A. D. 1853, against the defendants, James B. Gamble and Haley T. Blocker, setting forth amongst other matters, that the defendant, Gamble, had caused an execution at law, which he held against one William P. Craig, (the husband of complainant,) to be levied upon fifteen hogsheads of sugar, belong-

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433 ing to complainant "in her own right," and praying that the defendant Gamble, as plaintiff in execution, and the defendant Blocker, as Sheriff, to be perpetually enjoined from further proceedings under the said levy, and that the same be dismissed. In accordance with the prayer of the bill, a writ of injunction was granted, directed to the defendants, and restraining them from any proceedings until the further order of the court.

The defendant, Gamble, filed his answer on the 28th day of June, A. D. 1853, in which he denied all the material allegations contained in the bill, and particularly traversed the *title* of complainant to the hogsheads of sugar levied upon. This defendant also set forth in his answer special matter to be insisted upon by way of *demurrer*, at the final hearing, under that provision of the statute which recognizes and allows such practice; but in view of the decision to which this court has come upon the merits of the case, it has been deemed unnecessary to consider those matters, or to pronounce an opinion in relation thereto.

A final hearing of the cause was subsequently had upon bill, answer, replication and proofs, and the evidence relied upon is to be found incorporated in the following agreement of counsel, which forms a part of the record before us, viz:

"MEMORANDUM.—At the hearing of this cause before Hon. J. Wayles Baker, at Chambers, on the day of , 1853, it was admitted by the parties, by their counsel, as follows, to-wit: That the sugar in controversy in this cause, was raised and made by William P. Craig, husband of the complainant, on his plantation at Manatee, with the labor of himself and his own servants; that it was shipped by him to Mrs. William P. Craig, the complainant; and was stored in her name at the Railroad depot at Tallahassee; that it was shipped by him on the day of , 1852, as shown by the bill of lading in evi-
434 dence, and reached the Tallahassee depot on or before the 3d day of December, 1852; that John G. Gamble, who executed the transfer (in evidence) of judgments to John A. Craig and Hannah S. Craig, was duly empowered to transfer those judgments, and that the title and right thereto was and is legally vested in said John A. Craig and Hannah S. Craig."

The "bill of lading" referred to in the foregoing agreement, is a simple shipping receipt, signed by one William Blakeney, acknowledging to have received of *"William P. Craig," "for and on account of Mrs. William P. Craig,"* certain hogsheads of sugar, together with some other articles of merchandise; and the *"transfer of judgments,"* also referred to, is in the usual form, assigning certain judgments at law, which had been obtained in favor of the Union Bank of Florida, against William P. Craig, to Hannah S. Craig and John A. Craig.

This is all the evidence that was adduced at the final hearing of the cause, and upon this evidence, the Judge in the court below, sitting as Chancellor, was called upon to determine whether or not the injunction which had been temporarily granted, should be made perpetual.

We are of opinion that he decided correctly in refusing the prayer of complainant, and in ordering the bill to be dismissed with costs.

It is clearly manifest that, in the then state of the pleadings, the *title* to the sugar levied upon was the only point at issue. If it had been shown by the proofs that Mrs. Craig, the complainant, had legally acquired the ownership of the property, then might her title have been protected by virtue of the provisions of the statute enacted by our Legislature for the protection of the rights of married women. But we are of opinion that the evidence to this point entirely fails to show such a title in her as will override the rights of creditors, and especially the lien of an execu- 435
tion creditor. What are the facts of the case, as admitted at the hearing? Why, that "the sugar in controversy was raised and made by William P. Craig, (the defendant in execution,) on his plantation at Manatee, with the labor of himself and his own servants." This, then, according to the well established principles of law, invested him with the absolute title to the same, as the fruit of his labor. When and by what means did he divest himself of that title? In looking into the record, we can find no evidence of a purchase by or sale to the complainant, or indeed to any other person; there is no proof of consideration or value passing from her to the owner, William P. Craig, and the only intimation of an intended change of property is to be found in the terms of the bill of lading, or shipping receipt, given by William Blakeney for the sugar in controversy. Now, by the very terms of the bill of lading, it is shown that the sugar was received of William P. Craig, the defendant in the execution, but for and on account of the complainant, his wife. This bill of lading, or shipping receipt, however, it might tend, as a matter of evidence, to induce the impression that there had been or was to be a change of property in the sugar, from William P. Craig to his wife, certainly does not of itself afford any proof of a sale. The essential element of a *bona fide* sale is wanting —the *consideration*, and this is not supplied by any proof *aliunde*, so far as we have been able to discover. It is true that in the argument by counsel, it was insisted that the complainant, being a creditor of her husband, by virtue of the several judgments assigned to herself and John A. Craig, it was legitimate presumption that the shipment of sugar embraced in the bill of lading was intended as a payment on account of that demand; but we can discover in the record no evidence which in the remotest degree tends to connect those judgments with the shipment of the 436
sugar. There is no evidence that any credit for the value of the sugar, was ever entered upon those demands, or ever intended so to be. Neither the transcripts of the judgments nor the copies of the executions issued thereon are before us, but the transfer from John G. Gamble to the complainant and John A. Craig, stands in the record isolated and alone, unconnected by a particle of proof with the only point in issue, to-wit: The title to or ownership of the property in controversy.

If it be assumed that the shipment of sugar was intended as a *pledge*, the proceeds of which, when sold, were to pass to the credit of the transferred judgments, the reply is obvious—the bill contains no allegation of the kind, nor is there any proof in the record tending to support such an assumption.

In view, then, of the entire absence of any proof to show a sale or pledge of the sugar in controversy, from William P. Craig to the complainant, the court is constrained to arrive at the conclusion that the title of the complainant is not of such a character as will defeat the lien of the execution held by James B. Gamble, the defendant. Giving to the bill of lading the utmost effect contended for by the counsel for complainant, it can at most only be viewed as a *voluntary* assignment, *without consideration*—a *gift* from the owner of the property embraced therein; and it requires no citation of authority to show that a debtor in embarrassed circumstances may not *give* away his property, to the injury and detriment of his *bona fide* creditors. The maxim that "a man must be just before he can be permitted to be generous," finds as ready a response in the breast of the moralist as it does in that of the enlightened jurist. It is based upon and finds its sanction in the purest morality—the fountain of all law.

437 However needless it may seem to attempt to fortify our conclusion in this case, by the citation of authority, yet it may not be improper briefly to refer to a recent adjudication by this court of the point now under consideration. In the case of Mercer vs. Hooker, (5 Florida R., 277,) an execution at law in favor of William B. Hooker vs. Edward T. Kendrick, had been levied upon a horse in the possession of Mercer, as the property of the defendant in execution. Mercer interposed his claim under the statute, and upon the trial, traced his title from the wife of the defendant in execution. In the course of the trial, it was proved that the horse in controversy had been received in exchange for one for which Mrs. Kendrick held a *bill of sale*, and was afterwards sold to the claimant. It further appeared that although the bill of sale for the first horse was given to the wife, yet that the purchase money had been paid by the hands of the husband, and in the absence of proof that the money belonged to the wife, the court very properly ruled that neither her title nor the title of any one claiming through her, would defeat the lien of the execution against her husband.

It will be perceived that in the view which the court has taken of this case, it has not felt itself called upon to consider any one of the very interesting questions presented by counsel, as growing out of the act of the General Assembly entitled, "An act for the protection of the rights of married women," and however irrelevant to the merits of the present case, it is gratifying to reflect that the time consumed in listening to the very able arguments of counsel engaged on either side, has not been misspent. The very agitation of the subject will lead to useful results, in provoking investigation, and we may confidently hope that whenever a case shall arise bringing legitimately in review before the appellate tribunal this very important statute,
438 both the bar and the court will be so much the better prepared to give such an interpretation to the act as shall command not only the sanction but the cordial approbation of the entire community.

Let the decree of the court below be affirmed, with costs.

Thomas Randall vs. James T. Archer.

1. An attorney or solicitor who conducts a suit, has a *lien* for his fees upon the fund recovered as long as it remains within the custody or control of the court.

2. Where a solicitor had been employed, under a special agreement, to conduct a suit, and during the progress and pendency of the suit, the owner of the demand assigned his interest in the same to a third party, no stipulation entered into between the assignor and assignee, in regard to the amount of fees to be allowed the solicitor, will be permitted to affect his rights which had accrued in virtue of the special agreement.

3. Where a client employs an attorney, for a stipulated fee, to institute and conduct a suit, and during the progress of the same he employs additional counsel, this gives the client no *right* to insist upon a reduction of the amount of the stipulated fee; but any abatement thereof, in view of the additional charge imposed upon him, must be a matter of *agreement*—it is not a matter of *right*.

This was a rule against James T. Archer, solicitor of Robert Lumpkin, to show cause why he should not be ordered to pay to Thomas Randall the sum of $667.93, for his fees in the case of the Southern Life Insurance and Trust Company vs. Augustus H. Lanier, in which case final judgment was rendered in this court.

Notice of this motion was duly served on all the parties interested.

The following answer was made by James T. Archer: 439

The answer of James T. Archer, an attorney of this court, to the rule of Thomas Randall, Esq., served upon him in relation to the claim of the said Thomas Randall to commission and fees, out of the proceeds of a judgment rendered in this court in favor of the Southern Life Insurance and Trust Company vs. Augustus H. Lanier, which judgment is for the use of Robert Lumpkin.

This respondent answers and says that he was a solicitor in said cause, and received a notice from the said Randall to retain of the proceeds the amount of his claim; that Thurston Lumpkin, agent of Robert Lumpkin, claimed to have received the claim against Lanier in payment of liabilities of the Southern Life Insurance and Trust Company held by said Robert Lumpkin, and that the commissions of said Thomas Randall ought to attach to the moneys received by the company, and not the proceeds in the hands of the purchaser. He also claimed that he knew nothing of the claim for commissions by said Randall.

The respondent further answers that said judgment was settled without the payment of money, and by securities, payable on time, the first instalment, for $8,000, including interest, falling due 15th January, instant; that said Lumpkin has paid to W. G. Davis, as solicitor, the sum of two thousand dollars, for his professional services, and to James T. Archer the like sum, the said last mentioned solicitor having been employed by Robert Lumpkin after the said assignment of said claim.

This respondent further says that he received the notes and securities taken in payment of said claim, and held the same at the time of the notice by said Randall to him to retain and this respondent now has in his hands, of said claims, securities to the amount of six hundred dollars, falling due and payable, in New York, the 15th January, in- 440
stant.

This respondent submits to the court what should be done by him in the premises, and is ready to abide the order to be made. JAMES T. ARCHER,

9th January, 1853. *For himself.*

The following agreement between the Southern Life Insurance and Trust Company and Randall & Hagner, attorneys, of whom said Thomas Randall is survivor, was offered in evidence to the court, viz:

In the cases of Southern Life Insurance and Trust Company, complainants in foreclosure of mortgages, &c.:

The undersigned agree as follows:—We will file the bills in chancery and direct issuing of process and docketing the cases, for fifty dollars for each bill filed.

If the case is compromised before decree, an additional charge of twenty-five dollars, in full for all services rendered in such cause.

If the decree is rendered and prosecuted by sale, then three per cent. is to be allowed, in lieu of the twenty-five dollars above in case of compromise, for all moneys realized, or if no sale is had upon the property, to fix the value, then the commission to be allowed upon the cash value to be determined.

(Signed) RANDALL & HAGNER.

Tallahassee, May 30, 1846.

The foregoing is a copy of original in my possession.

ROB. LYON, *Cashier.*

Approved June 3, '46.

It was further shown to the court that Randall & Hagner filed the bill for the foreclosure of mortgage in the case of the Southern Life Insurance and Trust Company vs. A. H. Lanier; that they were solicitors of record, and there

441 was nothing to show that they ever abandoned the case or were discharged therefrom. It further appeared that the moneys in the hands of James T. Archer were received under a decree rendered in the case. During the progress of the cause, the Southern Life Insurance and Trust Company assigned all its interest therein to Robert Lumpkin, who employed other counsel.

M. D. Papy for Randall.

J. T. Archer contra.

DuPONT, J. delivered the opinion of the court.

This is a *rule nisi*, moved at the instance of Thomas Randall, against James T. Archer, an attorney and solicitor of this court, to show cause why he should not be compelled to pay over to the said complainant the sum of six hundred and sixty-seven dollars and ninety-three cents, which he claims to be due him as solicitor's fees, for services rendered in a certain cause decided at the last January term of this court, wherein the "Southern Life Insurance and Trust Company" was plaintiff and Augustus H. Lanier was defendant, and in which cause a final decree was rendered in this court against the defendant.

The answer of the respondent discloses the following state of facts, viz:—That the claim which constituted the cause of action in the said suit, had been assigned by the Southern Life Insurance and Trust Company to Robert Lumpkin, the present owner, in payment of certain liabilities which he held against said Company; that respondent and W. G. M. Davis, Esq., were employed by the said assignee to conduct the prosecution of the said cause, and for which service they each received from Lumpkin the sum of two thousand dollars; that upon a final decree being rendered in said cause, the same was settled by the defendant, La-
442 nier, by certain "securities," which were in the hands of respondent, as solicitor, at the time that the notice to retain was served upon him by complainant, and that he now has in his hands of said securities the amount of six hundred dollars, falling due and payable in New York, on the fifteenth day of January, instant.

It was admitted at the hearing that the original bill of complaint was filed by the late firm of Randall & Hagner, of which complainant is the surviving partner, and that all the testimony used in the trial of the cause, was prepared under their professional supervision; that the assignment to Lumpkin and the employment of Archer and Davis took place during the pendency of the suit in the Circuit Court; that complainant had never been formally dismissed from the cause, but continued to consult and advise with the newly employed solicitors down to the final decision of the cause in this court. The complainant exhibited a written contract with the Southern Life Insurance and Trust Company, and relied upon the same as evidence of the amount of his bill for solicitor's fees in that particular case.

It was further admitted, in the course of the argument, that the securities received from Lanier, in settlement of the decree, had been in the hands of the receiver appointed in the case, and that they were afterwards, by the consent of parties, transferred to the custody of the respondent, to abide the order of the court in the premises, touching the claim of the complainant.

Upon this state of facts, three questions were presented by the respondent, viz:

First.—Whether the "attorney's lien" followed the proceeds of the decree in the hands of the assignee of the debt?

Secondly—Whether the complainant, *under the terms of his agreement* with the Southern Life Insurance and Trust Company ought to be allowed "commissions" upon

the amount recovered, or be confined to the stipulation for 443
a *specific fee* for filing the original bill of complaint?

Thirdly.—Whether, if "commissions" be allowed, the same ought to be calculated on the gross amount of the recovery, or only on the net amount, after deducting the four thousand dollars paid by the assignee to his solicitors?

We shall consider each of the questions in their place, and in order the more lucidly to present our views, it is necessary to promise that by the agreement entered into between Randall & Hagner and the Southern Life Insurance and Trust Company, they were to receive for the filing of the original bill and the issuing of process, the stipulated sum of fifty dollars. If the case should be compromised before final decree, then an additional fee of twenty-five dollars, in full satisfaction for all services; and if a decree be rendered, and the same be prosecuted by *sale*, then three per cent. on all moneys realized, to be allowed in lieu of the stipulated amount of twenty-five dollars; and if no *sale* be had, to fix the value, then such commissions to be allowed upon the cash value of the property, to be determined.

Upon the first point, it was contended by respondent, (who also appeared for and represented the interest of Lumpkin, the assignee of the debt,) that the assignee took the claim free from any lien save to the amount of seventy-five dollars, which amount he had stipulated in his agreement with the company to pay to their attorneys, as their full demand for professional services, arising under the second clause of their contract, and that if there was any claim for "commissions," by virtue of the terms of said contract, the claim was rightfully against the company, and the lien attached to the "liabilities" received by the company as the consideration of the sale of the debt to the assignee, and not upon the fund in court. We are of a different opinion.—To drive the attorneys to a resort to the fund received by 444
the company in consideration of the assignment, is effectually to deprive them of even the semblance of a *"lien"*—their demand in such case becomes simply an ordinary debt against the company; for of what avail is their *right of lien* when the fund upon which it is to attach is out of and removed beyond their control? The *corpus* of their lien was the bond and mortgage of Lanier, which had been placed in their custody for suit, and the *consummation* of their right, was limited only by the termination of the suit and the realization of its proceeds.

It was further contended upon this point that by the terms of the agreement between the assignor and assignee, for the sale and purchase of the debt against Lanier, it was stipulated that the assignee was to take the debt, subject only to a charge of seventy-five dollars, to be paid to the attorneys who had instituted this suit. To this we say that no arrangement entered into between the assignor and assignee, and to which the attorneys were not a party, will operate to divest their lien, and that in all assignments, whether legal or equitable, the assignee takes, *subject to existing rights.*

But upon a full review of the facts in this case, Lumpkin has no just cause to complain of this assertion of the right of lien. He had not only constructive but actual notice of its existence. The public records and files of the court furnished ample evidence of the relation which these attorneys bore to the claim which he was about to purchase, and his own stipulation to settle with them the amount of seventy-five dollars is proof conclusive that he had actual notice of that relation. As a cautious and prudent man, he ought to have sought from the proper source the extent of the attorneys' lien. It was his misfortune to have relied too implicitly and exclusively upon the repre-

Randall vs. Archer.—Opinion of Court.

445 sentations of the officers of the company, (doubtless growing out of a misconstruction of the contract which they had entered into with their attorneys,) and whatever right these representations may give him to claim re-imbursement from the company, they certainly cannot be permitted to operate to the detriment and injury of an innocent third party.

Upon the second point raised by the respondent, we are clearly of the opinion that the complainant is entitled, under the terms of his contract, to compensation by way of "commission." By reference to the written argeeement, it will be seen that the stipulation for the specific fee of seventy-five dollars, was to operate only in the event of "a compromise of the case before decree," and to sustain the position taken, it must be established that the case was so *"compromised."* We do not agree with the counsel that the arrangement entered into between Lumpkin and the company was a "compromise" within the spirit and meaning of the contract. Indeed, there was no compromise of the case before decree. The arrangement was simply an ordinary "assignment" of the debt upon which the suit had been brought. The first and most essential element of a compromise is lacking—the participancy and assent of Lanier, the debtor—and no arrangement to which he was not a party can bear that interpretation. But for the subsequent employment by the assignee of additional counsel, this controversy would probably never have arisen; and in view of the fact that the complainant was never dismissed from the cause, but continued his relation thereto as counsel and solicitor, to its termination, we are of opinion that he is equitably entitled to the full benefit of the agreemnt entered into with the original owners of the debt.

We feel no difficulty in ruling the third point also in favor of the complainant. It would be establishing a dangerous doctrine to admit the right of a client, at his own 446 option, by the employment of additional counsel, to reduce the amount of the compensation or fee which he had stipulated to pay to the original attorney. It is true that it not unfrequently happens that in the progress of a cause unforeseen difficulties arise, which make it advisable to call in the assistance of other counsel, and that in such cases the original attorney consents, in view of the additional charge upon his client, to abate the amount of compensation originally stipulated, but this, whenever it does occur, must be matter of agreement—it is not a matter of right.

It may be proper to be noted that the Southern Life Insurance and Trust Company, upon notice of this rule, appeared by attorney and *disclaimed* any interest in the controversy.

Upon a full view of the whole case, we are of opinion that the rule must be made absolute, and do therefore order that the respondent, James T. Archer, do pay to the complainant, Thomas Randall, out of the securities in his hands, when realized, the sum of six hundred and sixty-seven dollars and ninety-three cents, the amount of his bill for attorney's fees, due in the case of the Southern Life Insurance and Trust Company vs. Augustus H. Lanier. The costs of this rule to be paid by complainant.

DECISIONS

OF THE

Supreme Court of Florida

AT

FEBRUARY TERM, 1854.

HELD AT JACKSONVILLE.

WILLIAM D. BRANCH, ADMINISTRATOR, &c., APPELLANT, VS. LITTLEBERRY BRANCH, APPELLEE.

1. It is irregular in an action of replevin, to make an order for the issuing of a writ of return and restitution before final judgment. Such an order, when a party is entitled to it, should form a part of the final judgment.

2. In an ordinary case a judgment dismissing a suit is a final judgment, but an action of replevin is an extraordinary remedy, and in such action a judgment dismissing the suit is not final, and error cannot be assigned upon such an order until after final judgment.

3. The 11th section of the act of March 11th, 1845, provides that if it shall appear, upon the non-suit of the plaintiff, or upon trial, or *otherwise*, that the defendant is entitled to a return of the goods, he shall have judgment therefor accordingly, with damages, &c., unless he shall elect, &c.

4. By a judgment dismissing the suit, it does *otherwise* appear that the defendant is entitled to a return of the goods, and the necessary proceedings to enforce such return may be had on such judgment.

5. A writ of error will only lie (under our statute) on a final judgment.

Motion to dismiss the appeal in this cause, on the ground that it was taken from a judgment which is not final.

448 *Rogers & Sanderson* for the motion.

Pearson & McIntosh contra.

DOUGLAS, J., delivered the opinion of the Court.

This is an action of replevin, instituted in the Circuit Court for Marion county, by William D. Branch, administrator, &c., of Samuel E. Swilley, deceased, against Littleberry Branch, to recover a stock of cattle numbering about eighteen hundred. An affidavit and bond were filed, whether in accordance with the provisions of the statute or not is a question not presented for our consideration. The writ was issued and levied, a summons was served upon defendant, a declaration was duly filed, and at the last term of said court, the cause came on to be heard, when the defendant's counsel "moved the court to quash the writ and declaration, for a variance between the writ and declaration," and also moved the court to dismiss the suit, for want of a sufficient affidavit and bond, and because a pluries writ had been issued in said cause before declaration filed. Whereupon the court, having heard the argument of counsel, and having considered the matter, overruled the motion to quash said writ and declaration, but sustained defendant's motion to dismiss said suit, for want of a sufficient affidavit and bond. Whereupon the plaintiff, by his counsel, prayed an appeal, in open court, and the said plaintiff, having executed a bond, according to law, and paid the costs, the same was allowed by the court. After the appeal was taken, the next step in the case, as appears by the record, was a judgment, of the court, in the following words, to-wit: "It appearing to the satisfaction of the court, by the order heretofore entered, dismissing said cause, that the defendant is entitled to a return of

449 six hundred and thirty-eight head of cattle, taken and detained by the plaintiff, under and by virtue of the writ of replevin in this cause, whereupon it is ordered, considered and adjudged by the court that the plaintiff do return the said six hundred and thirty-eight head of cattle to the defendant; and it is further ordered, considered and adjudged that a writ of return and restitution thereof be and the same is hereby awarded to the defendant, and the defendant do recover his costs in this behalf expended, taxed, &c." Here would seem to be an irregularity, either of the court or the Clerk who made up the record, for the matter should make a part of the *final judgment of the court,* whenever a writ of return and restriction is awarded; but instead of that, it was immediately followed by the calling and empanneling of a jury, to assess "the damage the defendant had sustained by reason of the wrongful taking and detention of the stock of cattle, under and by virtue of the said writ of replevin," who found that the defendant had sustained no damage by reason of the said taking and detention, which verdict was, on motion of the said defendant, set aside and annulled, and a new assessment of damages was ordered. These are all the facts of the case which are deemed necessary to a decision upon this motion, and the question now presented for our consideration is, can this appeal be sustained? If it can, this motion should fail; otherwise it must prevail; and this raises the question whether the judgment of the Circuit Court dismissing the suit was or was not a final judgment. This court has already ruled, in a late case at Tallahassee, (Carroll vs. Dawkins.) that notwitstanding the provisions contained in the first section of the act approved January 7th, 1853, Pamphlet Laws 1853, page 100, entitled "an act in addition to and amendatory of the several acts concerning writs of error and appeals to the Supreme Court," which, amongst other
450 things, enacts that the granting of a new trial may be assigned for error, that a writ of error cannot issue on such assignment until there has been a final judgment entered in the case, and the counsel who argued this case for the defendant, seemed to recognize the ruling as correct, by contending, (as he did with great zeal and energy) that this was a final judgment. We entertain a different view of it. "A final judgment is one that puts an end to the suit." Bouvier's Law Dict., title Judgments Final, page 550.

A judgment is defined to be the sentence of the law pronounced by the court, upon the matter appearing from the previous proceedings in the suit. Har. Law. Dict., title, Judgment, page 255, 256. It is the conclusion that naturally and regularly follows from the premises of law, and fact. Jacob's Law Dict., title, Judgment, page 551.

The action of replevin, (the defendant's counsel very properly said,) is an extraordinary remedy, given by the statute to establish the right of possession, and to whomsoever the court awards the possession, whether plaintiff or defendant, that is the *conclusion* of law, and it matters not whether that right of possession is established either by a trial upon the merits or by a default of the plaintiff. Suppose we admit the premises, does the conclusion that this is a final judgment follow? It is precisely because this is an extraordinary remedy that it does not; it will be readily admitted that in an ordinary case a judgment dismissing the suit is a final judgment, but the 11th section of the act of March 11th, 1845, the act under which this suit was brought, (Thompson's Digest, page 390, No. 4,) declares that if it shall appear upon the non-suit of a plaintiff, or upon trial, or *otherwise,* that the defendant is entitled to a return of the goods, he shall have judgment there-

for accordingly, with damages for the taking thereof by the 451
replevin, with costs, with a writ of restitution thereupon accordingly, unless he shall elect to waive such return, as in the next section provided. That next section provides that whenever the defendant shall be entitled to a return of the property replevied, instead of taking judgment therefor, he may take judgment for the value of the property replevied, to be assessed by the jury. Now it does not appear by the non-suit of the plaintiff, or upon trial, that the defendant is entitled to a return of the goods; yet it does, we think, otherwise very clearly appear that he is thus entitled, viz: By the dismissal of the suit for want of a sufficient affidavit and bond, (if, indeed, it was for that cause properly dismissed,) a matter which, in the present aspect of the case, for the purpose of this motion, we are obliged to assume. This must be so, or the plaintiff, by putting in an insufficient affidavit and bond, might obtain possession of the property, accomplish the object of his suit, and perhaps leave the defendant remediless, or if not entirely remediless, he would entail upon him a long and tedious litigation to obtain the possession of his property, of which he had been wrongfully dispossessed, through the instrumentality of the law, or the value thereof. If these views are correct, (and we believe them to be so,) then upon the dismissal of the cause, subsequent proceedings material to the cause, and the interest of the parties, could properly have been taken, unless by the appeal the case was removed beyond the jurisdiction of the Circuit Court, a question which we are not called upon to decide, and if we were, a decision of it would not affect the interest of the parties upon the present motion, or under our statute in relation to appeals and writs of error to the Supreme Court. (See Thompson's Digest, page 446, Sec. 1.) An appeal only lies upon a final judgment. That statute, Sec. 1, con-
tains the only provision of the law of this State authorizing 452
an appeal to this court in a case at law, and it only authorizes an appeal in cases where "a party in either of the Circuit Courts of this State shall feel aggreived by a final judgment, sentence, or decree made or pronounced by and or either of said courts." The judgment from which the appeal in this case was taken, is (as we have shown) *not final.* The motion therefore is sustained. Let the appeal be dismissed and the cause be remanded to the Circuit Court from which it came, for further proceedings, in accordance with this opinion. *Per totam Curiam.*

Wiley Daniels and Nehomi Daniels, his Wife, Appellants, vs. Henry Henderson, Appellee.

1. By our Statute of December 11,1824,providing for the foreclosure of mortgages, an anomalous proceeding is authorized, partaking partly of Chancery and partly of common law principles.

2. Under it,upon a petition for the foreclosure of a mortgage given by husband and wife, to secure the payment of a note of the husband, and for judgment on the note, a judgment or decree of foreclosure may be entered against both husband and wife, and a judgment may be entered against the husband *only* upon the note, *as in other cases.*

3. In such a case,it is error to enter a joint judgment against the husband and wife.

4. The wife is a necessary party to the proceeding so far as regards the foreclosure, but not as to the note.

Appeal from the Circuit Court of Putnam County.

The facts in this cause are fully set out in the opinion of the court, to which reference is made.

Daniels and Wife vs. Henderson.—Opinion of Court.

453 *B. M. Pearson* for Appellants.

McQueen McIntosh for Appellee.

DOUGLAS, J., delivered the oponion of the court.

This is a suit instituted in the Circuit Court for Putnam county, by Henry Henderson, against Wiley Daniels and Nehomi Daniels, his wife, under the act of December 11, 1824, "To regulate the foreclosure of mortgages by the courts of common law," Acts of 1824, page 161; Thompson's Digest, page 376-'77. A petition was filed in accordance with the provisions of the statute, and a copy of the original mortgage is set out in the record, from which it appears that the said mortgage was executed by said Wiley Daniels and Nehomi Daniels, his wife, to one R. R. Duke, on the 5th day of August, 1852, conveying to the said Duke a negro fellow, named Alexander, to secure to him the payment of a promissory note of the same date, given by the said Wiley Daniels, for the sum of six hundred and five dollars and sixty-three cents, which note was executed by the said Wiley Daniels *only*, to the said Duke, who endorsed it to petitioner, Henderson, to whom he also assigned the said original mortgage, which had been duly acknowledged by the said Daniels and Nehomi, his wife, before a Justice of the Peace, who examined the latter separate and apart from her husband, when she acknowledged that she "executed the same freely, and without fear, persuasion or compulsion of her husband," after which the said mortgage was, in due time, recorded in the proper office, a summons issued and duly served upon the said Wiley Daniels and Nehomi Daniels, his wife, but they put in no objection or plea in the case. At the late term of the Circuit Court, holden in and for the county of Putnam, the cause came on for trial; the defendants, were then and there three times
454 solemnly called, and came not, but made default. Whereupon an affidavit of the amount then actually due was made a decree or judgment of foreclosure of the equity of redemption in the mortgage was pronounced by the court, and a judgment was entered upon the said promissory note, against both the said Wiley Daniels and Nehomi, his wife, From this decree and judgment, the defendants have brought the case, by appeal, to this court, upon the following grounds, to-wit: The judgment should have been ordered to be levied first against the goods specifically mortgaged; 2. The judgment should have been confined to the goods and chattels, &c., mortgaged, and not allowed to travel in its lien beyond, so as to reach other property of the defendants; 3. The judgment should *not* have been against the goods and chattels, lands and tenements, of Wiley Daniels and Nehomi, his wife, but only against the goods and chattels of Wiley Daniels.

That there is manifest error in this record, no one, we think, will deny; but we have been in some difficulty in arriving at a conclusion how this error should be corrected. Were this a suit in chancery, the difficulty would not exist. There are many cases of foreclosure to which the statute mentioned is entirely inapplicable and inadequate. For instance, in the case of Wilson, administrator, vs. Hayward, 1 Florida Reports, 27, this court held "that this act may afford a remedy against the *mortgagor*, but not against the assignee of the mortgagor," because the statute gives judgment for the debt, which cannot be rendered against the assignee of the mortgagor, and that the party claiming the foreclosure, under the statute, should be the owner of all the demands secured by the mortgage; and in the case of Manley and Moseley, administrators, &c., against the Union Bank, it held that where the mortgagee has elected to proceed at law, and has obtained judgment there upon his debt, he cannot proceed under the staute, 455
but should go into chancery to obtain a foreclosure of his mortgage; and owing to the anomalous character of the case now presented for our consideration, much doubt was at first entertained whether this court could do otherwise than to remand this case to the court below, with directions to dismiss the petition. The wife is a party to the mortgage, which makes her a necessary party to the suit, so far as the mortgage and foreclosure are concerned, but she is *not* a party to the note, and therefore is by no means a necessary party so far as it is concerned, and no judgment upon that should have been entered against her. Were this a case in chancery, the rights of all the parties could be adjusted without difficulty, and were it a case at *common law*, this joinder would have been fatal to it. We often hear this statute spoken of as providing for the foreclosure of mortgages at common law, but it only provides for the foreclosure of mortgages in the common law courts, and does not require us to apply to it the strict technical rules of the common law, and in the case of Manley and Moseley, administrators, vs. the Union Bank, above cited, this court so adjudged, and treated it accordingly. At page 185, in discussing a question of pleading under it, the court used the following language, viz: "We do not consider the ordinary rules of special pleading or the technical rules of practice in ordinary cases at law, applicable to a proceeding under our statute of foreclosure. The proceeding is an anomalous one, for which neither the courts of common law or equity furnish a precedent. And so the appellee has treated it, for his petition neither contains the essential requisites of a declaration at law nor of a bill in chancery. It contains something of both, but not enough of either to stand the test of scrutiny, by the rules of pleading which prevail in either of those tribunals; and were
we to apply that strictness to it which is demanded in re- 456
lation to the pleas or objections, the appellee must fail on that ground alone, if on no other. But we are not inclined to apply a greater degree of strictness to either than is necessary to subserve the principles of justice and equity. Indeed, a more liberal spirit than prevailed in times gone by in regard to special pleading, one more consonant with the spirit of the age, seems everywhere to be gaining ground, and we feel warranted in departing from those strict, technical and rigid rules which were formerly applied to this science, whenever such departure may facilitate the attainment of justice, without endangering any of its principles, and our Legislature has left us an open door for so doing." Were this case to be sent out of court, it would be in compliance with some of those strict and technical rules; but we think we can avoid that, without endangering any of the principles of justice, and we are therefore disposed to carry out in this case the principles enunciated in the one last cited.

We have said that the wife is a necessary party so far as the mortgage and foreclosure are concerned. Making her a party to the judgment on the note, and a note, too, in the execution of which she never joined, is an error that most surely would strike any lawyer at the first blush, and must, we think, have escaped the notice of the learned Judge who rendered the judgment.

There is also error in the direction of the court as to the property on which the execution that should issue on the judgment was to be levied. The statute *expressly provides* that "the judgment of the court on the foreclosure of a mortgage, shall in all cases be entered up and filed, and execution shall issue thereon as in *other cases*." The safest course is to follow that express provision.

457 The judgment should have been against Wiley Daniels *only*, and entered up *as in other cases.*

Let the judgment or decree of foreclosure be affirmed, and the judgment on the said promissory note be reversed, and the cause be remanded to the court below, with directions to enter up a judgment on said note against Wiley Daniels *only*, in accordance with this opinion.

The appellee to pay the costs to be taxed. *Per totam Curiam.*

JOHN M. PONS, PLAINTIFF IN ERROR, VS. ISAIAH D. HART, DEFENDANT IN ERROR.

1. Where a party has substantially the benefit of a paper as evidence before the jury, the case will not be reversed because it was not formally read, or because the court had rejected it as evidence in the previous progress of the trial.

2. If a particular defence be relied upon as conclusive, it should be presented in the court below, by pleading, instructions to the jury, or motion for a new trial, and not originally in this court, as a ground of reversal.

3. The Supreme Court have no power to consider the weight of evidence as if they were a jury, and can only do so when the question is presented to them on motion for a new trial, or other appropriate manner.

4. The facts of the case are brought before this court by the Bill of Exceptions, and the court is confined to the questions presented by it.

This was a writ of error to a judgment of the Circuit Court of Duval County, rendered Fall Term, 1853.

Hart instituted in the court below an action of replevin against Pons for the recovery of three negro slaves. The transcript of the record does not embrace a copy of the writ, but it appears that a declaration was duly filed, and that Pons, the defendant, appeared and pleaded "*not* 458 *guilty.*" A trial was had and judgment rendered in favor of Hart. The following bill of exceptions was signed by the court and made a part of the record:

Upon the trial of said cause, the defendant, to maintain the issue on his part, offered to give in evidence the writ of replevin in the case of William Proctor vs. Isaiah D. Hart, and the return of the Sheriff thereon, and to prove by the evidence of George H. Smith that the slaves in controversy in this case, are the identical slaves taken out of the possession of the said Isaiah D. Hart, by the said writ of replevin; that they were delivered to the said William Proctor by virtue of said writ and in obedience thereto; to which evidence and every part thereof, the counsel for the plaintiff objected. The court sustained the objection and ruled out the evidence, and the counsel for the defendant excepted.

And hereupon an agreement was entered into and signed by the counsel of both plaintiff and defendant in the cases of I. D. Hart vs. Pons and William Proctor vs. I. D. Hart, as follows, viz:

William Proctor, vs. Isaiah D. Hart. } Replevin for Slaves.

It is agreed between the counsel in this cause that the jury now empanneled in the case of Isaiah D. Hart vs. John M. Pons, be also sworn in this cause, and that the same be submitted to them, and that the court render such judgment in both causes as may seem right and proper from the finding of the jury.

SANDERSON & CALL,
For Isaiah D. Hart.
PHILIP FRASER,
For Proctor & Pons.

Under which said agreement both the said cases were submitted to the same jury which had been sworn in the 459 case of I. D. Hart vs. Pons, and in the progress of the trial George H. Smith was introduced and sworn as a witness, and upon the writ of replevin in the case of William Proctor vs. I. D. Hart being placed in his hands, he testified that he executed the same, as Sheriff of Duval county, by taking the said negroes mentioned therein and delivering them to said Proctor, and that they were the same negroes mentioned in the writ of replevin in the case of Hart vs Pons, and thereupon, after hearing the other evidence in this cause, the jury having found a verdict for the plaintiff, the counsel for the defendant prayed the court to sign and seal this bill of exceptions, which is done accordingly.

The following assignment of errors was filed by the plaintiff in error:

The court erred in entering judgment on the verdict of the jury in the court below, because it does not appear by the record that any writ of replevin was issued in this case, or that the negro slaves in controversy were taken by the Sheriff in the execution and service of such writ.

The court below erred in ruling out the evidence offered by the defendant, to-wit: The writ of replevin in the case of William Proctor vs. Isaiah D. Hart and the return of the Sheriff thereon, and the evidence of George H. Smith, showing that the slaves in controversy in this case were the identical slaves taken out of the possession of the said Isaiah D. Hart by the said writ of replevin; that they were delivered to the said William Proctor by virtue of said writ and in obedience thereto.

Philip Fraser for Plaintiff in Error.

G. W. Call for Defendant in Error.

BALTZELL, C. J., delivered the opinion of the court 460

This was an action of replevin, instituted by Isaiah D. Hart, to recover from John M. Pons three negro slaves, which he alleges he took from him and unjustly detains. On the trial defendant, "to maintain the issue on his part, offered to give in evidence the writ of replevin in the case of William Proctor vs. Isaiah D. Hart, and the return of the Sheriff thereon, and to prove by the evidence of George H. Smith that the slaves in controversy are the identical slaves taken out of the possession of Hart by the said writ of replevin, which were delivered to Proctor by virtue of the writ; but the counsel of plaintiff objected, and the court sustained the objection."

This is assigned for error in this court by Pons, and has been pressed with some zeal on the part of counsel. It is insisted on the part of Hart that if there was error in this ruling, it was cured by the action of the court in the further progress of the trial, "as Smith was introduced as a witness, and upon the writ of replevin in the case of Hart and Proctor being placed in his hands, he testified that he executed the same, as Sheriff of Duval county, by taking the negroes mentioned therein and delivering them to Proctor, and that they were the same negroes mentioned in the writ of replevin in the case of Hart and Pons.

There is no complaint as to the non-admission of Smith's testimony; the objection is that the writ of replevin was not read in evidence.

It is true, this does not appear in express terms to have been read, yet defendant seems to have had the benefit of it before the jury. It was "placed in the hands of the witness, the Sheriff, and he testified that he executed it," &c. Now it is scarcely credible that in this state of the case defendant was prevented from availing himself of the fact that

461 there was such a writ. Moreover, the admission of Smith's evidence, with the use of the writ, was such an indication of the disposition of the court to admit the writ also, that if there was a failure to get it before the jury more fully, it can scarcely be regarded as the fault of the court, or an error for which the judgment should be reversed. In the case of Morrison vs. Call, recently tried at Tallahassee, the court decided that the admission of testimony rejected at a former stage of the trial, cured the error, and we see no reason to doubt the correctness of the ruling. We are of opinion, then, that there is no error in this assignment. It is proper to remark that appellant's counsel contend that Smith's evidence was not introduced at their instance, but in this we suppose they are mistaken. It is certainly not in favor of Hart. It forms the ground of defence of Pons; indeed, the only position assumed in his behalf.

It is also said that this evidence was applicable to the case of Hart and Proctor, and not designed for that Pons vs. Hart.

If so, the bill does not present that aspect, and the question naturally arises why evidence used in the one case is incorporated into and made part of the other? Whether the writ and evidence of Smith should have the effect contended for, of concluding the case, is not for our consideration. We are confined to the questions made by the bill of exceptions. See Gray vs. Belden, 3 Florida Reports, 114; Exparte Crane, 5 Peters, 199; 4 How., 298, 401, 292, 418, 541; 1 Leigh, 86; 1 Wend., 418; 14 John., 804; 1 Cowen, 622, and the opinion pronounced in the case of Proctor vs Hart at the present term.

A party having a defence has the right, through his pleadings, and through instructions proposed during the trial, to obtain a decision as to its effect. If conclusive, (as alleged in the present instance,) he may insist on the
462 court's so declaring, and if they refuse, or make an erroneous decision, he may appeal to the Supreme Court to correct the error.

He may, however, if he prefers, submit the matter to the arbitrament of the jury, taking the chances of their deciding in his favor. Nor is he confined even to this; for if the jury find against him, he may apply for a new trial, and present the decision on this also to the appellate court for review. Such is the mode and process by which the rights of the citizen are asserted and maintained in the courts. If none of them are adopted, he may be regarded as waiving his objections, or as being content with the decision. In the present case we perceive no plea, no instruction proposed, nor any motion made for a new trial. In the absence of all these we are asked to regard a piece of testimony introduced by one of the parties as conclusive, without any knowledge or information as to that produced by the other, and to reverse the case on that account. If the whole testimony were before us in the bill of exceptions, we have no such power. To an application of like kind, the Supreme Court of the United States, in the case of Hapburn vs. Dubois, made this response: "In urging upon this court a review of the parol evidence in the record, we think the counsel of the plaintiff in error have asked us to transcend the limits prescribed to our action on questions of fact, by an uniform course of decision from the first organization of this court, which has been repeatedly defined in our opinions during this term, unanimous on the law, though sometimes differing in its application to particular cases.

"If our past course of adjudication has not sufficed to satisfy the bar as to what we have considered our most solemn duty, and if it is yet an open question as to what is the line which the law has drawn between those questions of fact cognizable only by the jury below, and questions arising 463
on the joint action of the court and jury in that court, whose record we judicially inspect, on error, it will be useless to close it by any opinion to be delivered in this case."

They then assert, that they are expressly prohibited by the provision of the Constitution of the United States securing the right of trial by jury, from considering the subject in the manner proposed. 12 Peters, 375-'6.

This court has also declared its deliberate purpose to maintain the like provision in our State Constitution. Flint River Steam Boat Co. vs. Roberts & Co., 2 Fla., 102.

In addition to this, it is very clear that such a review by an Appellate Court invokes the exercise of *original jurisdiction,* whilst that of this court is carefully declared by the Constitution of the State to be *"appellate only,"* original jurisdiction being conferred upon the Circuit Courts. See Constitution of the State.

We have not thought proper to decide the point, argued with great force and ability on the part of defendant in error, that under no circumstances was this writ of replevin admissible in evidence, being satisfied with the conclusive view already taken of the subject.

This case has been argued as if a cross replevin had been issued, and complaint is made of the hardship and irregularity of the proceedings, but the record does not present it in that light. The appellant shows no connection with Proctor, nor interest, nor right in him, nor anybody else. If in fact, a cross replevin had been issued, the remedy and power of the court might have been complete to prevent injury. The Supreme Court of New York superseded a writ of replevin issued by defendant to obtain a re-deliverance of the property taken from him by writ of replevin. Morris vs. DeWitt, 5 Wend., 70.

It is not necessary to decide that a like course would be
appropriate under our statute. We may be permitted to 464
say, however, that the statute in our opinion is very imperfect, and to express the fear that it may be made the instrument of great injury and injustice. To allow the possession of personal property to be taken from a defendant under a mere affidavit, and to remain with plaintiff until after trial, under our tardy system, is to give a decided advantage to one party. The New York statute provides for an immediate trial when a claim of right is put in by the defendant, and prevents also the change of possession until after the decision.

The writ of replevin is not copied into the record, and counsel for appellant taking it for granted that none ever existed, now insists that the judgment, on this account, is invalid. In this we think he is mistaken. That there was a writ, is very manifest, from the whole record. The affidavit and bond on which it was issued are before us, and it is very clear if there was no writ plaintiff effected no object of this suit, and there was actually no contest between the parties. But the Sheriff, Smith, whose testimony we have already given, speaks of the writ and of the negroes mentioned in it, as being the same as in the case of Proctor and Hart. If there was no writ, and it was important, defendant should have filed his plea to that effect, or moved to set aside the proceeding. Instead of this, he has plead in chief, thus avoiding all objection to the preliminary proceeding. Nor do we see how the writ is material to the questions presented in this court, no motion having been made connected with or dependent upon it. But supposing it to be material to some question to be decided in this court, and it was apparent that it had been lost from the files, would the court on this account reverse the judgment? Obviously not. It would be opposed to every sense of propriety to make the rights of parties dependent upon mere acci-

dent or chance. Papers when filed with the clerk, are in the custody of the law, and if lost or mislaid, the court will exert itself to have them replaced, or to have a substitute for them, so as to prevent injury. If this paper were at all material to any question before us, we should not hesitate to continue the case, to enable the parties to supply the deficiency.

We are therefore of opinion that there is no error in the judgment of the court below, and that the same be affirmed, with costs.

WILLIAM PROCTOR, PLAINTIFF IN ERROR, VS. ISAIAH D. HART, DEFENDANT IN ERROR.

1. A refusal to give instructions on a mere abstract proposition, not based on any color of evidence, affords no ground of exception.

2. And even where a charge is given to the jury which is entirely abstract, or out of the case, so as not to affect it, although the charge be erroneous as a proposition of law, yet this will not constitute a ground of exception.

3. The party excepting must, at his peril, place as much in his bill as shows that the court did err to his prejudice; for the presumption is in favor of the rectitude of their proceeding, and all decisions made will be presumed correct until the contrary appear.

4. Wherefore if the evidence on which instructions to the jury were intended to bear, be not presented by the bill, the court will not adjudge such instructions erroneous.

5. While the court recognizes the doctrine that upon a writ of error it is within its province to look beyond the bill of exceptions, and to consider errors apparent upon the face of the record, yet this must be limited to such errors only as have not been waived by the pleadings.

6. And therefore where a plaintiff, instead of *demurring* to a plea, *replies* to the same, it is too late to make the objection in this court that the plea is bad.

MEM.-It is the exclusive *right* of the clerks of the Supreme Court to furnish the
466 copies of the record required by the rule to be prepared for the use of the Judges, and the compensation thereof constitutes a perquisite of their offices.

This was a writ of error to a judgment of the Circuit Court of Duval county.

The errors assigned in this case are based upon the charges given by the court below, and upon the refusal of the court to give in charge to the jury instructions asked for by Plaintiff in Error. The bill of exceptions, which was made a part of the record, does not embrace the evidence upon which the charges given by the court were predicated, nor is there any evidence in the record to show that the instructions asked for by plaintiff were relevant or material, or other than abstract propositions.

The fourth plea of defendant, which is alleged to be had, was replied to by plaintiff, and no objection thereto, by demurrer or otherwise, seems to have been made in the court below.

Philip Fraser for Plaintiff in Error.

G. W. Call, for Defendant in Error.

DUPONT, J., delivered the opinion of the court.

This case is brought up from the Circuit Court of Duval county, by writ of error, and the only errors assigned are the exceptions set forth in the bill of exceptions, which constitutes a part of the record before us. In looking into the record, a difficulty is presented at the thresh-hold, which, in the opinion of the court, is decisive of this case. The matters complained of as error, are confined exclusively to the several *"charges"* of the court below, as given and refused, and the bill of exceptions incorporates no portion of the evidence upon which the charges were predicated. If in this state of the record the court were to proceed to examine the propriety of those charges, they could view them only as abstract propositions; but it is a well 467
established principle that a refusal to give instructions prayed for on a mere abstract proposition, not bottomed on any color of evidence, will be no ground of exception, (Hamilton vs. Russell, 1 Cranch, 309 and 318; Greatham vs. Brown, 5 Munroe, 280, 282;) and even where a charge is given to the jury which is entirely abstract, or out of the case, so as not to affect it, although the charge be erroneous as a proposition of law, yet this will not constitute a good exception. Vide 3 Philips on Evidence, (Cowen and Hill's Notes,) 787, citing the following cases: Clarke vs. Dutcher, 9 Conn. R., 674; Smith vs. Carrington, 4 Cranch R., 62; King vs. Kinney, 4 Hamm., 81; Wardell vs. Hughes, 3 Wend. R., 418; Broffit vs. Williams, 1 Yerger, 89; Norton vs. Saunders, 1 Dana R., 14, 15. "At common law, a writ of error lay for error in law apparent on the record, and not for error in law not apparent upon the record. If a party allege any matter of law at the trial, and was overruled by the Judge, he was without redress, the matter not appearing" on the record. (2 Institutes, 42.) To remedy this evil, the statute was passed which gives the "bill of exceptions," through the instrumentality of which the party aggrieved is entitled to make such rulings of the Judge matter of record, which but for the statute would have remained in *pais*. The office of the bill of exceptions is very clearly defined in 3 Philips on Evidence, (Cowen & Hill's Notes,) at page 790, and it is there stated as follows: "If the bill be not tacked to the record, it should set out the whole proceedings previous to the trial, but otherwise it begins with the proceedings, after issue joined, and in either case it goes on to state the circumstances upon which it is founded, as that a witness was called to establish certain facts, or evidence offered, or challenge made, or demurrer tendered; the allegations of counsel respecting the competency of the witness; the 468
admissibility of the evidence, or legal effect of it, &c.; the opinion of the court or judge; the exception of the counsel to the opinion, and the verdict of the jury," (citing Bul. N. P., 317, 319; Tidd Prac., 788; 2 Dunlap Prac., 643; Swift's Ev., 168.)

The consequence to the appellant of a defective bill of exceptions, is also stated in the same authority, and is thus set forth: "The party excepting must, at his peril, place so much in his bill as shows that the court did err to his prejudice, for the presumption is in favor of the rectitude of their proceeding, and all decisions made will be presumed correct until the contrary appear. (Citing Richardson vs. Dennison, 1 Aik., 20; Adams vs. Ellis, ib., 24; Eaton vs. Houghton, ib., 380; Stearns vs. Warner, 2 ib., 26; Snowden vs. Warder, 3 Rolle, 1; Harrison vs. Baker, 1 J. J. Marsh., 317, 318; King vs. Kinny, 4 Hamm., 81; McDougal vs. Fleming, 4 ib., 388; Ingraham vs. White, 2 Miller, 294-'8; Reynolds vs. Rogers, 5 Ham., 169, 171.) "In other words, nothing must be left to conjecture, and if the bill be so loosely drawn as to leave the matter in doubt, the proceeding below will be sustained, notwithstanding there be some reason to *suspect* that error might have intervened." Citing Adams vs. Ellis, 1 Aik., 24; Eaton vs. Houghton, ib., 380. And again—"Most of our courts have acted upon the principle above stated, of presuming that the court below did right until the contrary expressly appear. Accordingly it has been held that if the evidence on which instructions to the jury were intended to bear be not presented by the bill, the court will not adjudge such instructions erroneous. (Citing Harrison vs. Baker, 1 J. J. Marsh., 317, 318.) And again—"When instructions were asked for upon certain facts, it appears necessary to set forth in the bill that evidence of such facts

469 was given to the jury. (Citing Vasser vs. Smith, 6 Cranch R., 226, 233. Note.)

We have not had access to all of the cases cited, but so far as we have, we find that they fully sustain the principles enunciated. And, indeed, if there ever was any doubt as to the correctness of these principles, that doubt, so far as it might affect this cause, has been removed and the doctrine settled, by the ruling in the case of Dorman vs. The Executor of Francis Richard, (1 Florida Reps., 297.) In that case the court say—"For aught that appears to the contrary, other proofs besides the note in question may have been presented on the trial below, and such as may have influenced or determined the verdict and judgment; and there is nothing to show that such proof, if so presented, was inadmissible, or otherwise exceptionable at law. In the absence, therefore, of a bill of exceptions showing the testimony exhibited, the presumption is that there was full and adequate evidence before the jury to warrant and support the verdict," &c.

But if we were without precedent or authority on the point, the doctrine is too obviously based upon sound reason to admit of a doubt. As a jury cannot be called upon to render a verdict but upon the facts of the case, as made known to them through the evidence, so every charge of the Judge, if applicable, must be *predicated upon those facts;* and in order to obtain the benefit of the supervisory power of the appellate tribunal, the party invoking the same must put the court in possession of those facts, *duly authenticated.* This brings us to the consideration of the question as to what may be deemed a due and proper authentication of the evidence used upon the trial in the court below. It seems to have been taken for granted by the counsel who prepared the bill of exceptions, and who superintended the making up of the record for the court,

470 that it was sufficient if the evidence used or alleged to have been used upon the trial should appear in and form part of the record so certified to by the clerk of the Circuit Court, without having the same incorporated or even referred to in the bill of exceptions. Such a practice, if sanctioned, would obviously lead to great looseness and uncertainty, and might work irreparable injury to parties litigant; for it would be to substitute the testimony of the clerk as to what evidence was submitted to the jury, for that of the Judge, who, and who alone, (except in the case provided for in the statute, vide Thomp. Dig., 351, Sec. 3, part 1,) is authorized to attest that matter. Indeed, it is wholly beyond the province of the clerk, in the exercise of his official duty, to certify to the existence of any matter which is not a matter of record, and it will scarcely be pretended that the evi-

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dence given in the trial of a cause is a matter of record until it shall have been made so by being incorporated into a bill of exceptions, duly signed and sealed by the Judge, or by three by-standers, as is provided for in the statute. The danger of adopting so loose a practice is forcibly illustrated by an inspection of the record before us. To several of the interrogatories it appears that *exception* was taken in writing, before the issuing of the commission, but there is nothing in the record to show whether those exceptions were sustained or overruled by the court, and it is therefore left in doubt whether the entire depositions, or only a portion, were used as evidence on the trial.

It was further contended by the counsel for the appellant that this case having been brought up by "writ of error," it is the province of the appellate tribunal to look beyond the bill of exceptions, and to consider any error which might be apparent upon the face of the record, and the attention of the court was called to the *fourth plea,* which it was insisted was bad.

The court fully recognizes the doctrine, that upon a writ 471
of error it is its province to look beyond the bill of exceptions and to consider errors apparent upon the face of the record; but while they recognize the doctrine, they do not think that the error complained of, (even if it is an error,) is such as would justify a reversal of the judgment. At most the plea, if bad, was so only in presenting an *immaterial* issue, which did not affect the merits of the cause. If the plaintiff below was desirous of obtaining the judgment of the court upon the plea, his proper course of proceeding would have been to have demurred to the same, and this would have raised a question of law, of which he might have availed himself in this court; but by replying to the plea, he waived his demurrer, and consequently lost any benefit which might have otherwise resulted to him. Vide Mitchell vs. Chaires, 2 Fla. R., 18, and Mitchell vs. Cotten's Ex'r., *ib.,* 136.

We are of opinion that as the cause is presented to us by the record, there is no error in the judgment of the court below; therefore let the judgment be affirmed with costs.

Mem.—Upon this case being called, the court was presented by the counsel for the appellant with three copies of the record filed in this court, which were made out and certified to by the Clerk of the Circuit Court. A question was thereupon raised by the clerk of this court as to his right to furnish the copies required by the rule to be furnished to the Judges. The court decided that the furnishing of the copies is not only a perquisite of his office, but that his certificate is necessary to give *authenticity* to them.

DECISIONS
OF THE
Supreme Court of Florida
AT

MARCH TERM, 1854,

HELD AT TAMPA.

CRAWFORD AND SEAT, APPELLANTS, VS. JOHN WATERSON, APPELLEE.

1. Trespass will lie in favor of one having possession against a wrong doer.

2. Trespass *vi et armis*, and not case, is the appropriate remedy, where the injury is immediate and direct.

3. Where there is a wrong there is a remedy, and the State Courts are competent to give redress in all cases in which exclusive jurisdiction is not given to Federal Courts.

4. If a wrong or injury be done by an officer of the General Government, without authority, he is liable, like any other citizen, to be sued in the State Courts.

This was an action of trespass on the case. The injury complained of, was the unlawful seizure and taking away of sixty thousand feet of lumber. The allegation in the first count of the declaration is, "that under the authority of the Quarter Master of the United States, they received permission to cut lumber off the military reserve, and in pursuance of such order, they did cut sixty thousand feet

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473 of lumber, when defendant, without authority, took the same and held the same in his custody until sold."

The second count alleges that "when the seizure was made, the plaintiffs cleared by their mill $25 a day, and would have continued to do so for a long space of time, had they not been compelled to desist, by the seizure of defendant and his pretended authority as timber agent."

The third count alleges that by reason of the seizure, plaintiffs incurred great expense, in going to Washington, and also that during their absence their dwelling house was destroyed by fire.

To this declaration the defendant demurred, which was sustained by the court, on the ground "that the court had no jurisdiction, for the reason that the cause of action originated exclusively under the laws and regulations of the United States." From this judgment the plaintiffs appealed.

BALTZELL, C. J., delivered the opinion of the court.

This was an action of trespass on the case, instituted by the plaintiffs to recover damages for the injury sustained by them in the unlawful seizure and sale of a quantity of lumber.

The defendant demurred to the declaration, assigning various grounds of objection.

The court sustained the demurrer and dismissed the case, on the ground "that the court had no jurisdiction, for the reason that the cause of action originated exclusively under the laws and regulations of the United States."

We are clearly of opinion that for an injury to and damages sustained by a party, the proper remedy and redress is by suit in the State Courts, and that the court erred in dismissing the case upon this ground. The suit is based upon the allegation that the defendant, without any lawful
474 authority, seized the lumber. If this allegation be true, he was justified by no law or regulation of the United States, and was clearly liable for the injury done. If the defendant could show that in the action leading to the injury complained of, he acted under lawful authority from the United States, this would avail him as well in the State as in the Federal Courts. We know of no exemption from suit in the State Courts against individuals for wrong, except in certain cases specially enumerated in the Constitution of the United States, where exclusive jurisdiction is given to the Federal Courts. The general principle is that there is no wrong without a remedy.

Suits are brought daily in the State Courts for injuries done by officers of the Government of the United States, whether for injuries to the person or property of the citizen, and in many cases the party would be remediless, unless his action were brought there.

The Federal Courts are courts of limited jurisdiction, and their doors are closed to the *citizen* for most purposes; they are designed for the citizens of other States, or aliens, whose right to sue must appear by a declaration of their character on the face of the proceedings, to give jurisdiction. Our Courts, on the contrary, are courts of general jurisdiction, free to every one to obtain redress whenever injury or damage is done. We do not, then, agree to the ruling of the court below in this respect. Stewart vs. Preston, 1 Florida.

We are, however, of opinion that the demurrer was rightly decided, for other reasons. The injury complained of was a trespass, and a suit of that kind, or in trover, or replevin, should have been brought, and not an action on the case. Slocum vs. Maybury, 2 Wh., 1; Gelston vs. Hoyt, 3 Wh., 246.

The plaintiffs allege "that under the authority of the Quarter Master of the United States they received permis- 475
sion to cut lumber off the military reserve, and in pursuance of such order, they did cut sixty thousand feet of lumber, when defendant, without authority, took the same, and held the same in his custody till he sold them." Here we perceive "an injury in its character forcible, and occasioned *immediately* by the act of defendant, in which case the action of trespass *vi et armis* is the proper remedy." 1 Chitty Pl., 142.

Nor is it necessary that actual force be proved in case of trespass for the asportation of goods. 10 Mass., 125.

The distinction is between acts that are "immediate and direct," in which trespass is the appropriate remedy, and such as are mediate and consequential, in which case lies. 1 Chitty, 142.

As to the interest of the plaintiff, trespass will lie in favor of one having possession, as against a wrong doer. 1 Chitty, 196; n. 2, 202-'3.

There is no precedent in an action on the case for injury, like the present, whilst in trespass there is no lack of them. Trespass is the peculiar remedy for injuries done by persons acting under the color of authority. 1 Chitty, 210; Gelston vs. Hoyt, 4 Cond. Reps. S. C. U. S., 246; 3 Wh., 246.

It is proper to say that there is an allegation in the count alluded to that the lumber was disposed of at public sale, and purchased by defendant himself, but this does not alter the character of the injury or of the remedy.

The second count alleges that "when the seizure was made, the plaintiffs cleared by their mill $25 a day, and would have continued to do so for a long space of time, had they not been compelled to desist, by the seizure of defendant, and his pretended authority as timber agent." What effect this might have, in an action of trespass, to enlarge the damages, it is not for us to decide on the present occa- 476
sion; but this much we are satisfied, that it does not constitute a substantive ground of action, of itself. Courts give redress for injuries actually sustained, not for such as are speculative or suppositious—not for that which a party might by possibility make or have made.

We are of opinion that the third count, or remainder of he declaration also is insufficient, and does not constitute a valid cause of action against defendant, for the causes already assigned.

The expense of going to Washington, and the loss of the dwelling house by fire, are not so connected with the act of trespass or injury as to constitute a cause of action, if indeed they could be used to increase the damages in an action of trespass.

The judgment will be affirmed, with costs.

HENRY N. CLARKE, APPELLANT, VS. PERRY G. WALL, APPELLEE.

After a plea of set-off pleaded, and before the cause is submitted to the Jury, the plaintiff has a right to take a non-suit.

Appeal from Hernando Circuit Court.

The plaintiff instituted in the court below an action of assumpsit, to which the defendant pleaded a set-off. Before the cause was submitted to the jury, the plaintiff asked leave to take a non-suit, which was refused by the court. This ruling of the court is assigned for error.

DUPONT, J., delivered the opinion of the court.

This case is brought up by appeal from the Circuit Court

477 of Hernando County, and the only question which has been submitted for our decision is as to the right of a plaintiff to discontinue his action after a plea of set-off has been filed by the defendant.

This question has already been settled, by the adjudication in the case of Buffington vs. Quackenboss, (5 Florida Reps., 196,) and we see no good reason for disturbing that decision. In the case referred to, the defendant in the court below pleaded, by way of set-off, an open account which exceeded in amount the plaintiff's demand. At the trial term, the court, upon motion of the plaintiff, ordered the cause to be dismissed, to which the counsel for the defendant excepted, and assigned the same as error. The Supreme Court sustained the judgment of the court below, and thereby affirmed the right of the plaintiff to discontinue his action. notwithstanding a plea of set-off had been filed.

Clarke vs. Wall.—Opinion of Court.

In the case now before us, the error assigned is the refusal to permit the plaintiff to take a non-suit before the cause had been submitted to the jury, and thus it will be seen that the points made in the two cases are identical.

Let the judgment be reversed, with costs, and the cause remanded for such further proceedings as may not be inconsistent with this opinion.

DECISIONS

OF THE

Supreme Court of Florida

AT

MARCH TERM, 1854.

HELD AT MARIANNA

THOMAS M. WHITE, APPELLANT, VS. GEORGE WALKER, APPELLEE.

1. A decretal order made by consent, cannot be set aside, either upon appeal or re-hearing; but an order thus made may be set aside by *consent*.
2. A Master must not go beyond the matters referred to him; if he does, his report, so far as relates to that matter, is a nullity.

3. A reference to the Master will not authorize a report by him more extensive than the allegations and proof.

4. A report which is erroneous on its face, may be enquired into without any exceptions.

5. It is a general and material rule in all cases of accounts, that where there has been a settlement, and the account has either been signed, or a security executed at the foot of it, a Court of Equity will not open that transaction, unless the evidence produced (founded on the charges in the bill,) shows the transaction to be iniquitous; that it ought not to be brought forward at all to affect the party sought to be bound.

6. Mere inadequancy of price, if the bargain is fair, is no ground for relief
7. If the value of a thing sold depends upon a *contingency*, although *great advantage* may be gained, yet the contract shall be sustained.

479 8. Concealment of a material fact by the party whose duty it is to disclose it, is sufficient to set aside a contract.

9. A partner purchasing must give a full account of the state of the property.
10. To these general rules there are qualifications, suited to cases of an extraordinary nature.

11. As if the party making the representation was speaking not from personal knowledge, but with reference to accounts that were equally open to both parties, and the representations were justified by such accounts.

12. A party cannot be charged against his own denial, in his answer under oath, on the testimony of only a single witness; it must, to warrant a decree, be contradicted by at least two witnesses, or by documents.

13. But the answer, to have this power, must be direct and positive.
14. Fraud is not to be presumed, but must be proved.

15. The report of a master containing upon its face material errors, should not be made by the court the basis of a decree.

16. Testimony merely *conjectural* is wholly inconclusive, and ought not to be received.

17. As a general rule, the prevailing party is entitled to costs, as well in equity as at law; yet costs do not always follow the decree in favor of a party They are in the sound discretion of the court, and are to be rewarded or refused according to the justice of each particular case.

Appeal from a decree of the Circuit Court of Jackson county, sitting in chancery.

The opinion of the court contains a full statement of the facts in the cause.

W. G. M. Davis for appellant.

R. L. Campbell for appellee.

DOUGLAS, J., delivered the opinion of the court.

The bill filed on the 23d October, 1843, in the Superior Court of Jackson county, by the appellee, charges that on the 7th September, 1838, the parties entered into a copartnership, under the style of White & Walker, for the purpose of merchandizing at Marianna, Fla.; that by the articles, which were in writing, it was agreed that the business should be under the care and management of the ap- 480
pellant, for which he was to receive a reasonable compensation; that each party should contribute the sum of $2,-757.25, as his share of the capital stock, and each enjoy an equal share of the profits, after the payment of all the debts; that the capital was paid in by the parties, and large stocks of goods were purchased, partly for cash, and partly on credit, from the fall of 1838 till April, 1843, when the stock on hand was sold to F. R. Ely; that respondent always had the exclusive management and control of the business, and complainant had nothing to do with it, whatever; that the business was eminently prosperous, the goods having been sold at large profits, and but few bad debts contracted; that respondent purchased property, and in other ways speculated with the funds of the concern, for his own benefit, and abstracted assets of the firm to a large amount, with which he failed to charge himself; that respondent did not, as he was bound and paid to do, under the articles of copartnership, devote his exclusive attention to the business of the firm, but on the contrary, gave a large portion of his time to other occupations, by which the concern was greatly injured; that the books were falsely and fraudulently kept, and presented but a partial and confused history of the business; that in the early part of June, 1843, when complainant was in a feeble state of health, respondent proposed a dissolution of copartnership, and a division of its assets, and succeeded, by presenting false and simulated accounts of the business, in procuring for the sum of 9009.23, ($1000 in cash, and the balance in complainant's account, and notes of third persons,) a receipt in full for complainant's interest in the firm, and that a much larger sum than that represented by respondent, upon said settlement, would appear to be due him upon a just and fair account, and the bill prays an account that the settle-

481 ment may be set aside, his receipt cancelled, the partnership dissolved, &c.

On the 6th March, 1844, a general demurrer to the bill was filed, which being overruled, on 30th March, 1844, by consent of parties, an order was made, giving respondent thirty days to file his answer, and appointing commissioners to take and state an account.

On 20th August, 1844, respondent filed his answer, admitting the copartnership, and the articles as set forth in the bill; that the capital stock of $2,757.25 each was paid in by the parties; that large stocks of goods were purchased between the Fall of 1838 and April, 1843, when the stock on hand was sold to F. R. Ely; that the business was conducted exclusively by respondent; that he did use the funds of the firm, to a limited amount, in the purchase of property, but accounted for the same, and charged himself with everything he procured from the concern. The answer *denies all fraud,* and states that in May, 1843, respondent was informed by complainant that he wished to sell his interest in the concern, with the view of leaving the country, and requested respondent to make him an offer; that respondent replied he could not say what would be an equitable price for his interest, but he would "make out a *full* and *complete* statement of the assets and liabilities of the house, exhibit them to him, and if then complainant desired it, he (respondent) would make him an offer to take or give a stated sum;" that complainant said that he was willing to *take less than half, as he desired to quit the country;* that on 7th June, 1843, respondent submitted to complainant statements A. and B., (which are appended to the answer,) requesting him to examine them, and offering him access to the books to aid him in his examination; respondent told complainant that he would rather sell than buy, and would take $8,500 for his interest; that respon-
482 dent having fully explained exhibits A. and B., told complainant that inasmuch as he, respondent, was more intimately acquainted with the business affairs of said firm, and its customers, and could make more out of the bad debts than complainant could, he, respondent, would give complainant the sum of $9,000 for his interest, in the following payments, to-wit: $1,000 in cash, $1,769.11 in his, complainant's, account, and the remainder to be selected by complainant from all the business papers, notes, and accounts, &c., of the firm, which proposition complainant accepted, and the bargain was consummated; complainant gave respondent a receipt in full, and respondent entered into an obligation to pay all the debts of the concern; that according to exhibits A. and B. all the good debts and assets of the firm amounted to $19,652.53, besides complainant's account for $1,769.11, respondent's account for $1,329.35, and that the debts due by the house amounted to $2,765.66, and the bad debts to $4,080, and the answer sets up this as a full defence to the bill.

Abstracts of Exhibits A. and B.

Assets deemed good	$19,652 53
Amount of complainant's account	1,769 11
Amount of respondent's account	1,329 35
	$22,750 99
Deduct amount of debts owing	2,765 66
To be divided between the parties	2)19,985 33
Each entitled to	$9,992 66½
Amount received by complainant	9,009 00
	$983 66½

Upon the coming in of the answer, the commissioners appointed having failed to report, the order appointing

them was, by consent of parties, vacated and annulled, and 483
William Nickels was appointed Master, to *examine the books and papers of said concren, and report upon them, in reference to the charges made in complainant's bill.*

On the 4th day of May, 1846, Master Nickels filed his report, with accompanying schedule, stating the profits of the concern, after paying all debts and losses, at $30,872. 69. From this sum, however, the capital stock, $5,514.50, and the bad debts, amounting to $4,080, (in order to show the nett profits, according to his calculation,) to be deducted. Deduct these two items, which together amount to $9,594 50, and there remains $21,278.19.

On the 25th day of May, 1846, the appellant filed his exceptions to the report, and the same having been argued, the case was again referred to George F. Baltzell, as Master in Chancery, upon six points, viz:

1st. To ascertain the value of the bills of the Union Bank, during the existence of the firm;

2d. To take further testimony as to the sale of Union Bank money to Benjamin Wynns;

3d. To take further testimony as to the amount of goods sold for notes of third persons.

4th. To review the exchange and interest account;

5th. To take further testimony as to the sale of Union Bank money to Thomas M. Bush;

6th. To ascertain the solvency or insolvency of the persons named in exhibit A. as being insolvent.

And on the 26th of January, 1848, Master Baltzell filed his report, which, however, was attended with no definite result, except ascertaining the value of Union Bank money, increasing the interest and exchange account in favor of the concern, and proving all the persons named in exhibit A. to be insolvent at the date of the settlement.

On the 10th of May, 1848, exceptions were filed to the second report. The cause having been argued on the ex- 484
ceptions to the several reports, on the 13th day of January, 1852, an interlocutory decree was rendered, decreeing a balance of $3,720.37 to have been due complainant on the 8th of June, 1843, after allowing respondent credit for $9009.33, paid complainant at the date of the settlement, and a credit of $4,080, for the bad debts set forth in exhibit A., that the said settlement be vacated, the partnership dissolved, and the case set for final hearing on the question of interest and costs.

On the 22d day of November, 1852, a final decree was rendered, in favor of the appellee, for the sum of $6,534.22, and costs, and thereupon the appellant appealed, has brought his case up to his court, and the question now to be determined is whether that decree is right or not. The cause has been argued with great zeal and ability upon both sides.

On the one hand, it is contended that the decree of the Circuit Court is wrong; that it ought to be reversed, the settlement sustained, the bill dismissed, and the costs taxed upon the fund: on the other, that the said decree is right and proper in all things, except that it ought to be increased by the amount of $2,757.25, the portion of the capital stock furnished to the concern by the complainant.

The first and most important question presented for our consideration, is whether the sale made by the complainant of his interest in the concern, to the respondent, on the 8th day of June, 1843, should or should not be sustained, and we are met at the very threshold of this enquiry by the position that "the order of the 30th of May, 1844, for an account, established the fact that the appellant was an accounting party, and in establishing that fact, nullified the settlement."

It may be well here to remark that the transaction be-

White vs. Walker.—Opinion of Court.

485 tween the parties of the 8th of June, 1843, purported to be a sale by the complainant of his interest in the concern and a purchase of it by the respondent, and not a settlement of the matters of the partnership, any further than such a sale and purchase would have that effect. The respondent states in his answer that the complainant said that he was willing to take less than one half of the profits of the concern, and it appears, both by the answer of the respondent and the testimony of J. W. Russ, that he hurried the respondent into the arrangement, and did not give respondent time to make out a full statement of all the matters of the concern, so as to show what the amount of the nett profits were.

Now in regard to the order of the 30th of May, 1844, it is very evident that the court did not understand that it nullified this sale and purchase, or it would not (as it did,) in the same order have given to the respondent thirty days within which to file his answer. If this order established the fact that the respondent was an accounting party, all that remained to be done, was to ascertain the amount of his liability, and that was not the object of the appointment of Master Nickels. He was appointed for the express purpose of examining the books and papers of the concern, in order to ascertain whether the respondent was an accounting party or not. The respondent did not so understand the effect of the order, or he would not have set up his purchase of the interest of the complainant in his answer, as a bar to the suit; and it surely could not have been so understood by the complainant, or his learned and able counsel would undoubtedly, on the coming in of the answer, have excepted to it for that reason, and had that matter stricken out, as irrelevant and improper. It is, however, deemed a sufficient answer to the objection to say that this order, made by consent, was, after the answer was
486 filed, also by consent of parties, revoked, vacated and annulled, and that no other order for an account appears in the record. It is further insisted that a decretal order, made by consent, cannot be set aside, either upon a rehearing or appeal, and to this we assent; but we think such an order, made by consent, may by consent be set aside. The next order, the one appointing William Nickels Master, and referring the matter to him, shows that he was appointed to examine the books and papers of said concern, and report upon the same, with reference to the charges made in complainant's bill. He was not required to state an account —it was no part of the duty assigned him; and the same may be said of George F. Baltzell, who was subsequently appointed, who seemed to understand his duty, and did not attempt to state an account. So far, therefore, as regards the account stated by the Master Nickels, it was a nullity. The Master, (says Mr. Daniel, in his able work upon Chancery pleading and practice, vol. 2, page 1478,) must not go beyond the matters referred to him, and it is, he says, laid down in one of Lord Bacon's orders, Beams orders, 23, that if a master reports as to matter which is not referred to him, his report so far as relates to that matter is a nullity. It has been decided that in such a case the proper course is not to except to the Master's report, but before it is confirmed to apply to the court that it may be referred back to the master, to review his report, but that if no such application is made, and the report should be confirmed, the court will pay no attention to it, except so far as it is warranted by the decree. Jenkins vs. Briant, 6 Sim., 605. A reference to the Master will not authorize a report by him more extensive than the allegations and proof warrant, and a report which is erroneous on its face, may be enquired into without any exceptions. Levert vs. Redwood, 9 Porter, 80. If the Master has exceeded his authority, the court will either direct him to review his report, or take no 487
notice of his finding. 2 Daniel's Ch. Pl. and Pr., 1501.

Having disposed of the foregoing proposition we come now to the important question whether the sale by the complainant of his interest in the concern to the respondent ought to be set aside or sustained. It is a general and most material rule in all cases of accounts that where there has been a settlement, and the account has either been signed or a security executed at the foot of it, a Court of Equity will not open that transaction, unless the evidence produced (founded on the charges in the bill,) shows the transaction to be so iniquitous that it ought not to be brought forward at all to affect the party sought to be bound. 1 Hovenden on Frauds, 160; Chambers vs. Goldwin, 9 Ves., 266; Drew vs. Power, 1 Sch. & Lefr., 192; Farnham vs. Brooks, 9 Pick. Rep., 231. Some principles, however, (say the court in the last case cited,) may be extracted from the decisions which stand not contradicted by others, and therefore may be adopted as rules. One is that mere inadequacy in price, if the bargain is fair, is no ground for relief. Another that if the value of the thing sold depends upon a contingency, although great advantage may be gained, yet the contract shall be sustained. Another that old age or infirmity alone, without practice upon it, shall not avoid a contract. Perhaps (say the court,) the whole doctrine may be summed up in this brief sentence taken from a case in Sch. & Lefr. 209: Concealment of a material fact, by the party whose duty it is to disclose it, is sufficient to set aside a contract. And in another book, (1 Simons' Ch. Rep., 89,) it is said that a partner purchasing must *give a full account* of the state of the property; and in 3 Swanst., 73, it is said *full information is required;* and in 14 Ves., 300, *that although the purchaser may not be aware of the duties of giving information, &c., which the court would require in the situation in which he stood, it is necessary to impute knowledge* 488
which the party may not actually have had. We subscribe to these doctrines generally, but are satisfied that there must be qualifications suited to cases of an extraordinary nature, in which a strict application of the rule would infallibly produce injustice. If a trustee, or an agent, undertakes to purchase of the owner an estate, or stock, or debts, with the condition of which he may be well acquainted, and of which the owner may be entirely or partially ignorant, there is no doubt a sufficient disclosure should be made to enable the owner to judge of the adequacy of the offer made; and if there is anything misrepresented, or concealed, or withheld, even without a design to conceal, the bargain will be void. But suppose the subject matter of the bargain to be of a complicated nature, such as an account running through many years and many volumes of books, and relating to transactions which may in a measure have gone out of memory; in such cases, all that fairness requires would seem to be to give information sufficient to lead the party into an enquiry, a willingness to answer to all questions put, and a surrender of all the materials of knowledge by the purchaser to the seller.

The exhibit of a balance considerably larger than the sum offered for it, is of itself one pretty strong ground of enquiry, and an intimation of contingencies which may affect the bargain, and if the books and memoranda containing the elements from which the balance is composed, be offered for scrutiny, there seems to be no ground to impute fraud. If the party entering into the contract has the full means of knowledge committed to him by the other party, and does not choose or neglects to avail himself of them, it is his own fault if the bargain turns out to be unfavorable. He may have too much confidence in the party with whom he deals to think it necessary to go into a particular

examination, but if that confidence is not well placed, the bargain will not be affected. Farnham vs. Brooks, 9 Pick. Rep., 233, 234.

An agreement will not be avoided by reason that representations made by one party to the other, upon the subject of the agreement, are not correct, if it be manifest that the party making the representations is speaking not from personal knowledge, but with reference to accounts which were equally open to both parties, and if the repreesntations be justified by those accounts. Harris vs. Hemble, 2 Eng. Cond. Ch. Rep., 57.

We have been referred by complainant's counsel to the case of Maddeford vs. Austwick and Austwick vs. Maddeford, 1 Simons' Rep., 89, 2 Eng. Cond. Ch. Rep., 45, to show that mhere a partner who superintended exclusively the accounts of the concern, agreed to purchase his co-partner's share of the business, for a sum which he knew, from accounts in his possession, but which he *concealed* from his co-partner, was an inadequate consideration, the agreement was set aside. But there are several circumstances which materially distinguished that case from the case at bar. One is that at the time the agreement was made between the plaintiff and defendant, the defendant had in his possession a *private book,* which contained a statement of the accounts between the plaintiff and defendant, made out by the defendant, whereby it appeared that the one thousand pounds which the defendant agreed to pay to the plaintiff, in addition to the money which he had drawn from the concern, would have been nearly but not quite a fair consideration, if no profits had been made from the concern of the mint; but taking the mint profits into the account, which the defendant was unquestionably bound to divide with the plaintiff, it would have been many hundred pounds less than the plaintiff would be entitled to receive. This *private book he concealed.* The public books of account belonging to that concern, to which all parties had access, were (as were those of White & Walker,) of an intricate nature. The respondent in this case had no such private book; and moreover, in that case the proposition to purchase was made by the defendant, and there is nothing to show that the plaintiff did not seek a full share of the profits, while in this the proposal to sell came from the complainant, who evinced a desire for an *immediate* close of the business, without waiting until the full statement of the matters of the concern could be ascertained, expressing a willingness to take *less than one half of the profits,* respondent at the same time offering him full access to all the books and papers of the concern, and suggesting the propriety of a full examination. And here it may not be improper to observe that this case was argued throughout, on behalf of the complainant, as though the respondent, at this juncture of their affairs, had undertaken to make out and present to the complainant (before he would make him an offer of what he would give for his share,) a full statement of all the matters of the concern, whereas his undertaking (and this not at the instance of the complainant,) was to make out a statement of the assets and liabilities. This he did—whether substantially correct or not will be seen hereafter. In this case, the accounts were of a complicated nature, running through four and a half years, and through many volumes of books, and relating to transactions many of which had in a measure gone out of the memory of the respondent, as appears by his examination before the Master. He gave information sufficient to have put the complainant on enquiry, advised it, and offered the books and memoranda containing the elements from which the balance is composed, for the scrutiny of the complainant. There is no pretence that he at any time evinced any unwillingness to answer any questions put to him by the complainant. Where, then, is the ground to impute to him fraud, either actual or constructive? The defendant, by his answer, denies all fraud, and, indeed, all the charges alleged, and all the facts set forth in the bill as grounds for the interference of the court. The answer is sworn to, and it is a well settled rule in equity that a party is not to be charged upon any fact stated in the bill, against his own denial, in his answer under oath, of the existence of such fact, if the proof of the fact is only by one witness, upon the equitable principle that if he is put upon his oath by his adversary, credit shall be given to his own declarations, unless they are contradicted by at least two witnesses, or by written documents, or pregnant circumstances. In every case the answer of the defendant to a bill filed against him, upon any matter stated in the bill, and responsive to it, is evidence in his own favor, and is conclusive, unless overcome by the testimony of two opposing witnesses, or of one witness, corroborated by other circumstances and facts, which give to it a greater weight than the answer, or which is equivalent in weight to a second witness. 2 Story Eq. Jur., Sec. 1528, and note 2, page 995, 5th Ed. But then the answer, to have this power, most be direct and positive. Only vs. Walker, 2 Atkyns, 407; Walton vs. Hobbs, ibid., 19; Arnut vs. Bircue, 1 Ves., Sr., 97; Lenere vs. Lenere, 1 Ves., Sr., 66; Wetmore vs. White, 2 Caine's Cases in Error; Farnham vs. Brooks, 9 Pick. Rep., 249, 250. The answer in this case is direct and positive. The question of fraud is one of motive and intent, and can rarely if ever be considered as a single fact, but a conclusion to be inferred from all the circumstances of the case. In conclusion, however, the same general rule prevails in equity as at law; it is not to be presumed, but must be proved. Wilson & Cleland vs. Luke Lott, 5 Fla, R., 316.

Where, we would ask, is the evidence to fix the charge of fraud or liability upon the respondent? We have carefully examined the testimony of every witness who was sworn to testify in the case, and have found nothing in it which establishes any such charge. We may, therefore, safely say it does not exist, unless it is to be found in the report of the Master Nickels. Hence we turn to that report, and what do we find? A document full of errors and exceedingly unsatisfactory, although it cost him about eight months' labor to prepare it, a recast of the books, *in his opinion,* being necessary to enable him to make out a statement of the affairs of the concern; and when it comes, what does it present? This recast of all the books, with schedules, &c., and a long report, mostly upon matters not referred to him, without a single word as to the charges in the bill, (except in the caption referring to his appointment,) in regard to which and for no other purpose he was appointed to examine the books and papers of the concern. There is presented, amongst other things, a paper marked T., called a profit and loss account, showing a balance of $30,872.67, which he reports as the net profits of the firm, and yet in this important account he forgot (or did not know that it was necessary, in order to show the net profits) to deduct the amount of the capital stock paid in and the amount of bad debts, together amounting to near one third of that sum.

Now if he committed so gross an error in an account covering less than half a sheet of foolscap paper, what errors may he not have committed in recasting the whole set of books of the firm of White & Walker, which did a large business, running through a period of four and a half years? And ought such a report to be taken as conclusive, and as sufficient evidence to establish the grave charges made against the respondent in the complainant's

bill, especially after all of the books and papers of the concern have been burned up, so that they cannot be referred to for the purpose of testing the correctness of the report? We think not. In the cases of Moore & Taylor vs. Story, 8 Dana's (Kentucky) Reps., 231, in which an Auditor had been appointed to examine the books and accounts of a partnership concern, &c., and to report, &c., the books (nine in number) had been very irregularly kept, and the accounts were (as in this case) exceedingly complicated. The auditor made his report, but the court said they "could not rely upon the result of his estimates, *as they had discovered several material errors in his calculations.* Nor can we (said the court,) *confide in data assumed by him* to arrive at the amount of capital, (a question that had been specially referred to him.) We think the parol proof in the cause, strengthened by the facts deduced from the whole case, may more safely be relied on." So in the case now before us. We cannot (for a similar reason,) *confide* in the *report of the Master* Nickels, and are satisfied that it should not be made the basis of a decree against the respondent. But there are other errors in this report still more important, some of which were corrected in the Circuit Court, and others which we propose to correct here.

It may be proper to remark that we have looked into this report merely as a matter of evidence, to ascertain the fact whether respondent was an accounting party or not—the sole object of this reference to this Master.

In regard to the item in account T., charged as goods sold for promissory notes of individuals, &c., $2,500, the proof is exceedingly vague and unsatisfactory. Indeed, there is no legal proof of any specific amount. The respondent, in his examination before the master Nickels, in answer to a question put to him on this subject, said—We were in the habit of receiving promissory notes of individuals for goods; don't know the amount, but think it was not large, as we did not do much of that kind of business, and merchandise has not had credit for them. J. W. Russ, who was also examined as to this matter, before the same Master, said that while he was in the employment of White & Walker, as clerk, they did receive promissory notes of individuals in payment for merchandise, but could not tell how much. In a subsequent examination before the Master Baltzell, he says he remembered some business of the kind being done, but does not recollect any particular transaction, it being confined to limited amounts, and *entries were made;* the notes were put away with other notes of the firm; the practice was not common, the respondent preferring good customers' debts to notes of third persons. F. R. Pittman, who had also been a clerk of White & Walker, was examined by Master Baltzell, and in answer to a question put to him in regard to this matter, said he did not recollect any such transactions; it was not the practice of the firm, and if any occurred they were small, or he would recollect it more perfectly. M. L. Cavert, another witness, in answer to an enquiry put to him, said—I was in the habit of trading for promissory notes of individuals, and suppose I received five hundred per annum for each of these years, (1841, 1842, 1843 and 1844,) and I think this is a small estimate; and being asked as to the general custom of merchants in Marianna in regard to this matter, said—I cannot say whether it was the general custom of the merchants; I dealt in them myself, because I preferred good notes rather than charge them (goods) in account. Isaac Widgeon, another witness examined, said—I think it was the custom of merchants generally (in Marianna) to sell merchandise for promissory notes on third persons, and that he was in the habit of doing so himself, and on being asked what amount of such papers per annum would be a fair average for which merchandise was sold in such a business as White & Walker, (which question was objected to by respondent,) he answered—"I suppose five or six hundred dollars." This is all the testimony on the subject, and we may well lay out of view the testimony of the last two witnesses, there being no rule of law justifying its reception. In the case of Simpson vs. Feltz, 1 Nott & McCord's Ch. Cases, 215, an attempt was made to prove the profits of a firm by showing what profits other merchants in the same neighborhood made, but the court said:—The evidence in support of the item in the Commissioner's report is very flimsy, weak, and altogether conjectural, being founded on the opinion of merchants in the neighborhood, whose situations were entirely different from that of complainants, they being owners of new cash stores, when that of complainants was a credit store. The evidence of these two witnesses, Cavert and Widgeon, is equally conjectural; indeed, more so. There is nothing at all to show the relative business of White & Walker with any other merchant in Marianna. One, for aught that appears, may have had ten times the amount of stock of the other. Cavert or Widgeon may have had fifty thousand dollars worth; White & Walker may not have had ten thousand. The testimony shows that in 1841 and 1842 their stock of goods was small. One witness says that it had been quite low. The respondent, it will be observed, said, speaking of these notes, merchandise has not been credited for them. This he might well say, for other testimony in the case shows that White & Walker did not keep what is called by accountants a merchandise account; but Russ, the principal clerk of the house, who kept the books, and was intimately acquainted with the transactions of the concern, says—*Entries were made; the notes were put away with other notes of the firm.* It is very evident, therefore, that the concern had the benefit of them. Indeed, they may, and probably did, constitute a part of the very notes from which the complainant made his selection. And here it may not be improper to remark that the able and astute counsel who closed the argument of this cause for the complainant, while he earnestly contended that merchandise ought to have a credit for these notes, did not charge the respondent with having made any improper use of them, but freely admitted that they had gone into the general fund of the firm, and that it had had the use of them. Apart from this consideration, however, from the view which we have taken of this case, showing an absence of all fraud on the part of the respondent, the amount, from all the legal proof in the case, being but small, would not change the result.

The charge for profits on Union Bank money, seems to have nothing to sustain it. The testimony shows that some of it was received at its face for goods sold, and bought at a discount of fifty per cent.; that it was lent, to be paid in good money, and that it was paid, and that the amount received went to pay the debts of the concern, and Russ, their principal clerk, who was intimately acquainted with all the business transactions of the house, says expressly in his testimony, taken before the Master, that all these speculations were for the benefit of the concern. There is consequently no reason or pretence for this charge.

The Master's report affords no satisfactory explanation in regard to the item of $2731.75, found on the credit side of exhibit T. He states it thus:—"Sales made to cash which has been paid out to individuals, which I have found charged to them at sundry times in day book, but has not been entered in cash book; therefore merchandise ought to be credited." By turning to exhibit R., we find that this item is made up of 53 monthly items, embracing doubtless di-

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497 vers small sums lent each month, commencing in November, 1838, and running on until April, 1843. This exhibit is headed thus—"Statement of entries, cash paid out, which are found on day book, posted in journal, and have never been entered on cash book, or to credit of merchandise." In this report he says—"The paper marked R., shows various cash entries on the day book and ledger, which have not been placed on the cash, or anywhere else carried to credit of merchandist." This is all that is anywhere said in relation to this item, except in the examination of the respondent before the master Nickels, to which reference will hereafter be made. It seems from all this that the master assumed the fact that these items had not been entered on the cash book. Why this assumption? It does not appear to be based on testimony, or even a reasonable probability. We have nothing before us to show that the cash book of this firm was not kept in the usual manner, and if it was, and these items were for cash received in the daily sale of goods, then they must have been entered in the cash book, and merchandise had already been credited with the amount of them; and the witness, Russ, the principal clerk of the House, testifies that a portion of the time Pittman, another clerk, kept the cash book, and *squared it;* that is, we understand, balanced it. Now upon the hypothesis of the Master, we are at a loss to know how this book was made to balance. The argument of counsel (as we understand it,) on this point was that these amounts were found charged in various accounts of customers, as cash loaned or advanced, and that it was a legitimate presumption that the cash so loaned was taken from the till or drawer, which contained the money received for the daily cash sales of merchandise, and therefore, in order to have full benefit of all the goods sold, it was necessary to enter the amount to the credit of merchan-
498 dise, in the account T. Now the objection to this item, as it stands in the Master's report, is that his assumption that these items were never carried to the cash book is a mere assumption, unsustained by proof, unless it is to be found in the answer of the respondent to a question propounded to him upon his examination before the Master, and not within the bounds of a reasonable presumption, and we think that to fix a charge of fraud upon a party, we ought to have something more than the mere assumption of facts.

The objection to the explanation offered in the argument of counsel, viz: That it afforded an index of the amount of merchandise sold for cash, is equally unsatisfactory; for, *non constat,* that the money so loaned to customers was collected from other sources than the daily sales, as for settlement of accounts previously contracted by other customers, or taken out of moneys already entered in the cash book, and which had passed into the general fund of the concern, and other monies, collected from various sources, and placed in the same fund, which is much more likely. Fraud, as before stated, is never to be presumed, but must be proved; but if facts may be assumed, and made to rise to the dignity of testimony, this sound, salutary and equitable rule of law may very easily be evaded. The question propounded to the respondent, to which his answer above referred to was given, is as follows, viz: "I find many charges of cash entered on the day book which have never been entered on the cash book; how are they to be accounted for, and to what account are they to be placed?" To which the answer was: "I *presume* merchandise ought to be credited with the amounts." Here, in the question put, is to be found again the same assumption. It is a mere general question; the attention of the witness is not called to any particular item; but without any particular item being brought to his notice, he is called upon to answer to a series of items, amounting doubtless to several hundreds, 499
and running through a period of four and a half years, and this, too, eight years after these entries commenced. Can it be supposed by any reasonable man that he could, when thus suddenly interrogated, recollect all or even any considerable portion of these numerous items, so as to be able to answer understandingly in regard to them? Surely not. The clerks of the house, it appears, made most of the daily entries. These items were small, although amounting to considerable in the aggregate. It is not probable, therefore, that his attention was ever very particularly called to them, and hence the general and necessarily unsatisfactory language of his answer—"I presume," &c. Nothing more than mere presumption could be expected in an answer founded entirely on an assumed fact. To what weight, then, is the answer entitled? It would seem that it should not be permitted to outweigh the defendant's answer, which is responsive to the bill, and the testimony of Russ, the principal clerk of the House, who states in substance that the books were justly kept, and all the entries in them *bona fide,* and honestly made.

As to the sum of $4,080 for bad debts, it is deemed sufficient to say that this item is set up in the answer responsive to the bill, that it was allowed by the court below, and has not been objected to here, even by way of argument.

We insert here a statement showing the difference between the exhibit made by White to Walker at the time of the purchase of his interest in the partnership business, and the actual condition of the business, as shown by the Master's report, after being corrected by this court.

White's exhibit, made to Walker at the time of sale, viz:

Good assets over and above the debts due by the concern, and including the private accounts of the copartners,	$19,985 33
Bad assets reported,	4,080 00 500
Totals assets due concern, over and above its liabilities,	24,065 33
Balance reported by Master, in account of profit and loss,	30,872 67
By item in account designated as "sales to cash paid out to individuals,"	2,731 75
By item in account, "Goods sold for promissory notes,"	2,500 00
By item in account, profit on Union Bank notes loaned to T. M. Bush,	935 00
By item in account, profit on Union Bank notes loaned to Wynns,	660 00
	$6,826 75
Total balance, as corrected by this court,	24,045 92
Balance in favor of White's exhibit,	19 41
To gross balance due partnership, as per above statement,	24,045 92
By amount allowed for bad debts by the Circuit Court,	4,080 00
Net balance, to be divided in equal moities,	19,965 92
Nett balance due to each partner,	9,982 96
Amount of cash and selected notes received by Walker,	9,009 00
Excess in favor of White, consisting of assets remaining after the selection by Walker, of his portion,	$873 96

It is insisted by the complainant that the decree of the Circuit Court is erroneous in this: That it does not allow him for the cash which he contributed as capital stock, with which the firm commenced business, and that this ought to be added to the amount decreed in his favor. This claim of the complainant we have maturely consid-

ered, and think that it is without foundation. The basis of the decree of the Circuit Court is the balance struck in account T., which purports to be a "profit and loss" account, but which is in fact only a "balance sheet" showing the difference between the assumed disbursements and receipts of the concern. To convert it into a "profit and loss" account, it was necessary to carry to the "debit side of the account" the whole cash capital invested, and this, if it had been done, would have reduced the balance by that amount and would then have exhibited the clear "profit" (as the Master understood it,) over and above that capital. Admitting the position claimed by complainant, the account between the copartners would stand thus:

Balance reported in account T.		$30,872 67
One moiety, or Walker's half.	$15,436 33	
Add for cash contributed to capital stock	2,757 25	$18,193 58
Balance to be received by White		$12,679 09

Thus it will be perceived, upon the hypothesis on which the complainant's claim is based, of two copartners contributing equal portions of the cash capital, and to participate equally in the profits, one receives from the nett assets of the concern $18,193.58, while the other gets only $12,679.09. To meet a result so obviously inequitable, it was insisted by the counsel for complainant that $2,757.25 was to be viewed as coming not out of the nett assets of the concern, but as due by White, the acting partner, who had received it from Walker at the time of entering into the copartnership, and that he ought to be required to refund it out of his private funds. It is true, White did receive the amount, as Walker's portion of the cash capital, but it is equally true that he disbursed it for the purchase of merchandise, which very merchandise is debited in account T., and the proceeds thereof, when sold, carried to the credit side of the same account. Now if White is to be debited with the cash received, he must likewise be credited with the amount when paid out for merchandise, and the two amounts being equal, they balance each other, amounting to a cross entry, which could not in the least affect or vary the balance stated in the account. We should not have deemed it necessary to expend an argument upon this point but for the very earnest manner in which it was pressed upon us by both of the able counsel who represented the complainant. We cannot but believe that they had been led into an erroneous conception of this matter, by viewing the result exhibited in account T. as "*clear profit*," when it was in fact only the "*balance*" between the "*receipts* and *disbursements*" of the concern; and indeed, the designation of that account might well induce the misconception. We are perfectly satisfied that there is no error in the decree of the Circuit Court in rejecting this item of claim. The view which we have taken of the case, in the former part of this opinion, and the conclusion to which we have come upon the whole case, renders it unnecessary to consider the other claims set forth in the complainant's petition of appeal. Upon a view of the entire case, it is gratifying to us to perceive that our conclusion upon the details is strongly fortified by the general result, based upon the evidence of the witnesses examined to the point of the average profits realized by other mercantile houses during the period that this firm was in operation. The weight of evidence on that subject seemed to establish fifty per cent. advance on the sale of goods as the average. If we assume this data as the basis of our calculation, (and we are inclined to the opinion, from the disasters which attended the majority of the mercantile firms doing business at that period, that this average is a very high one,) the result will stand thus:

Amount of merchandise bought during four and a half years, the period of doing business, (in round numbers,)		$44,000 00
Fifty per cent. advance on cost is		22,000 00
Deduct for bad debts		4,000 00
Leaving good assets to be divided		$18,000 00
One moiety of good assets		9,000 00

Which is in round numbers the amount the complainant received for his interest in the concern when he sold out to White—a result with which we think complainant has no cause to be dissatisfied, when we reflect that he embarked in the enterprise only the sum of $2,757.25, and in the brief period of four and a half years, had returned to him, in cash and the *selected* assets of the concern, the amount of $9,009.00. A result so satisfactory, and achieved through the perilous periods of 1840, 1841 and 1842, is in our estimation the highest compliment which could be paid, not only to the business capacity, but to the honesty and integrity of the respondent. Let the decree of the court below be reversed, and the cause be remanded to the court below, with directions to dismiss the bill; and as to the costs, we deem it right and proper that under the circumstances each party should pay one half the costs, and accordingly so decree.

As a general rule, *prima facie*, the prevailing party is entitled to costs, as well in equity as in law. 3 Daniels' Ch. Pr., (by Perkins,) 1520, and notes. Yet costs do not always follow the decree in favor of a party; they are in the sound discretion of the court, and are to be awarded or refused according to the justice of each particular case. Ibid, 1515, 1516, and note and case cited. In Jones vs. Morehead, &c., 3 B. Monroe's Reps., it was held that in a case where suit was necessary to wind up the partnership, it is proper to divide the costs. In Taylor vs. Cawthorne, 2 Dev. Eq., 221, it is said costs are usually taxed on partnership effects. In the case of Simpson vs. Feltz, 1 Eng. Cond. Ch. Reps., 213, 219, the plaintiffs, in a suit for a settlement against a co-partner, were ordered, under the circumstances, to pay two-thirds of the costs. A very large portion of the costs, had the respondent (the appellant here,) taken the proper steps at the coming in of the report of the Master Nickels, to get rid of all that portion of it which was beyond the scope of his authority, (which he failed to do,) might have been saved; and he is at fault in relation to other matters, which tended to increase the costs, and especially in the great and unnecessary length of his answer.

Therefore let one half the costs be taxed against each party, both in this court and the court below. *Per totam Curiam.*

FREDERICK BELDEN, PLAINTIFF IN ERROR, VS. JOHN D. GRAY, DEFENDANT IN ERROR.

1. The statute against usury is salutary in its operation, and it is of paramount importance to guard it against the shifts and devices usually restored to to evade its operation.

2. Whether or not a contract is usurious, is a question of law, and it is within the province of the court to determine that question, and to instruct the jury accordingly.

3. The case of Gray vs. Belden, (3 Florida Reps., 110,) considered and approved.

4. The court will not disturb a verdict merely on the ground that the facts of the case did not call for a certain instruction which was given by the court,

505 and which instruction was correct in principle, and not calculated to mislead the jury.

Writ of Error to Franklin Circuit Court.

This was an action of assumpsit on a promissory note. The defence set up was usury.

The facts, as shown by the record, were these: Gray was security on a forthcoming bond, given by one Tobey, whose slaves were levied on for a debt of $4,000, and replevied. The slaves were not forthcoming on the day of sale; the bond was returned forfeited, and execution was issued against Gray, whose property was levied on and advertised for sale. On the day of sale, Gray agreed with one T. J. Vickers, the holder of the execution, to give, and did give him a note for $200, payable thirty days after date, upon the consideration that Vickers would stay the execution for that time; and the object of this stay is stated to be that Gray might have time to go to Mobile and get the slaves mentioned in the forthcoming bond, and have them sold in discharge of the execution which had been levied on his property. The note thus given was endorsed to Belden, the plaintiff in error, who brought suit thereon. Upon this state of facts the Supreme Court, at January term, 1850, upon a writ of error, duly prosecuted, determined that the contract was usurious, and remanded the cause to the court below for a new trial.

At the April Term, 1850, of Franklin Circuit Court, a new trial was had, and the following additional evidence was adduced, viz:

"On the day appointed for the sale of Gray's property, Gray applied to Vickers to postpone the sale for thirty days to enable him, Gray, to seek for and surrender the property of said Tobey, (for the delivery of which said forthcoming bond was given.) Vickers declined and said that he wanted to be present at said sale, and that he had
506 come from Montgomery, Alabama, (where he resided,) on purpose to attend said sale, and that if it was postponed, he would have to return to Montgomery, and come back to St. Josephs, (the place where the property was levied on and to be sold,) at some cost and expense. Gray then offered to give to Vickers, his note for two hundred dollars, as an inducement to postpone said sale. Vickers consented, and postponed the sale, and the note was given. The whole of said judgment was subsequently paid to said Vickers. The conversation here stated between Vickers and Gray, took place in presence of witness, on the day the sale was to take place, and about the same time and just before the Marshal was about to sell the property of said Gray.

"The court instructed the jury that if the note sued upon was for the postponement of the sale by Vickers, it was usurious, and could not be recovered upon, although there were other accompanying considerations. If bad in part, bad in whole, and in such case, will find for defendant."

The jury returned a verdict for defendant, upon which judgment was rendered.

W. G. M. Davis for Plaintiff in Error.

G. S. Hankins for Defendant in Error.

DuPONT, J. delivered the opinion of the court.

At the January term, A. D. 1850, this case was brought up to the Supreme Court, by writ of error, sued out by the present appellee, and the judgment of the Circuit Court having been reversed, it was remanded for a new trial. (Vide Gray vs. Belden, 3 Fla. R., 110.)

In obedience to the mandate of the Supreme Court, a new trial was had, at the Spring Term, A. D. 1850, of the Franklin Circuit Court, upon which trial a verdict was

rendered for the defendant below, and a judgment entered 507 accordingly. To reverse that judgment is the object of the present appeal to this court.

We do not feel ourselves called upon to review the opinion delivered in the case of Gray vs. Belden, concurring as we do in that opinion, so far as it bears upon the issue which was raised by the pleadings; and in order, therefore, to a decision of the present case, it will only be necessary to consider, *first,* whether the additional evidence offered at the second trial altered in any material respect the former aspect of the case; and *secondly,* whether the instructions of the Judge, given on the trial below, were in conformity to the law, as announced in that opinion.

The issue upon which the case was decided, both at the first and second trials, was raised by the plea of usury. The evidence adduced at the former trial to sustain the plea, proved that the note sued upon had been given by Gray, the defendant, in consideration that a certain execution at law, which had been levied upon his property, should be stayed for the period of thirty days. The language of the witness, as we find it in the record, is as follows: "On the day of sale, by agreement, Gray gave the note sued on to Vickers, payee and holder of execution, in consideration that Vickers would stay the execution for thirty days, in order to give Gray time to go to Mobile and get the negroes mentioned in forthcoming bond, and have them sold in discharge of the execution against him, founded on the forthcoming bond." The only additional evidence adduced at the second trial, was given by the same witness,, who testified to this point on the first trial, and was as follows, viz: "Vickers declined," (the offer to take the note) "and said that he wanted to be present at said sale, and that he had come from Montgomery, Alabama, where he resided, on purpose to attend said sale, and that if it were postponed, he would have to return to Montgomery, and come back to 508 St. Josephs, the place the property was levied on and to be sold, at some cost and expense. Gray then offered to give Vickers his note for two hundred dollars, as an inducement to postpone said sale. Vickers consented and postponed the sale, and the note was given."

We are at a loss to perceive how the additional evidence changed or altered the aspect of the case, as it was presented on the first trial. It is true that the counsel for the depellant insisted in his argument that a different consideration for the giving of the note is established by the additional evidence, viz: An *indemnity* or *reimbursement* for the traveling expenses of Vickers to and from Montgomery; and in this connection, he contended with great earnestness against the impolicy of preventing a creditor from extending to his debtor that forbearance which a well disposed and benevolent man might desire to exercise. But we differ from the counsel in the supposition that any new or different consideration was established by the additional evidence; and as to the matter of policy, we deem it to be of paramount importance that a statute so salutary in its operation as is the statute against usury, should be sedulously guarded againsth the ingenious shifts and devices so often resorted to to evade its operation. The true question involved in the issue is this: What was the consideration which moved Gray to the giving of the note? Evidently it was the postponement of the sale of his property, or, in the words of the statute, the "forbearance, or giving day of payment," by which the creditor to the debtor. We are, then clearly of opinion that the present aspect of the case is identical with that presented at the first trial, and that it has not been relieved, by the additional evidence offered at the second trial, from the operation of the statute.

The other question which remains to be considered, is as

509 to the propriety of the instructions given to the jury on the second trial. There was some difference of opinion between the counsel as to what was the instruction given by the court, it being apparent that there was a clerical omission in the record; but giving it the reading contended for by the counsel for the appellant, (which we are inclined to think is the correct version,) it was in the following words, to-wit: "If the consideration of the note sued upon was the postponement of the sale by Vickers, it was usurious, and the note could not be recovered upon, although there were other accompanying considerations. If bad in part, bad in whole, and in such case the jury will find for defendant." The first clause of this instruction, we think, is in strict conformity to the opinion delivered at the former hearing of the case, and is otherwise correct in principle. It did not interfere with the legitimate province of the jury to inquire into the consideration of the note; and that being ascertained to be the postponement of the collection of the debt, it was the right and duty of the court to announce the law. Whether a contract be usurious, is a question of law, and in this clause of the instruction, the court did no more than to declare the law, as applicable to the facts of the case.

Nor do we think that the second clause of the instruction, which declares that "a consideration bad in part is bad in whole," is obnoxious to any valid objection. Although the facts of the case might not, perhaps, have called for the giving of the instruction, yet, being correct in principle, *when applied to a case of this kind*, and not perceiving how the appellant could be injured thereby, we are not disposed to lay any stress upon it.

Let the judgment be affirmed, with costs.

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510 JAMES C. JONES, APPELLANT, vs. WILLIAM J. FELL, EXECUTOR OF S. G. CLIFFORD, DECEASED, APPELLEE.

An agreement amongst Pilots to associate together for their business, is not illegal.

Appeal from a judgment of the Circuit Court for Escambia County, in the Western Circuit.

This was an action of assumpsit, instituted by the appellee in the court below, to recover an amount as a balance claimed to be due from appellant to Clifford, the appellee's testator, upon an account stated. Non assumpsit was pleaded, upon which issue was joined.

On the trial of the cause, Edward Onixon, a witness for plaintiff, testified that Clifford, the appellee's testator, Jones, the appellant, and he, the witness, were partners, equal in interest, in piloting; that they were in the habit of settling up every quarter until the month of October; that Clifford was taken sick in the latter part of November, 1850, in consequence of which there was no other settlement until the 6th of March, 1851, when it appeared that Jones had overdrawn his share of the profits of the business to the amount of $192.10, and the witness had overdrawn his share some $40 to $60. Jones acknowledged all in account to be correct. Whether Jones paid anything at that time, or since, the witness says he does not know. The above settlement of accounts was made at the request of Clifford, and it was agreed that whatever had been overdrawn by either, should be paid. To this Jones made no objection.

On his cross-examination, he stated "that the partnership between himself, Clifford and Jones continued for several

years; that according to their by-laws, each was on duty 511
one day and off duty two days, and when each was absent, he drew his share of the profits when he returned; that the understanding was, that one of them should at all times be on duty, and not more than one, unless they were needed, and that under this arrangement, they shared alike in the profits; that they had by-laws, which imposed a forfeiture in cases of delinquency. If the pilot on service was on the look out, we did not all go after a vessel, unless there was a second vessel. Clifford's sickness did not affect or abridge his right to a share of the profits. The partnership continued to the 6th of March, 1851. I left at one time, with the leave of the Port Wardens. We had the liberty to go where we pleased during the two days of respite; but if we were not actually on the bar we were there. It was the duty of all three pilots to be there, but under our arrangements but one was on the watch, or look out; but if either was absent when wanted, he forfeited his share of the profits. But this arrangement did not relieve any of them from duty. The one on duty on the bar was the lookout, but none were afloat at such time. No injury resulted to commerce, or the service in which they were engaged, by this partnership, as far as witness knows. Two of the Port Wardens advised this association. On one occasion, he, witness, heard that a vessel could not get a pilot off Pensacola bar."

Mr. Kelly, a witness for defendant, testified that he has been Port Warden for many years, both at this port and elsewhere; that he has always been of opinion that these combinations among pilots were injurious to commerce, and the harbor where vessels come in. This, however, is only his individual opinion; that three pilots were appointed for this port; that it was expected that they should be on duty, except when absent by leave of the Port Wardens. This witness further stated that if the matter 512
had been officially reported to the Port Wardens, he, as one of that Board, would have ordered a dissolution or annulment of such combination. He says that three pilots were considered necessary, but that he does not know that it was necessary for all of them to be constantly on the lookout.

The court charged the jury that a contract in violation of public policy, or in contravention of a public statute, is void in law; and also that if the parties in this case made a contract the tendency of which was dangerous and injurious to commerce and navigation, such contract would be void, as against public policy.

The defendants, amongst other things, asked of the court the following instruction to the jury: If the jurors are satisfied that there were three pilots appointed by the Board of Port Wardens, then they are to presume that the public service rquired these pilots, and that any partnership or combination amongst these pilots so appointed, by which one or two were relieved from duty, even for a day, was therefore in derogation of a public duty, and consequently void. This instruction was refused by the court, and the defendant excepted.

A verdict and judgment having been rendered for plaintiff, defendant moved for a new trial, which was refused by the court, and defendant appealed.

R. L. Campbell for appellant.

BALTZELL, C. J., delivered the opinion of the court.

This is a suit instituted by a pilot of the harbor of Pensacola, to recover from one of his associates, a share of the profits claimed to be due him under agreement to unite in the business of pilotage.

Jones vs. Clifford's Ex'r.—Opinion of Court.

513 The error complained of is in the refusal of the Circuit Court to give an instruction asked in the following terms: "If the jurors are satisfied that there were three pilots appointed by the Board of Port Wardens, then they are to presume that the public service required three pilots, and that any partnership or combination amongst the pilots so appointed, by which one or two were relieved from duty even for a day, was, therefore, in derogation of a public duty, and consequently void."

This maintains the position that all the pilots of a port are to be constantly engaged, and that an arrangement for the relief of one of them, for any time, however small, is illegal and improper. Whilst the act of 1822, providing for the appointment of pilots, prohibits persons from acting who are not appointed, under a penalty, (Duval 62,) yet the regulation of them and establishment of all such ordidances as they shall deem advisable, with the power of removal and to fix and alter the rates of pilotage, is by special law left to the Board of Port Wardens for the harbor. Thompson's Dig., 256.

There is no rule or regulation (as appears from the record,) of this Board of Officers making provision for this constant attention to duty, and it may be questioned, we think, whether one carried to such an extreme of strictness, would be either polite or proper. It would be a different thing to require that a sufficient number of the pilots appointed should be kept engaged to supply the wants of the harbor.

Nor does it follow as a necessary consequence, that because three were appointed, the engagement of them all, without any relief, was necessary or requisite. The reasonable presumption, we think, is that a number was appointed sufficient to provide for casualties and sickness, and to give such relief as the exigencies, not only of a day,
514 but even a longer time might make necessary for one or more of the pilots.

As a general rule, the law gives its command to its officers, with a large discretion as to the mode of execution, yet exacting a faithful performance. Thus, pilots whose business it is, of most delicate and important character, to guide and conduct vessels in safety over the bars, and through the intricacies of a channel into a harbor, are required to be on the alert, to render in due season the requisite assistance. For neglect of duty or other misconduct, they are liable to be discharged or dismissed, and have their licenses revoked; they are also responsible in damages to the parties injured. As already remarked, they are placed under the governance and directions of officers, whose duty it is to give licenses, only to persons possessed of an intimate acquaintance with the particular navigation, of integrity, diligence, activity, sobriety and steadiness, and of the skill to manage all the vessels that may trade to the port.

It seems to be the practice in other ports to require bond and security, and an oath to discharge the duties faithfully. The Port Wardens may possibly possess the power to establish a rule, such as is insisted on, and if one had been shown in this case, it would certainly have received from the court a very respectful consideration. As it is, we have no power to declare or create such a one, or to consider this case as if one existed, and had been disregarded by the pilots.

It is insisted that an association "amongst pilots is in violation of public policy, tending to impair competition between them, and diminish their exertions in the public service; that they share alike in the profits is sufficient to destroy all emulation." It is also insisted that the court shall affirm the truth of these propositions as matter of law, 515 and without reference to the facts.

It will be seen at once that the question is, and would be embarrassing to persons unacquainted with, and having little practical knowledge or experience of the subject, whether such an association is wise or unwise, beneficial or injurious to commerce, and may not be determined by reference to the books, for no authority has been cited, or is to be found on the subject, so far as research has extended, but would best be ascertained by the examination of persons whose interest or duty may prompt them to watch its operation. In this case, one of the Port Wardens, Mr. Kelly, thinks it injurious, while two of the others, Messrs. LeBaron and Mitchell, advised it—the Board not acting nor prohibiting it. At the bar of the Mississippi there are fifty pilots, organized into an association having a principal and Board of Directors, with regular government and rules for distribution of service, pay, &c.

After an experience of ten years, the system was found to work well. The evidence for the good order, faithfulness, decorum and entire efficiency of the pilot union was unanimous. See report of Committee of Legislature of Louisiana, 2 DeBow In Res. 8, 10.

Associations are so common an element, not only in commerce, but in all the affairs of life, that it would be rather perilous on the part of the court, to assert that they impair competition, destroy emulation and diminish exertion. There is scarcely an occupation in life, scarcely a branch of trade, from the very largest to the smallest, that does not feel the exciting and invigorating influence of this wonderful instrumentality. It made and conducts our government, constructs our railroads, our steam vessels, our magnificent ships, our temples of worship, structures for public and private use, our manufactories, creates our 516 institutions for learning, builds up our cities and towns.

Its very office is to do what individual exertion may not accomplish, and in a degree distinguishes civilized from savage life. Why then should this important agency be denied to this meritorious class of our citizens? They are in general men of small means, to whom an association may not only be desirable, but necessary and indispensable. Were our minds less clear on the subject, we are not permitted to assert the invalidity of the act on this account.

"An agreement is not void on this ground, unless it expressly and unquestionably contravenes public policy and be manifestly injurious to the interests of the State." Chitty on Cont., 664.

We are then of opinion, that there was no error in the court's refusing the instruction asked.

The second instruction asked was given in substance by the court, in the last charge, that a contract, the tendency of which was dangerous and injurious to commerce, was void as against public policy, nor is there any reason, that we can perceive, for granting a new trial.

The judgment will be affirmed with costs.

ROBERT MYERS, APPELLANT, VS. BENJAMIN F. NOURSE, ADMINISTRATOR OF O. C. RAYMOND, DECEASED, APPELLEE.

1. Ten years is not a reasonable time within which to perfect the title, after objections by purchaser, under a judicial sale by the master, of real estate.

2. Where time is given, the party should be put under terms to procure the title speedily.

3. The practice of allowing time to perfect title not encouraged; the court and parties should take care before hand that the title is in a state to be sold.

4. A material distinction exists between the actual existence of the title, and the state of the evidence of the title; in the latter event, the court may give time to reform and amend it.

5. A purchaser not permitted to cast about for a title, after a judicial sale; Lord Redesdale's rule in selling land under a decree of court commended.

Appeal from Franklin County Circuit Court.

Benjamin F. Nourse, administrator of Raymond, filed his bill in Chancery against A. K. Allison, and others, claiming that certain town lots in Apalachicola, conveyed by the Trustees of the Apalachicola Land Company to O. C. Raymond and said A. K. Allison, were held by them as tenants in common, and charging that said Allison mortgaged said lots to certain creditors of the firm of Raymond & Allison, for more than was really due, and prayed for a receiver, &c.

It appears that O. C. Raymond and A. K. Allison had been partners in trade, and as such, and for the use and benefit, and for the purposes of the partnership, had purchased the lots in question, and had erected a brick building or store thereon. After the death of Raymond, Allison, as surviving partner, mortgaged the lots, to secure the payment of $7000, alleged to be due the firm of Morgan & Barker, of New York, by Raymond & Allison. At Fall Term 1843, by consent of parties, a decree was entered cancelling the mortgage executed by Allison to Morgan & Barker, and ordering the said lots to be sold by Benjamin F. Nourse, receiver, after giving public notice of the time and place of sale, on terms of one fourth cash, and the remainder in six, twelve and eighteen months, with good joint and several notes for security, and no title to be given until said notes were paid. Nourse, as administrator, was to join in the sale,
518 and in making titles. Pursuant to this decree, the two town lots in question were offered at public sale, to the highest bidder, on the 22d day of March, 1844, and the same were purchased by Robert Myers, for $6,100. Of this amount, $1,525, being one fourth, were paid in cash, and Myers gave three notes, each for $1,525, payable respectively in six, twelve, and eighteen months after date. As a further security, the receiver required that Myers, the purchaser, should cause the property to be insured, for the sum of $4,000, and should regularly assign to him the policy of insurance.

On the 9th day of December, 1844, Robert Myers filed his petition in Franklin Circuit Court, alleging that D. B. Wood and N. J. Deblois who were partners, were jointly interested with him in the purchase of said lots, and that the sole object which they had in view in purchasing said lots and the buildings thereon, was the adaptation and conversion of said property, with other contiguous property belonging to them, into a cotton warehouse; that in case the title acquired by them should be defective, the purposes for which the purchase was made would be frustrated, and the lots would be of much less value to them. He further alleged that he had been advised by his counsel that the decree under which the sale was made was erroneous, and that the title acquired by said purchase was defective, and prayed the court to review its decree, and if it should appear that the sale made by Nourse under said decree, did not operate to convey a good title, that the said sale might be rescinded.

On reading the petition, and after argument of counsel, the court decreed, that the title obtained by Myers, under the sale made by the receiver, was not complete, because the judgment creditors of A. K. Allison, as surviving partner of Raymond & Allison, who obtained judgments prior

to the rendition of the decree ordering the sale, on the lia- 519
bilities of the firm, and because the heir, or heirs, or distributees of O. C. Raymond, deceased, ought to have been made parties to said decree. But inasmuch as the court was of opinion that Nourse, administrator, &c., ought to have further and reasonable time to perfect said title, and remove all objections thereto, the prayer of the petition, so far as it related to the rescinding of the sale, was refused; and it was further ordered that Nourse should proceed, by proper steps, to bring in the creditors of Raymond & Allison, and the heir, or heirs, and distributees of O. C. Raymond, to test their claims, or the claim of any of them, to said lots, if any they have, or pretend to have, and to do such other matters and things as might thereafter appear to be necessary to render the title to Myers secure. It was at the same time ordered that Myers have the possession of said lots.

On the 20th March, 1845, Nourse filed his amended and supplemental bill, making the creditors of Raymond & Allison, and the infant heir of O. C. Raymond, parties thereto, in conformity to the previous order of the court. On the same day an order was made appointing A. G. Semmes guardian *ad litem* for the infant heir of Raymond, and ordering subpoenas to issue against such of the parties as were within the jurisdiction of the court, and publication to be made, as required by law, as to such of the parties as were non-residents; which was accordingly done.

On the 16th of April, 1846, Robert Myers made an affidavit in support of his application for a rescission of the purchase made by him, in which he alleged that since said purchase, D. B. Wood and N. J. Deblois, who were interested with him, became unable to comply with their part of the contract, and that he, Myers, was unable to carry out the same by himself, out of his own means; that the object in making said purchase, was to convert said prop- 520
erty, with the adjacent property, to the purposes of warehousing cotton, but from the losses of said Wood & Deblois, they were unable to carry out said intention, and that the property is of much less value to them for any other purpose. Myers further alleged that had he and his associates obtained a good title to said property at the time of the purchase, they could and would have since sold the same for the same price agreed to be paid for it by them, but were prevented from doing so by the cloud that hangs over the title.

On the 22d of April, 1846, an order was made, granting leave to complainant to amend his supplemental bill, by making A. K. Allison a defendant, who appeared by his solicitor and agreed to answer said bill in thirty days. It was at the same time further ordered that a decree *pro confesso* be entered against all the parties defendant, except the infant heir of O. C. Raymond, and that his guardian *ad litem* have thirty days to file an answer.

On the 25th April, 1847, Nourse filed his amendment to his supplemental bill, making A. K. Allison a defendant thereto.

On the 26th January, 1847, the answer of the infant heir of O. C. Raymond, by his guardian *ad litem* was filed.

On the 14th day of December, 1853, a motion was made, on behalf of Myers, to be discharged from the purchase aforesaid, because Nourse had not completed the title to said lots, and because the delay to do so had been unreasonable. In support of this motion, Myers, on the 15th day of December, 1853, filed an affidavit, in which he renews his application, upon the ground taken in his former applications, and also alleging that in 1847 the buildings upon the lots were destroyed by fire, and thereafter the lots were suffered to remain vacant, because he had no means to im-

521 prove them, and because, had he the means, the defect in the title discouraged him from so doing. He also alleges that he and his associates had not, since the filing of the first petition, been willing to take a title to said lots, but on the contrary, counsel had ever since been retained to oppose a confirmation of the sale.

On the 16th day of December, 1853, Nourse filed a statement by way of response to the petition of Myers, in which he sets forth the various orders and proceedings in the cause, and showing that from April Term 1847, to December Term 1853, the Judge who presided was disqualified to try the case. He also alleges that at December Term 1846, he could have pressed for a decree of confirmation, but as the amount of Insurance money claimed, viz: $4,000 was expected at once to accrue to the fund and thus obviate nearly all cause of dispute, it was thought by himself and counsel unnecessary and harsh towards Myers to press the motion at that time. He further states that by the fault of Myers or his associates in not keeping the policy of Insurance in the name of the receiver, great delay in collecting the money occurred. The policy of insurance was allowed to stand in the name of D. B. Wood & Co. After the fire which destroyed the buildings and before any formal claim could be sent by the Receiver, the creditors of D. B. Wood & Co., attached the money in the hands of the Insurers. A contest arose involving an expense to the fund, which did not end until January 1850, and then only by the withdrawal of the claim put in by the creditors of D. B. Wood & Co.

To this delay in getting the Insurance money and to the absence of a qualified Judge for every term since 1847, Nourse alleges, must be attributed the absence of action on his part.

522 Afterwards and at December term, 1853, the court refused the application of Myers for a discharge and directed the master to make a title to the lots, from which decree Myers appealed.

W. G. M. Davis, for appellant.

George S. Hawkins and *Archer & Papy* for appellees.

BALTZELL, C. J., delivered the opinion of the Court.

In the year 1844, Robert Myers filed his petition, praying to be released from the purchase of two lots lying in Apalachicola, purchased by him at a sale made by a receiver or Master in Chancery under a decree of court, to which he insisted he got no title. The sale was made at the instance of Nourse, admr. *de bonis non* of O. C. Raymond, and the court on the hearing of the case adjudged "the title incomplete for want of the heirs of O. C. Raymond and the creditors of Raymond & Allison and gave farther and *reasonable* time to the plaintiff Nourse to perfect the title and remove all objections to the same." This decree was made in 1844 and from that time to 1853 the party had not complied, and it was only at the December Term of the latter year, the requisite steps and testimony were taken to obtain a decree making the title sufficient in the opinion of the court.

This tardy action can scarcely, in our opinion, be regarded as a compliance with the order allowing time. The plaintiff alleges, and has urged, that he used due diligence and every proper exertion. Admitting this, it shows very conclusively that a title requiring the labor of near ten years to complete, is not of a kind to be forced upon a purchaser. Surely such a period could not have been contemplated by the Chancellor when making the order. The bare suggestion of so long a time would have struck him with amazement, as unreasonable and unprecedented.

In an affidavit filed at a later period of the case, still ob- 523
jecting to the purchase, the purchaser states "that his object in buying the property, to-wit: the erection of a cotton warehouse, has been defeated by the erection of other buildings sufficient for the purposes of trade—that the partners associated with him have failed and that real property in Apalachicola has depreciated to an extent which prevents investment and makes it not desirable to him. The buildings erected upon it, too, have been burnt down, leaving only the naked ground, and that if he had obtained the title when he contracted for it, he could have sold the property so as to secure himself against loss."

These allegations, if true, show the great injury of delay, and the necessity for despatch and promptness in this, as the other affairs of life. They show conclusively, we think, that a reasonable time for such an object as that contemplated in the present case, any where, and especially in a commercial community, would by no means extend to the period claimed. But apart from this, the usual order in Chancery, "on a Report of the Master that the vendee *will have* a title is, to put under terms to procure that speedily." 2 Danl. Ch. Prac., 1415; Coffin vs. Cooper, Vesey, 205, and that we apprehend should have been the order in the present case.

But apart from this, we are of opinion that the attention of the Court should have been directed to the state of the title at the time the objections to it were first considered. A material distinction is this, (says the Chancellor, in Meginnis vs. Fallen,) which is to be remembered: the actual existence of title at the time of objecting, and the then state of the evidence of that title. If the title stands ultimately as from the first by the abstract, yet the evidence given of that title differs; if that be so, it is not altering the title, but adducing additional evidence, &c. The requiring additional evidence of title to be supplied by the vendor is consistent 524
with the rule of not keeping the purchaser too long in the suspense of investigation, and the question always is whether it is *the same title* as existed at first that is followed up, or whether the vendor has been put *to cast about for a new title.*"

"Again, not what the title is *now*, but what it was when the master ruled his objections, was the state of title to be pronounced upon." 2 Mallory, 561. Tested by this rule, the order giving time to complete the title was improper, as then the administrator had no title and had nothing to sell. If suit had been instituted by him against the creditors and heirs, to settle and adjust the state of his intestate, O. C. Raymond, pay the debts, &c., and sell the real estate for this purpose—or if a like suit had been instituted against the surviving partner of the firm of Raymond & Allison, alleging mal-administration of their affairs, calling in the creditors and the heirs of Raymond, and in the course of the administration by the court, of the affairs of this concern, it become necessary to sell the real estate to pay debts, we are not prepared to say that a sale might not have been had on such a showing. But the case before us is not of this character. The bill and supplemental bill both allege that the property sold was *individual property*, and not that of the firm, and that on the death of *Raymond* it *descended to his heirs.* There is neither allegation nor proof that it was necessary to pay his debts. According to the bill, it does not appear that it was necessary to pay the debts of the firm, or that its assets had been exhausted. Surely, upon every principle, before resorting to the real estate of an individual deceased partner, the joint effects, assets and property of the partnership should be first disposed of. If sold for purposes of division, as intimated in the decree, it was wholly unwarranted, as the

Myers vs. Raymond's Adm'r.—Opinion of Court.

525 administrator had nothing whatever to do with this. The suit was originally instituted with other parties, to avoid an illegal arrangement made in reference to a mortgage on the property, and on settling this with the party interested, the order for the sale of the property was made. It is insisted that plaintiff sold the interest of Raymond & Allison "only as far as he was legally authorized, as Master, to sell;" then, in our view, he was not authorized to sell at all. The decree, however, does not admit this interpretation, nor justify this addition. It recites "that the principal estate of Raymond & Allison consists in his houses and lots, to which all adverse claims are now released, and directs the property to be sold, and no title to be given until after payment of the last notes." It contains no direction to the master to sell *"the interest so far as he was authorized,"* and if the result were to make a purchaser pay $6,000 without getting any title, and leave him subject to be dispossessed by the rightful owner, then we say that no such design can be attributed to the court; so far from it, the order made on discovering the state of the title shows, that they considered the purchaser entitled to a good title, and such a deduction the purchaser would be entitled to draw from the terms of the decree.

It is said again, that the purchaser was let into and continued in possession. This was in conformity to the sale and consistent with the order of the court overruling his objection to the title and giving further time to complete it. His retaining the possession was an appropriate respect to the order of the court, and should not be construed to his prejudice.

It is again urged that both parties should have been active in procuring the title. The decree directing the vendor "to proceed to bring the parties interested before the court, and to do such other matters and things as may be necessary
526 to render the title of said Myers to said property secure," is the best answer to this objection.

Again, that plaintiff was not guilty of laches. Of this we are by no means satisfied, and if we were, how is the case of the purchaser affected by it? If the vendor, with all due industry and exertion, cannot get the title, is the vendee to wait and to be held on until by extraordinary effort and exertion he can succeed? We think not. He bargained for the title; not getting it, he objected and complained to the court; they order him to wait a reasonable time; he waits until nearly ten years elapse, and still no title. If not the fault, it has been the misfortune of the vendor not to get it in due time; but surely this should not be visited upon his purchaser, who, during all this time, has been neither owner nor released from his bargain, not at liberty to sell nor improve, nor to invest his money in other property but liable to be called upon for the residue of the purchase money of $6,000, whenever the sale should be confirmed. We are of opinion, then, that this purchaser has a clear right to be relieved. Whilst on this subject it may not be amiss to state that the English Courts have a rule, introduced by Lord Redisdale, the great equity pleader and Judge, which is declared to be an excellent and salutary resolution, that "lands shall not be put up to sale and the parties embarrassed with a purchaser until a true state of the title, with the counsel's opinion thereon, be produced and title deeds deposited." 2 Sch. & Lef., 738. If the contract is regarded to be made by the purchaser, with the court, as some of the authorities hold, then indeed very great caution and care would seem to be requisite that nothing wrongful or injurious be done, and that the utmost good faith and propriety prevail; this is due to the court itself and to protect public interests from jeopardy. We do not hesitate to say that the practice of perfecting a title after a sale should not be encouraged. Besides inviting loose- 527
ness and irregularity on the part of the court and parties, it reverses the regular order of proceeding, by beginning where it should end, assuming jurisdiction, then striving to maintain it; selling property and then seeking to get the title to it. It is as if a workman should construct his edifice of frail materials in the hope of perfecting it by patchwork afterwards. In this respect we would discriminate between substantial objections, and those that do not enter into the intrinsic merits of a title.

In disposing of this matter finally, the court below will cause an account to be taken of matters proceeding from this relation of the parties, crediting Myers with the purchase money paid by him with interest, and charging him with such sums as he may have received, or may be justly chargeable with, on account of the purchase, whether of rents, and the like. The subject of expense in procuring the insurance, will be a proper subject of considearation, adverted to in this court, but we have not the means of determining it.

It is therefore decreed and ordered, that the decree of the Circuit Court ordering the sale of the two lots in Apalachicola at the instance of Nourse, administrator of Raymond, and the subsequent orders confirming said sale and the purchase thereof by Robert Myers, be set aside and reversed, and that he be relieved therefrom, and the cause remanded to the court below, that an account be had and taken between the parties, of the sums due and chargeable to each on account of the said sale, and for other proceedings to be had in conformity with this opinion and the principles of equity.

DECISIONS
OF THE
Supreme Court of Florida,
AT
EXTRA AUGUST TERM, 1854.
HELD AT TALLAHASSEE.

THOMAS ORMAN, ADMINISTRATOR OF SAMUEL SIMPSON, DECEASED, APPELLANT, VS. BARNARD, ADAMS & CO., APPELLEE.

1. It is the duty of the appellant or his Attorney or Solicitor, to see that the original record of a cause, about to be removed into the Supreme Court, is correctly made out and skillfully prepared.

2. It is a practice of doubtful utility and *not to be encouraged*, to permit in the Appellate Tribunal *oral admissions* to supply the defects and omissions in the record.

3. Where, in a defendant's answer, the "want of consideration" is formally set up, and is insisted upon in the argument, as a substantive defence, yet the court will look into the whole answer to determine whether the issue intended to be raised is one of *fact* or only *an inference of law*.

4. "Want of consideration," as a defence, must be so set up as not to present a *double issue*—in other words, it must simply *negative* a consideration; and anything beyond that, showing that the party defendant was only deceived or disappointed in that which he relied upon as a consideration, changes the defence from that of a "want," to "illegality" or "failure."

5. The case of the Southern Life Insurance and Trust Company, vs. Cole, (4 Fla. R. 377) so far as it makes the 24th Sec. of the Act of Nov. 23, 1828, regulating judicial proceedings, applicable to Courts of Equity—*doubted*.

Simpson's Adm'r. vs. Barnard, Adams & Co.—Statement of Case.

529 6. Only such matters of fact set forth in the answer of defendant as are clearly responsive to the allegation of the bill, will be considered as *evidence* in the cause. Matters of fact set up and insisted upon as a substantive defence, must be established by proof *aliunde*.

7. The general rule that "a well connected train of circumstances is as conclusive of the existence of a fact, as is the most direct and positive evidence," is as applicable to a Court of Equity as to a Court of Law. And so also is the other general rule, that "the best evidence the nature of the case admits of must always be produced."

8. But the former of these rules is not of universal application, and therefore reference ought always to be had to the *nature* of the fact to be proved; for there are some facts peculiarly susceptible of positive proof, whilst others, from their very nature can be established only by circumstances.

9. In the consideration of a fact which is peculiarly susceptible of positive and direct proof, the court will not be influenced by mere *circumstances* to adopt a conjectural conclusion, in regard to its existence.

Appeal from a decree of the Circuit Court from Franklin county.

This was a bill in Chancery instituted by Barnard, Adams & Co., against Thomas Orman, administrator of Samuel Simpson, deceased, for the foreclosure of a mortgage. The bill alleges, that on the 16th day of March, 1839, Samuel Simpson executed his bond, payable to the Southern Life Insurance and Trust Company, on or before the expiration of five years, after date, for six thousand dollars, and that to secure the payment of the said bond, principal and interest, said Simpson, at the same time, executed a mortgage to said Southern Life Insurance and Trust Company, on certain town property in the town of Apalachicola. The bill further alleges that the said bond and mortgage were afterwards regularly, and for a valuable consideration, assigned to said Barnard, Adams & Co. Copies of the bond and mortgage and of their assignment to complainants, were exhibited with the bill. The following receipt is endorsed on the bond, viz: "Received, January, 1840, two hundred and forty dollars in full for interest on this to date, it being in
530 full for dividend on sixty shares of Southern Life Insurance and Trust Company stock."

The answer sets forth that the said bond and mortgage were obtained from Simpson by the misrepresentation of the officers of the Southern Life Insurance and Trust Company, and alleges that it was represented to Simpson that the company had stock for sale, which stock was represented to be very valuable; that the company was in a very prosperous and flourishing condition, and that said stock would pay large and profitable dividends; whereas it is alleged in the answer that at the time these representations were made, the company was greatly embarrassed, and on the verge of bankruptcy.

The answer further alleges that the said bond and mortgage were given not for the consideration of $6,000 as in said bond stated, but for the consideration of a certificate purporting to entitle said Simpson to sixty shares of capital stock in said company; that the stock, at the time the certificate for the same was issued, was not nor has it been since, of any value, and that the said stock certificate was issued without authority of said charter, or any by-law passed in accordance with its provisions, but contrary to its express letter and spirit, by reason whereof the said Simpson, nor his heirs or representatives, could acquire no legal title to any interest in the capital stock of said company, as the defendants were advised and believe; that said bond and mortgage were fraudulently obtained from Simpson, and that they were given without consideration; that Barnard, Adams & Co. received the same after maturity, and as collateral security merely, and that the assignment thereof was without authority, and conveyed no right or title to complainants; that by the charter of the company, the said bond and mortgage were unassignable, but were to remain as a security for the ultimate payment of the liabilities of the Territory of Florida, assumed for 531
said company.

The following resolution of the Board of Directors of the Southern Life Insurance and Trust Company, adopted 15th February, 1839, appears in the record, viz: *"Resolved,* That the Southern Life Insurance and Trust Company, having had a portion of their stock surrendered to them, in pursuance of an amendment to their charter, passed in February, 1838, are prepared to receive applications for their stock, at par, on the pledge of bonds and mortgages, upon approved, unincumbered real and personal estate, held in security in Florida, to the amount of one million dollars, at their office at Apalachicola."

There also appears in the record a copy of a circular issued by the company, dated May 13, 1838, informing the public that bonds and mortgages would be received in exchange for the stock of the company, to be issued at par, and inviting those who wished stock, to make early application to their agent at Tallahassee. This circular represented that the stock of the company was to draw dividends semi-annually, and that according to the dividends theretofore, the stock drew two per cent. per annum more than the mortgages drew interest to the company.

There also appears in the record a copy of an answer of George Field, President of the Southern Life Insurance and Trust Company, filed in another cause, in which it is said that between three and four hundred thousand dollars of consolidated stock was distributed in Middle and West Florida, the stockholders becoming debtors to the Institution generally, both by bond and mortgage and by note, having become purchasers of stock, and received loans from the company.

The evidence of T. R. Betton, in the record, shows that Samuel Simpson was a stockholder in 1839, and held sixty 532
shares of stock. He states that the books of the company do not show any other consideration for the bond than what appears upon its face.

M. A. Long and *John Erskine* for Appellant.

James T. Archer and *W. G. M. Davis* for Appellee.

DuPONT, J., delivered the opinion of the court.

Preliminary to stating the grounds upon which we have decided this cause, it may not be amiss to remark upon the condition of the record, and to call to the special attention of the members of the bar the very unskillful manner in which it has been prepared, and consequently the great confusion which prevails in the presentation of the case to the mind of the court. The record does not, as it ought to do, give a history of the proceedings in the cause, but is for the most part only a copy of the files. In no part of the record is it stated what proofs were read at the hearing, but we find only *copies* of exhibits, depositions and other documents, without any statement going to show whether or not they, or any of them, were read at the hearing, and if read, whether with or without exception. This, in an equity cause especially, where all of the proofs are required to be reduced to writing, and where we have not, as in a court of common law, the benefit of the bill of exceptions, whose office it is to set forth the evidence adduced at the trial, is certainly very irregular and well calculated to produce confusion and uncertainty, and possibly injustice to parties litigant. A corrective ought to be applied, and we know of none more efficient than the personal superintendence of the solicitor of the appellant, whose duty it is to see that a correct and perfect record of the proceedings in the cause is made out for the inspection and information of the ap-

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pellate Tribunal. In the frequent changes and constant rotation which are continually going on under the operation of our Republican organization, it is perhaps presuming too much to expect of the clerks of our courts that professional knowledge and scientific skill which is to be met with amongst the offices of the English Courts, or even of the courts of the older States. But in making this remark, we would not by any means be understood to offer an apology for, or extenuate, either the negligence, ignorance or unskilfulness of this class of officers; for there is an implied promise on the part of every man, who either solicits or accepts office, that he either is, or will speedily qualify himself for the efficient discharge of his duties.

This particular record does not present an isolated case, for we are constrained to remark that it is but a sample of the larger portion of those which are of file in this court. But, to apply the foregoing remarks to the record under consideration, it is very manifest (if the strict rule of Chancery practice were adhered to,) that the cause would be before us without any proofs; and in order to rescue it from this category, we have been constrained to resort to the oral admission of the counsel on either side—a practice of extremely doubtful utility, and not to be encouraged. The admission to which we refer and which, we understood to have been made at the Bar, was to the effect that the court should consider everything contained in the record, partaking of the character of, and purporting to be evidence, as having been read at the hearing without exception, giving to each item of evidence such weight as its *relevancy* might entitle it to. It is upon this basis that we have considered the matters of evidence which have led our minds to the conclusion at which we have arrived in the final determination of this case.

The bill was filed by Barnard, Adams & Co., (the appellees,) as the assignees of the Southern Life Insurance and Trust Company, for the foreclosure of a mortgage, which it is therein alleged was executed and delivered to the said Company by Samuel Simpson, the intestate of respondent. The mortgage was given to secure the payment of a bond purporting to have been executed by the said Simpson, for the payment of $6,000, and conditioned to be void upon the full payment of the said sum of money, on or before the expiration of five years from the date thereof. The date of both the bond and mortgage is the sixteenth day of March, A. D. 1839. There is nothing on the face of the bond which indicates the particular "consideration" for which it was given. It purports to be an ordinary obligation to secure the payment of money, and is in the usual form; nor is there any allegation in the bill in reference to the "consideration." The answer alleges that Simpson "was induced to make the bond and mortgage, not for the consideration of six thousand dollars, as in said bond stated, but for the consideration of a certificate purporting to entitle said Simpson to sixty shares of capital stock in said Institution;" and then going into a detailed history of the transaction, alleges that the purchase of the stock by Simpson was induced by the false and fraudulent misrepresentations of the authorized agents of the said company. There is also contained in the answer the former allegation that the "bond and mortgage were fraudulently obtained from the said Simpson, and were given *without consideration;*" but this allegation is coupled with the further statement that they were given for the purchase of a *"stock certificate."*

The defence set up against the prayer for a foreclosure, has been considered by the counsel who argued the case for the respondent, under four distinct and independent heads, each of which, it was argued and insisted, appeared in the answer, and presented a substantive matter of defence. The several grounds, as alleged, were as follows, viz: 1st. That the bond and mortgage sued upon were given to the Southern Life Insurance and Trust Company without any consideration; 2d. *"Illegality of consideration,"* in this that the bond and mortgage were given for a pretended sale of shares in the capital stock of the Southern Life Insurance and Trust Company; 3d. That the bond and mortgage were given to the Southern Life Insurance and Trust Company upon the *false and fraudulent misrepresentations* of the authorized and accredited agent of the said company, in regard to the solvency and prosperous condition of the affairs of the company, and in regard to the value of its stock; 4th. That the assignment of the bond and mortgage is void, and vests no interest in the assignee, as being in contravention of the inhibition contained in the 6th section of the charter of incorporation, which prohibits the assignment of such bonds and mortgages as should be given to secure the repayment of *loans* which might be made out of the cash capital of the company. These are the several grounds of defence, as they were considered by the counsel in argument. It now becomes our duty, *in limine,* to ascertain whether or not they legitimately arise in the consideration of the case.

In order to ascertain the *issues* upon which the parties contest their respective rights, in any particular case, in a Court of Equity, it is the duty of the court to have reference as well to the allegations of the bill as to the *matters of fact* contained in the answer or plea; and upon this data, and this alone, can they proceed to adjudicate those rights. A party may, in good faith and with perfect sincerity, insist in *argument* upon a particular ground of defence, which, upon an examination of the whole answer, turns out to be *merely an inference of law,* deducible from the matters of fact therein stated. Of this character are we constrained to consider the first ground of defense argued by the counsel, viz: The "want of consideration." As a foundation for his argument, the counsel for respondent referred to that part of the answer in which the following language is used, viz: "For further answer, these defendants say that said bond and mortgage were fraudulently obtained from said Simpson, and were given *without consideration,* and that the said stock certificate was issued without authority of said charter, or any by-law passed in accordance with its provisions, but contrary to its express letter and spirit, by reason whereof the said Simpson, nor his heirs or representatives, could acquire no legal title to any interest in the capital stock of said company, as these defendants are advised and believe." This is the only portion of the answer which contains the formal allegation that the bond and mortgage were given *"without consideration,"* and in the connection in which the allegation is found, it can scarcely be seriously contended that it amounts to anything more than an *inference of law,* deducible from the accompanying statement of facts. It is very clear that the existence or non-existence of a consideration, is made to depend upon the result of the question, whether the "stock certificate" mentioned, (assuming that to have been the real consideration for the giving of the bond and mortgage,) was lawfully issued; and hence it will be really perceived that the question involved in this ground of defence, is one of *law,* and not of *fact.* Indeed, we would charitably hope that such was the view taken of this matter by the defendant, at the time that he solemnly swore to the facts set forth in his answer, for we can scarcely suppose hat he *intended* to be understood as swearing in one breath to the *fact* that there was no consideration, and in the next that there was a consideration. By the common law, a defendant was not permit-

537 ted, (except perhaps under very special circumstances,) to file contradictory pleas; and certainly much less will it be tolerated in a Court of Equity that a defendant should be permitted to set up in the same answer contradictory facts as a matter of substantive defense. It would be to encourage perjury in its worst and most dangerous form. This defence, when made at common law, is always the subject of a special plea, and it must be so pleaded as not to present a double issue. In other words, it must contain simply the negation of a consideration, and anything beyond that, showing that the party defendant was only deceived or disappointed in the value of that which he relied upon as a consideration, changes the character of the plea from that of a "want," to *illegality* or *failure* of consideration. We are, then, fully of opinion that the first ground of defence assumed in the argument, does not arise out of the pleadings, and therefore no argument made on that head can have any influence in determining the rights of the parties. The importance to the defendant of establishing this *first* head as a substantive ground of defence, grew out of the presumed advantage which it might give him in changing the onus of proof, under the operation of the 24th section of the act of November 23, A. D. 1828, regulating judicial proceedings, (Thomp. Dig., 331, chap. 2, sec. 1, art. 4,) and which, although evidently intended for the government of courts of law, seems, in the opinion delivered in the case of the Southern Life Insurance and Trust Company vs. Cole, (4 Florida Rep., 377,) to have been thought to be likewise applicable, by analogy, to Courts of Equity. As to what may be the authority of that case upon the point, it is unnecessary for us to consider in this investigation. We are disposed to dismiss it with the simple remark, that whenever the question may be fairly and fully presented how far a Court of Equity is permitted or
538 bound to adopt in its practice statutes affecting simply the *remedy*, and professedly enacted for the regulation of courts of law, it will receive that calm and deliberate consideration which its importance may demand.

Having thus disposed of the first head, we now address ourselves to the three remaining ones, viz: "Illegality of consideration," "fraudulent representations," and the "invalidity of the assignment."

Our first inquiry will be to ascertain, from the *evidence* and *proofs* in the cause, whether any other consideration than that appearing on the face of the bond has been established. In the prosecution of this inquiry, we first refer to the bill, and from that reference we ascertain that there is no allegation touching the consideration, and consequently no interrogatory addressed to the defendant in reference thereto. All, therefore, that appears in the answer of the defendant touching the consideration, must be taken to be new and substantive matter, pleaded by way of *avoidance*, and consequently must be proved *aliunde;* for it is a well established principle of equity practice that only such matters of fact set forth in the answer of the defendant as are clearly responsive to the allegations of the bill, will be considered as *evidence* in the cause. Matters of fact set up and insisted upon as a substantive defence, and being not responsive to the bill, will be required to be established by proof *aliunde*.

This is a principle of equity practice, too universally recognized to require the citation of any authority for its support. Proceeding then upon this doctrine in our examination of the various matters set forth in the answer, we are constrained to say that the allegations contained in the answer, in reference to the consideration for which the bond and mortgage were given, afford no *evidence* of the facts alleged. We are next thrown upon the proofs which were adduced at the final hearing of the cause, and after a 539
strict and scrutinizing examination of the record, we are equally at a loss to discover even the semblance of any direct or positive evidence upon the subject, going to show a consideration for the giving of the bond and mortgage variant from that which their face import. The bond purports to be a simple money bond, and the deed of mortgage is of the usual form, containing no extraordinary or unusual covenants.

The counsel for the respondent, however, have argued with great ingenuity and zeal that there is contained in the record a body "of circumstantial evidence," which as conclusively supports the allegations in the answer, as would the production of the most direct and positive evidence. We readily recognize the position as a sound one, when invoked *as a general rule*, that in equity as well as at law "a well connected train of circumstances, is as conclusive of the existence of a fact, as is the greatest array of positive evidence." But of equal authority and of no less applicability, is that other familiar rule of evidence, viz: that "the best evidence the nature of the case will admit of, must always be adduced." These are but general rules, and the former especially is not of universal application, for there are some matters of fact peculiarly susceptible of *positive* proof, whilst there are others which from their very nature, and from the secrecy which invariably attend them, can only be proved by *circumstantial* evidence. In the application of the rule, it therefore becomes the part of wisdom always to have reference to the nature of the subject.

Now the subject under consideration in this investigation is, the true consideration for which an obligation, purporting to be an ordinary money bond, had been executed and is, in our opinion amongst that class of subjects pecu- 540
liarly susceptible of direct and positive proof.

Moreover the bond and mortgage before us are each attested by two witnesses, who may be presumed to have been cognizant of the matter in issue, and might have been required to testify on the subject had suitable efforts been made to obtain their testimony.

It may be that the witnesses are all dead or beyond the reach of the process of the court. But if such be the fact, there is no proof in the record of its existence, which if proved, would, according to all the well recognized principles regulating the admissibility of evidence, have opened a door for the introduction of the *circumstantial* evidence relied upon in the argument of counsel. In addition to the result of our own examination of the record, it was frankly admitted by the counsel that there was no *positive* proof upon the subject of the consideration of the bond, and hence they had to rely exclusively upon the weight of circumstances, to establish the several defences set forth in the answer of the defendant. These circumstances, as we find them detailed in the brief which has been furnished us, and which were relied upon as tending to prove that the consideration for which the bond and mortgage had been given by the defendant's intestate Simpson, was a purchase of shares in the capital stock of the Southern Life Insurance and Trust Company are as follows, viz:

1. The fact that no other consideration (than what appears on the face of the bond) appears from the books of the bank or was known to its President or Cashier.

2. Copy of a resolution of the Board of Directors shortly prior to the date of the bond and mortgage, empowering Samuel L. Burritt to sell certain stock which had been surrendered, for bonds and mortgages.

3. Copy of a circular issued about the same time, by the

bank urging the people of Middle and West Florida to take stock on those terms. 541

4. That it is stated by George Field, in his evidence in the record, that stock was sold to divers persons for bonds and mortgages, but he says nothing of such a sale of stock to Mr. Simpson.

5. The inability of the bank to loan the money.

6. The indorsement of a *dividend* declared in his favor as a credit upon the bond.

7. The correspondence between the amount of the bond and the amount of the stock.

We have carefully considered, severally as well as collectively, the circumstances before enumerated. But after the maturest deliberation and with an anxious desire to accord to them all the weight to which they might be legitimately entitled, we are constrained to say, they have failed to produce in our minds that conviction which it is the legitimate office of evidence to effect. There is not that conclusiveness—that conviction growing out of a well connected train of circumstances, which will authorize us to say that, *from the evidence* in the record, the consideration of the bond is other than what it purports to have been. In a matter susceptible of proof, a court must not conjecture. This being the conclusion at which we have arrived, it results as a necessary consequence that neither of the three remaining heads of defence arise for our consideration, dependent as each of them is, upon the allegation in the answer, that the bond and mortgage were given for a purchase of shares in the capital stock of the Southern Life Insurance and Trust Company.

We are not disposed, nor indeed would it comport with judicial propriety, *unnecessarily* to undertake to discuss the very grave and important questions decided by this court in the case of the Southern Life Insurance and Trust Company vs. Lanier. Whenever any of those 542
questions may properly present themselves, we doubt not but that they will receive from the court, that patient, impartial, and independent examination, which their paramount importance may demand.

We have carefully examined the record in this cause, and failing to discover any error in the proceedings had in the court below, it is our judgment that the decree be affirmed with costs.

ROBERT A. YOUNG, ADMINISTRATOR DE BONIS NON, WITH WILL ANNEXED, OF ANDREW YOUNG, APPELLANT, VS. HENRY MCKINNIE, ADMINISTRATOR OF RICHARD MCKINNIE, APPELLEE.

1. Testator devised as follows:—"It is my will and desire that my property, including lands, tenements, negroes, horses, and stock of every kind, and everything of value that I may die seized and possessed of, shall be equally divided between my wife E, my daughter E. W., and my son R." *Held*, That this clause of the will conveys a present gift to the legatees, and is not controlled by the next clause, in which the testator says:—"It is my will and desire that all my property be kept together, for the use and benefit of my said wife and children, unless my wife should marry, or my children become of age, in which event, or events, I wish the property divided as above:" the sole effect of this latter clause being merely to postpone the division.

2. *Held, also* That upon the death of the daughter, E. W., under age, unmarried, and without issue, her brother, R., became, by the laws of Florida, her sole heir; and that upon the death of the mother, E., leaving a second husband and her son R. surviving, that R. became sole heir to the whole real estate of the testator.

3. It is a general rule that a legacy shall be taken to vest at the death of the testator, unless manifestly against the intention of the will.

4. When a testator directs the whole of his property to be kept together, for

the use and benefit of his wife and children until the happening of certain events, making no other provision for their support and maintenance, such circumstances are indicative of an intention on the part of the testator to give the *principal*, and will have the effect to vest the legacy. 543

5. A devise in the following words: "Also, I direct that all the property, real or personal, that I obtained from the estate of B. M., deceased, be returned to R. M., minor heir of said B. M., or such portion thereof as I may have in my possession," is specific and is not liable to abatement for the benefit of the residuary legatees. *Held*, also, That under this clause of the will, only such property as had been received by testator, and remained in specie in his possession at the time of his death, passed to the legatee, and that slaves, the after issue of those received from the estate of B. M., were not included in the bequest.

6. The decree of a court directing the sale of real estate, for the purpose of division between an infant and others, to which the infant was not made a party, is not conclusive upon the infant, so far as such decree undertakes to pronounce upon the extent of his interest; but if he take, under the sales made in pursuance thereof, he may be estopped from saying that the sales are void; for by receiving so much of the proceeds as properly belong to him, he affirms the sale, but is not estopped from contesting the other portion of the decree.

7. The intention of the testator to dispose of property not his own, thereby imposing upon the legatee the obligation to elect, must be *expressed* or *clearly implied* in the will itself Parol evidence cannot be received to establish it.

8. In stating an account against an administrator, under the laws of the State, annual rests are to be made, and interest charged on the balance found due at the period of each rest.

Appeal from Circuit Court, Jackson county.

The original bill was filed by Richard McKinnie, by his next friend, Henry McKinnie, and on his death the cause was revived by said Henry McKinnie, as his administrator.

The facts as they appear from the bill, answer, depositions, &c., are as follows.

Barney McKinnie, father of Richard McKinnie, died in the fall of 1833, leaving a will as follows:

* * * * "To wit, Imprimis. It is my will and desire that my property, including lands, tenements, negroes, horses and stock of every kind, and everything of value that I may die seized and possessed of, shall be equally di- 544
vided between my wife Elizabeth McKinnie, my daughter Elizabeth Washington, and my son Richard: It is further my will and desire, that all my property be kept together for the use and benefit of my said wife and children, unless my said wife should marry, or the children become of age, in which event or events, I wish the property divided as above: I hereby appoint my friend and relative, Bennett Ferril, my executor, and my wife Elizabeth, executrix, of this my last will and testament."

Shortly after the death of the testator, Elizabeth Washington, being an infant, died intestate. Neither of the persons appointed to execute the will ever qualified or acted under it. After the death of Elizabeth Washington, Mrs. McKinnie intermarried with Andrew Young, appellant's testator; and on the 20th November, 1834, the said Andrew Young was appointed administrator, with the will annexed, of the estate of Barney McKinnie.

On the 12th January, 1835, an order was made by the County Court of Jackson county, on the *ex parte* petition of Andrew Young, for the division of the McKinnie estate between Richard McKinnie and Andrew Young, in right of his wife Elizabeth. The commissioners appointed under the order dividing the negroes between the parties in equal moities and recommended a sale of the perishable property, consisting of stock, cotton, corn, &c., and the land, S. E. ¼ Sec. 29, T. 6, R. 11, N. and W., in order that a division of the proceeds might be made. One half of the negroes valued at $3,100 was assigned to Richard McKinnie, and thereafter held and hired out by Andrew Young as the property of said Richard; and the other half was assigned to Andrew Young, in right of his wife, who thereafter held and possessed them as in his own right.

In the year 1837, Mrs. Young, formerly Mrs. McKinnie,

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545 departed this life, leaving Richard McKinnie her sole surviving child.

On the 9th February, 1835, Andrew Young, as administrator, sold all the personalty of the McKinnie estate other than the slaves. On the 29th January, 1840, Andrew Young believing himself entitled to one-half the realty, filed a petition *ex parte* in the County Court, praying a sale thereof for the purpose of effecting a division between himself and Richard McKinnie, in which he recites and relies on the recommendation of the Commissioners, appointed under the order of 12th January, 1835, and on the 4th February, 1840, a decree was made by the County Court pursuant to the prayer of the petition. On the 5th February, 1840, the land was sold and purchased by Benjamin Wynn for $1,944.

From the date of the decree of the County Court, January 12th, 1835, up to his death, Andrew Young regarded and treated one-half of the McKinnie estate as his.

On the 2d April, 1841, Andrew Young died, leaving a will as follows:

* * * * "First—I direct that all my debts and funeral expenses be paid as soon after my decease as possible, out of the first monies that shall come into the hands of my executors out of any portion of my estate, real or personal. Also I direct that all the property, real or personal that I obtained from the estate of Barney McKinnie, deceased, be returned to Richard McKinnie, minor heir of said Barney McKinnie, deceased,—or such portion thereof as I now have in my possession: Also I direct that the remainder of my property, which I have accumulated be brought to an equal division among my legal heirs; therefore to accomplish that end I direct that a fair valuation or appraisement be made by three judicious persons, appointed for that purpose, of all my said estate, including my
546 household furniture, and other property real or personal, and after being signed with their names that a copy of the same shall be given by them to each of my executors; and I direct that all that portion of property which I have bequeathed to my legal heirs, real or personal be disposed of as the law directs, in such cases made and provided. And I do hereby ordain my neighbor, John Brett, Jr., executor of this my last will and testament."

At the date of his will and death, he had no property in his possession which he had obtained from the McKinnie estate, in right of his wife, except the negroes assigned him on the division, under the decree of the county court.

The negroes assigned to Richard McKinnie upon the division were delivered to his guardian, the said Henry McKinnie, by Brett, Executor of Young, on the 1st January, 1843; and those assigned to Young, were delivered to Richard McKinnie's guardian, on the first January, 1848, as his legacy under Young's will. The value of the negroes, both sets, at Young's death, was $8,475. The hires of all the negroes have been received by said Richard, his guardian, or administrator, since Young's death.

From the date of Young's marriage to his death, Richard was supported by him.

Between the division under the decree of the county court, and Young's death, two negroes, Tom and Amanda, were born of a negro woman assigned to him on said division and were delivered by John Brett, Executor of Young, to Richard's guardian as a portion of his legacy under Young's will.

The bill insists that complainant is entitled to two-thirds of the personal estate of his father, B. McKinnie—one-third as a legatee, and the other one-third as distributee of his sister, Elizabeth Washington; and the whole of the land, as devisee under his father's will, and heir of his mother and sister: Prays that the decrees of the County Court 547
may be declared null and void; a new division of the estate made, and that appellant be decreed to account, &c.

The answer insists that complainant was entitled to only one-half of the personal estate of B. McKinnie; that under the will Elizabeth Washington's interest was contingent, and on her death, before the marriage of the widow, fell into the residue of the estate for the benefit of the other legatees. That complainant should not be permitted to enforce his rights under his father's will, and as heir of his sister and mother—as to the realty—and yet take his legacy under Young's will; and that if he renounces his legacy under Young's will, he must account for the value of Young's interest in the slaves received by him, as well as their hires. That complainant should account for the value and hires of the two negroes, Tom and Amanda, on the ground that they did not pass by the legacy in Young's will. That the property received by complainant under Young's will should be equally liable for the debts due by Young's estate, as that bequeathed to the "legal heirs." And that complainant is liable to Young's estate for maintenance, &c.

Decree of Circuit Court, November Term, 1853:

1. That the legatees under McKinnie's will took vested legacies and contingent interests in the realty; that on the death of Elizabeth Washington, R. M. McKinnie, as her sole distributee, was entitled to her share of the personal estate; and that her interest in the land sunk into the estate for the benefit of the other divisees.

2. That on the death of Mrs. Young, her interest in the land descended to Richard as her sole heir.

3. That Richard was not bound to elect between his rights as set forth in the bill, and his legacy under Young's will.

4. That he took his legacy without liability to contribute 548
to Young's debts.

5. That negroes, Tom and Amanda, passed under Young's bequest.

6. Decrees of County Court declared null and void.

7. General account ordered: "and that the master take an account of all the property real and personal that said Andrew Young was entitled to, or had received, or had in possession in right of his wife, from said estate of said Barney McKinnie."

R. L. Campbell & G. S. Hawkins, for Appellant.

J. H. DuPont and *Archer & Papy* for Appellee.

DOUGLAS, J., delivered the opinion of the court.

This case was brought up by appeal from the Circuit Court of Jackson County, taken pursuant to the provision of the 3d section of the act of the last session of our General Assembly, (see Pamphlet Laws, 101,) and the first question presented for our consideration, is whether the legacy to Elizabeth Washington McKinnie, under the will of Barney McKinnie, was as to the personalty a vested legacy; and we think it was, and that at her death it passed to Richard McKinnie, as her sole heir and distributee. The words of the will are: "It is my will and desire that my property, including lands, tenements, negroes, horses, and stock of every kind, and everything of value that I may die seized and possessed of, shall be equally divided between my wife, Elizabeth McKinnie, my daughter, Elizabeth Washington, and my son Richard." This clause, standing alone and by itself, it is admitted by the learned counsel who argued the cause for the appellant, imports a present gift; but they contended, with great zeal and ability, that it is controlled by the next clause, in which the

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549 testator says: "It is further my will and desire that all my property be kept together, for the use and benefit of my said wife and children, unless my wife should marry, or my children become of age, in which event, or events, I wish the property divided as above," and that no interest vested until one of these events occurred; but to this view of the matter we cannot assent. It renders the first clause entirely nugatory, although, so far as the division is concerned, entirely consistent with it. The first clause amply provides for the division. The words in the second, "in which event, or events, I wish the property divided as above," strike us as redundant, the sole effect of this second clause being, as we think, merely to postpone the division, because the testator believed it would be more beneficial to his wife and children to have the property kept together; and it is worthy of observation that he gives them *at once the whole income* of the estate—*all the use and benefit of it.* He does not provide for a future division of the income amongst them, or make any other provision for their maintenance, or for the education of his children, or use the terms of *strict condition* upon which Ch. Justice Ruffin, in Anderson vs. Felton *et al.,* Battle N. C. Rep., 58, cited by the learned counsel, laid so much stress. It is a general rule that a legacy shall be taken to vest at the death of the testator, unless manifestly against the intention of the will. 1 Roper on Legacies, (2d American from 4th London Ed.,) 555, 556. The cases, too, of Gaskell vs. Harmon, 6 Ves., 159; Stuart vs. Bruere, (in note;) Faulkner vs. Hollingsworth, 8 Ves., 558; Entwistle vs. Markland, and Stilwell vs. Barnard, also cited in 6 Ves., 528, (in note,) very strongly sustain this position. In Packham vs. Gregory, 4 Hare, 396, cited by Roper to this point, residuary personal estate was bequeathed to trustees, upon trust, to sell, get in and invest it, and pay the interest to the
550 testator's wife during her widowhood, and upon her death, to *pay and divide* the whole of the trust fund into and equally amongst all and every of the testator's nephews and nieces, share and share alike, within six months after they became entitled thereto. Sir James Wigram, V. C., held that the representatives of one of the nephews, who died in the life time of the tenant for life, were entitled to his share, *vested* on the death of the testator. In remarking upon the words *"pay and divide,"* his Honor referred to his decision in Leeming vs. Sherratt, 2 Hare, 34, in which he had carefully considered the effect of those words, and observed that the authorities confirmed his view, that there was no magic in the words *pay and divide.* Even though there be no other gift than in the direction to pay or distribute *in futuro,* yet if such payment or distribution appear to be postponed, for the convenience of the fund or property, the vesting will not be deferred until the period in question. 1 Jarman on Wills, 763; 1 Roper on Vested Legacies, 557, 558. In the case before us, the time of division is postponed expressly for the use and benefit of the wife and children of the testator, and the intention is clear that they should immediately have *all the use and benefit,* all the rents and profits. The postponement of the division is of his whole estate, and he makes no other provision for the support of his wife and children, or the education of the children, as before stated, except this use and benefit, and it cannot be supposed that he intended to leave them penniless. If this view of the case be correct, then this bequest falls within the principle of that large class of cases where giving the interest on stock or money bequeathed, vests the stock or capital immediately on the death of the testator, although, by the words of the will, the enjoyment of such stock or principal is postponed to a future period; and it has in many cases been held that a legacy, to be paid when the legatee attains his majority is 551
vested, though contingent. See Dawson vs. Killett, 1 Brown's C. C., (Perkins' Ed.,) 123, note A.; Barnes vs. Allen, Ib., 182, note B.; Carbin vs. Mead 2 Ashmead, 178.

Richard McKinnie was therefore entitled to all the real estate of which Barney McKinnie died seized and possessed, one third in his own right, one third as heir of his sister, Elizabeth Washington, who died soon after her father, and one third as heir of his mother, who died in 1837. He was also entitled to two thirds of all the personal property left by Barney McKinnie; one third in his own right, and one third as heir and distributee of his said sister. Andrew Young took one third *only* of the personal property in right of his wife, the widow of Barney McKinnie; and so much of this one-third as he had in his possession, he by his last will and testament, directed to be returned to Richard McKinnie. By the first clause, he directed that all his debts and funeral expenses should be paid as soon after his decease as possible, out of the first moneys that should come into the hands of his executors, out of any portion of his estate, real or personal. The second clause is as follows, viz: "Also, I direct that all the property, real or personal, that I obtained from the estate of Barney McKinnie, deceased, be returned to Richard McKinnie, minor heir of Barney McKinnie, deceased, *or such portion thereof as I now have in my possession."* He had previously sold all the real estate, and all the personal property except the negroes. These were in his possession at the date of his will and at the time of his death, and one third of these, which he had received in right of his wife, is, we think, all that he by his will bequeathed to Richard McKinnie. It appears from evidence in the record, (evidence *dehors* the *will,*) that Mr. Young supposed that he was entitled, in right of his wife, to one half of all the property, real and personal, of the estate 552
of Barney McKinnie, deceased, and it has therefore been contended that this raises a case not strictly of election, but in the nature of election,—a *quasi* election on the part of Richard McKinnie; but it is difficult to perceive how the doctrine of election could be applied to such a case. It is, however, a sufficient answer to this position to say that there is nothing upon the face of the will of Young which seems to indicate even in the remotest degree an intention on his part to bequeath anything that was not his own. His intention clearly was that all the property that he had received of the estate of Barney McKinnie, and was then in his possession (in specie,) should be returned to Richard McKinnie, and that the remainder of his property, which he had *accumulated,* should be brought into an equal division among his legal heirs, and were we allowed to speculate upon the matter, we see no reason to suppose that he would have made any other provision, if this alleged misapprehension had not existed; but we are not permitted thus to speculate. 2 Story's Eq., page 486, sec. 1093, and authorities there cited. In Stratton vs. Best, 1 Ves., 285, Lord Chancellor Thurlow said: "All the argument in Noys vs. Mordaunt, (2 Vern., 581,) and the whole suit of cases, have turned upon the expression in the will. If I were to receive the evidence of the testator's fancy, it would introduce a very desperate rule of property in this court." In order to impose upon a party claiming under a will the obligation of making an election, the intention of the testator must be expressed or clearly implied in the will itself. Roper on Legacies, (2d American from the 4th London Ed.,) 1582 to 1586; 3 Bac. Abr., (Ed. by Bouvier, 1848,) 316, and authorities there cited; Judd vs. Pratt, 13 Ves., 174, confirmed on appeal, 15 Ves. 390; 1 Jarman,

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553 on Wills, 391, 392, (and authorities there cited,) 1 Amer. Ed.

Again, it has been insisted by the counsel of the appellant that "Young's bequest to Richard McKinnie is so connected with the decrees of the County Court, that if he takes under the will, he takes under the decrees, and hence he is estopped, until he renounces his legacy, from alleging that the decrees are void." However this may be, he is not, we think, estopped from saying that they are erroneous, at least so far as they undertook to pronounce upon the extent of his interest; but if he takes under the sales made pursuant to the order of the County Court, he may be estopped from saying that the sales are void, because the County Court had no power to make the orders under which the sales took place. By receiving so much of the proceeds of the sales as properly belong to him, he affirms the sales; but we do not perceive how by this he affirms anything more or is prevented from contesting that portion of the decrees of the County Court which declared that Young was entitled to one-half of all the property. Such decrees may be good in part and void in part.

It is further insisted on behalf of the appellant that if Richard McKinnie takes under the will of Young he must take *cum onere;* that is, that "the portion given to McKinnie must contribute to the payment of the debts; not only the portion that actually passed, but what he intended should pass." We do not think that such was the intention of the testator, or that it is the legal import of the will, and the surrounding circumstances negative the idea. The direction is: that all his debts and funeral expenses be paid as soon as possible after his decease, out of the first monies that shall come into the hands of his executors, out of any portion of his estate, real or personal. The natural presumption resulting from this provision is, that he meant
554 such as would naturally first come into the hands of his executors, and from the proofs in the case, it would appear that there was a large amount of the monies which resulted from the sale of the McKinnie estate, in the hands of Young at the time of his death. This would be the first to come into the hands of his executors, and next such as would be received upon a sale of the perishable property of his own estate, or from debts due his estate. But aside from this, the bequest to Richard McKinnie was specific. The remainder was to be equally divided amongst the legal heirs of the testator—it goes just where it would have gone, if nothing had been said in the will about it; and in such a case the law casts the payment of the debts first upon such remainder. 1 Roper on Legacies, 2d Amer., from 4th London Ed., 191, 192, 356 to 363; 2 Williams on Executors, 972, 973.

The appellant also complains of that portion of the decree of the court below which requires the master in stating his account, to "make annual rests, charging legal interest on the balance found due at the period of each rest." Our statute, Thompson Digest, page 207, Sec. 9, No. 1, declares that "it shall be the duty of executors, administrators and guardians, annually at the first term (of the Probate Court), to render a full and correct report of the receipts and expenditures of all estates of which they may severally have the control." No. 2, same page provides, "that executors, administrators, and guardians, may, by leave of the court, retain in their possession the money of any minor, paying for the same lawful interest, or shall, under the direction of the court, put out the money of the minor at interest, upon such mortgage security as said court shall allow, &c., &c: *Provided,* That the day of payment of the money so put out at interest, at any time, shall not exceed one year from the date of the obligation or other security given for the same, and also 555 at the end of each year, the interest due, if not paid, be made principal and a new bond or obligation taken, and when the executor, administrator or guardian, retains the money on interest himself, the same rule shall be observed, the interest being added to the principal annually, but executors, administrators, and guardians, shall *not be liable to pay interest, except on the surplus of the estate of the deceased remaining in their hands, and unemployed as aforesaid,* after the settlement of their accounts." Duval's Compilation, 177.

That portion of the decree complained of in relation to this matter, was doubtless intended by the learned Judge who made it, to meet this peculiar provision of the statute, to which of course, we are bound to adhere: but without such a statute, we should have doubted the propriety in a case like this, of applying so stringent a rule.

The general rule of the courts is not to allow compound interest. Hoffman's Master in Chy., 109. "There may (he says, page 104,) be a case of such gross violation, in an executor, of duty imposed upon him by the will, as to lead the court to allow compound interest; but it is singular, that in the whole range of English decisions upon the unwarrantable conduct of executors, in all varieties, there is but a *solitary* case giving compound interest, and that placed by the court upon the peculiarity of the trust."

In this country, cases can be found where compound interest has been given, but they are generally if not universally founded upon some peculiar cause, and the general rule deducible from the cases here, is believed to be the same as in England. In the case of the State of Connecticut, vs. Jackson, 1 John. Chy. Rep. 14, the Chancellor says, "Except in some special cases, interest upon interest is not allowed, and the uniform course of decision is against it, as being a hard and oppressive exaction, tend- 556 ing to usury." In Black vs. Blakely, 2 McCord's Chy. Rep., 9, 10, this case was cited and approved, and Mr. Justice Nott, who delivered the opinion of the court, said: "I have never known it (*compound interest*), allowed on a mere neglect to pay over money." In Teague vs. Dendy, *Ibidem,* 207, it is said that an administrator will be charged with interest only upon the annual balances retained in his hands; and in Darrell vs. Eden, 3 De Saussure, 241, that an executor who has unnecessarily kept money of an estate in his hands, which might have been rendered productive, will be charged with interest on the annual balances. It will occur, in a large class of accounts (says Mr. Hoffman, page 107,) that the mode of stating, by giving interest upon each sum from the moment it is charged, will make the amount against the accounting party greater than by compounding interest at the end of each year; that is, by carrying the interest upon the balance found at the beginning of a year, into the balance struck at its close, and computing interest for the next upon the whole; *no interest being computed upon the sums when received.* This is evidently the method intended by our statute; and Mr. Hoffman, before cited, says: "It is clear that when compound interest is charged, that is the only allowable mode of doing it."

The decree in Raphael vs. Boehm, 11 Ves., 92, 111 and 112, the *solitary* case before mentioned, gave interest upon sums from the time of reception, and then half yearly rests for the purpose of compounding. And in the former as well as the latter particular, Lord Eldon, that eminent Chancellor, who, for more than twenty years, held the great seal of England, censures that decree, stating that it was peculiar in these points, and was expressed in terms which he hoped would never be found in a decree again.

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557 We find in the record the following statement of facts, signed by the counsel of the respective parties, to wit: "That after the divison of the negroes belonging to the estate of Barney McKinnie, between Andrew Young, in right of his wife, and complainant, on the 29th January, 1835, and before the date of Andrew Young's will, two negroes, Tom and Amanda, were born of Jenny, a negro woman assigned to Andrew Young on the said division, who are still alive, and that after the death of Andrew Young, said negroes were delivered over by his executor, John Brett, to Henry McKinnie, as guardian of complainant, under the impression that they were embraced in the bequest of said Young to the complainant." In that impression we have no hesitation in saying that Mr. Brett was mistaken. They were not embraced in the bequest to Henry McKinnie but were the property of the estate of said Young, part of the *accumulation* spoken of by him, and if they were not needed to pay his debts or funeral expenses, they passed with the remainder of his estate to his legal heirs. They were not a portion of the property which he had obtained from the estate of Barney McKinnie, but were *"servants born in his house."* We are aware of and recognize the rule, *"Partus sequitur ventrem,"* which has been so forcibly pressed upon our attention by the counsel for the appellee, and admit that in ordinary cases the issue follows the mother, but we think it does not apply to this case. Here the intention of the testator, as declared in his will, must govern. If we could travel out of it, and seek evidence of that intention *dehors* that instrument, we might perhaps find a different intention; but we feel ourselves constrained upon this, as upon the question of election, to confine ourselves to the will and not to speculate upon the testator's intention, not therein expressed or clearly implied. This we deem the safest rule.

558 The first, second, third, fourth and sixth clauses of the decree was consider right, and they are therefore affirmed. The fifth is eroneous, and is consequently reversed, and a decree must be entered by the court below, awarding the two slaves, Tom and Amanda, in the said fifth clause mentioned, to the appellant.

At the time of the intermarriage of the said Andrew Young with said Elizabeth McKinnie, widow of said Barney McKinnie, (which it appears by the pleadings in the cause, took place in the fall of the year, 1834,) said Young became entitled, in right of his wife, to that portion of the personal estate, including slaves, to-wit: *one-third* thereof, which he, the said Barney McKinnie, by his last will and testament, bequeathed to his wife, the said Elizabeth McKinnie. For this portion of *one-third,* the said Young was not liable to account; nor was he liable to account, during the life time of his said wife, Elizabeth, for the use or hire of the same one-third of the said slaves, or for the use or rent of the one-third of the real estate of his said wife, of which she was seized by virtue of the devise of it to her by the said last will and testament of the said Barney McKinnie. But for the use or hire of the said one-third of the said slaves, since the death of the said Young, the appellant is liable to account; and the said Young, in his life time, was, and the said appellant is, liable to account for the use and hire of the other two thirds of the said slaves; and the said Young was also liable to account for the rents and profits of the two-thirds of the real estate of the said Barney McKinnie, of which he became possessed in right of Henry McKinnie, who had become seized thereof as aforesaid, up to the time of the death of his said wife, Elizabeth, and also for the rents and profits of the whole of the said real estate from the time of the death of the said Elizabeth to the time of the sale thereof, in the year 1840; and the said Young was also liable to account after the said sale 559 to the time of his death, and the said appellant has, since the death of said Young, been and still is liable to account for the whole of the proceeds of all the real estate which was of the said Barney McKinnie, deceased, which was sold by the said Young, together with all the interest that has accrued on the said proceeds of the said real estate since the said sale thereof.

In taking the account for the hire of the slaves, the estate of said Young should be credited with the hire of the said Tom and Amanda, since the time of their delivery by John Brett, Executor, &c., to the guardian of Henry McKinnie, and in taking the account of the hires of the slaves, a due allowance should be made for clothing said slaves, for loss of time by sickness or other casualties, and for the support and maintenance of such of them as by reason of infancy, old age, or other cause, were unable to earn a livelihood.

We do not doubt that the learned Judge who made the decree in the court below, intended that the seventh clause thereof should be so construed as that the account might be taken in the manner we have indicated, except as to the two slaves Tom and Amanda; but as from the general terms in which this clause is expressed, the master might perhaps, in some particulars, construe it differently, we have considered it proper to add this much, as explanatory of our views in regard to it.

From the peculiarity of this case, the decree being in part sustained, and in part reversed, and the fact that both of the parties are administrators, we deem it right and just not to decree costs in favor of either. but to leave each party to pay his own costs.

Let the case be remanded to the court below, for further proceedings in accordance with this opinion. *Per totam Curiam.*

ST. ANDREWS BAY LAND COMPANY, APPELLANT, VS. ANN 560 W. CAMPBELL, APPELLEE.

1. Where A. alleges, in a bill of complaint, that her father, J. C., who afterwards died, and of whom she is an heir, together with L. & G., purchased from the United States an undivided interest in a tract of land, a certificate for which issued to L. & G. and the heirs of J. C., and the Receiver's receipt and the patent issued by the United States, in evidence in the cause, declare the purchase to have been made by L. & G., and three other persons by name, as heirs of J. C.: *Held,* That the allegations of the bill are not sustained by the proof, and that a decree directing a partition of the land, is erroneous.

2. No facts are in issue unless charged in the bill, and no proofs can generally be offered of facts not in the bill, nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleadings and evidence; for the court pronounces its decision *"secundum allegata et probata."*

Appeal from a decree of the Circuit Court for Jackson County.

The opinion of the court contains a full statement of the facts appearing in the record in this case.

R. L. Campbell and James T. Archer for Appellant.

M. A. Long and *John Erskine* for Appellee.

DOUGLAS, J., delivered the opinion of the court.

This is an appeal from an interlocutory decree of the Circuit Court of Jackson County, brought under the act of the last session of our General Assembly, Pamphlet Laws, page 101, Sec. 3, which provides for such a proceeding. The suit was instituted in the court below by Ann W. Campbell, who claims an interest in a tract of land situated at St. Andrews Bay, as heir to her father, (the late) John Clark. She alleges in her bill "that her father, the late John Clark, together with William M. Loftin and Pe-

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561 ter W. Gautier, Sen., purchased from the Government of the United States an undivided interest in the tract of land situate on St. Andrews Bay, and known in the map of Government surveys, as lot number (5) five, in section six, Township four, Range fourteen, south and west, containing eighty-six 50-100 acres, a certificate for which issued to the said Loftin and Gautier, and the heirs of said Clark (he having in the meantime departed this life,) by the Register of the Land office, and afterwards in like manner a Patent issued to said parties from the United States." "That afterwards an agreement was made between said parties to 'divide' the said fractional lot so as to give to each their respective improvements, making a fair, equitable division thereof, giving to each as near as possible an equal fronting on the Bay, that is one half to said Loftin, one half of the other half and two acres over and above that half, to the heirs of said Clark, and the remainder to said Gautier." And further "that the said parties, Loftin, Gautier and Wilie P. Clark, (who, with your oratrix, are the only surviving heirs of said Clark,) together with the late husband of your oratrix, John W. Campbell, sold and bargained to the said Land Company, or to Jesse H. Willis, Isham G. Searcy, and Richard H. Long, parties of the said Land Company, all their interest and right in the said lot No. five, so that a division thereof became necessary," and "that after the death of the said John W. Campbell, she became desirous of having the right and interest which she was entitled to in the said property set off and divided to her, amounting, as she conceives, to eleven acres and 76-100, she having an interest equal with her brother, the late Wilie P. Clark," and prays "that her portion and share of said lot be assigned and set off to her by metes and bounds," &c. These are all the allegations of the bill which are deemed material to the decision of this case.

562 The answer of the Appellant, (respondent in the court below,) states, "that it appears from the receipt of the Receiver of the Land Office at Tallahassee, and a patent issued thereon, November 5, 1841, that the land mentioned in the bill was purchased from the United States by Loftin, Gautier, Wilie P. Clark, John R. W. Clark, and John W. Campbell, heirs of John Clark, deceased; that on the 13th July, 1839, the said Wilie P. Clark and the said John W. Campbell, sold their respective interests in the said land to the said company or its trustee; that a town has been laid out thereon, and valuable improvements made by said company on said land, and that the respondents have been informed and believe the land in question was settled by one Allen, but that no certificate of purchase or patent had issued to him; that Loftin, Gautier, and John Clark purchased *Allen's* claim, and afterwards divided the tract according to their respective interests."

A replication was filed March 1st, 1852. The certificate of the Receiver, which appears in the record as exhibit B., is as follows, to-wit:

No. 554. } *Pre-emption under Act of* 1826,
RECEIVER'S OFFICE AT TALLAHASSEE.

Received from William M. Loftin, Peter W. Gautier, Sen., and Wylie P. Clark, John R. W. Clark, John W. Campbell, heirs of John Clark, deceased, of Florida, the sum of one hundred and eight dollars 12 1-2 cents, being in full for lot No. 5, Sec. 6, Township 4, Range 14, south and west, containing 86 50-100 acres at the rate of $1.25—100 per acre. $108.12 1-2. (Signed) R. K. CALL, Receiver.

The patent, which is in accordance with the receipt, the articles of association of the company, the deed from John W. Campbell to the Trustees of the Company, and the following admission of the parties, are also in the record, 563 viz:

"In this case the respondent admits that John Clark died in Washington County, Florida, on or about the twelfth day of October, A. D., 1832, leaving three children, to wit: Complainant, Ann W. Campbell, wife of John W. Campbell, Wylie P. Clark and John R. W. Clark, and that John R. W. Clark died in May, 1835, leaving no children;" "and the complainant admits that John W. Campbell died anterior to the commencement of this suit, and that he, the said Campbell, left a number of children by his marriage with the complainant."

This is *all the evidence* which the record exhibits. The allegation in the bill, that John Clark purchased the land from the United States, is negatived both by the answer and the proof; and there is nothing in the record to show that he had any title whatever to the lot of land in controversy or any part thereof. The answer to be sure states, "that Loftin, Gautier and John Clark, purchased Allen's claim and afterwards divided the tract according to their respective interests;" but there is no averment or suggestion as to the nature of Allen's claim. It may have been merely for improvements, or he may have had a pre-emption right. The certificate of the Receiver of the Land Office, before mentioned, is headed "Pre-emption under act of 1826," and from this it has been argued that Allen's claim, which Loftin, Gautier, and John Clark purchased, must have been a pre-emption right, but it by no means follows. Again it has been urged that the certificate and patent are to the heirs of John Clark, that Mrs. Campbell is an heir, and therefore entitled to a share as such; but here we are met by the difficulty that both the certificate and patent were issued to certain persons by name, as heirs of John Clark, and that her name is not mentioned in either. To get over this difficulty, it has been suggested and urged, 564 with some plausibility, that Mr. Campbell's first name, John, was probably inserted in the certificate and patent instead of Mrs. Campbell's first name Ann. This may be so, but there is no evidence to that effect, and we do not see how this, in the present shape of the case aids the complainant, (the present appellee:) she does not allege in her bill any such mistake, or ask to have the certificate or patent reformed. If Loftin, Gautier, and John Clark purchased of Allen a pre-emption right, and if John Clark, during his life, in good faith aided in carrying it out, this may have raised an equity in Mrs. Campbell after his death, as one of his heirs, to a share of the tract; and if the company purchased with notice of such equity, they would be bound by that notice, and estopped from defending themselves against it.

Mrs. Campbell appears, from the record, to have a valid claim to the share of her brother, John R. W. Clark, deceased, whatever it may be.

The Master to whom, by the interlocutory decree from which this appeal was taken, "it was assigned to ascertain the several propositions of the respective parties," states that Mrs. Campbell, as the heiress of her father, and entitled to one half, is entitled to eleven acres and eight-hundredths, and the Land Company is entitled to the like quantity, as holding the interest of the other heir, Wilie P. Clark, the said interest of the parties to embrace the improvements respectively made by the said parties, Gautier, Loftin and Clark. How or upon what evidence he ascertained the proportions of the respective parties, does not appear, and as the decree under which his report was made was appealed from, this is not a matter for our enquiry. The report is not in strictmenss before us; but having come to the conclusion that the matters in the record do not justify the

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565 decree complained of, we think that we may with propriety look into it, with a view to ascertain whether any good would be likely to result from sending the case back for further proceedings; and without intending to express any opinion as to the nature of the claim purchased of Allen by William M. Loftin, Peter W. Gautier, Sr., and John Clark, we may be permitted to say that the record discloses enough to render it proper that the appellee should have a further opportunity, by amending her bill, or filing a supplemental one, to place her claims fairly and fully before the court, to shew, (if the fact exists), that her father, John Clark, had an interest in the tract of land in question that descended to her; that the appellant purchased this interest *with notice of her equity,* and especially to show her right as heir of her brother, the said John R. W. Clark. In the bill now before us, she makes no claim as heir of this brother, nor is his right admitted by the answer, although it appears from it, and the proofs in the case, that he had some interest in said tract. But no facts are properly in issue unless charged in the bill, and of course no proofs can generally be offered of facts not in the bill, nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleadings and evidence; for the court pronounces its decisions "*secundum allegata et probata.*" Story's Eq. Pl., Sec. 257; Crockett vs. Lee, 7 Wheaton, 522; Jackson vs. Ashton, 11 Peters, 229. In Jouhan vs. Child, 1 Bro. C. C., 94, Lord Thurlow would not listen to any evidence that went to prove a deed fraudulent, because there was no allegation of fraud in the bill; and in James vs. McKernan, 6 John. Rep., 543, 565, the court said: "It is not a sufficient answer to the objection in this case that it must be deemed to have been waived because not raised upon the hearing. The counsel might well have presumed that the testimony to that point (a
566 matter not charged in the bill,) would not have been taken into consideration;" and in the case of New England Bank vs. Lewis, 8 Pickering, 113, it was held that "the answer of a defendant in equity, of facts which are not enquired of in the bill, is not evidence of such facts." And in the case of Jackson vs. Ashton, 11 Peters, 249, the court say: it may be proper to observe that no admission in an answer, can, under any circumstances, lay the foundation for relief under any specific head of equity, unless it be substantially set forth in the bill. With such authorities before us, (and numerous others might be cited,) we feel warranted in witholding our assent to the decree complained of in this case. It has been urged that we can decree for the complainant upon the proofs in the cause, nothwithstanding they vary so materially from the case made by the bill. But besides that variance, we do not consider those proofs sufficient to justify such a decree.

We are aware that there are cases, where, on a bill for the specific performance of a contract, the court has made a decree upon a contract set up in the answer varying from that alleged in the bill, as in Bradford vs. the Union Bank of Tennessee, 13 Howard's U. S. Rep. 69, and cases therein cited, the answer being treated as a cross bill, and made "the foundation for a proper decree by the court." And that court says, the same principle seems to be equally applicable to the complainant, where he insists upon a decree for a specific performance of the contract as established by the proof, although different from that set up in the bill; but to warrant such a decree for the complainant in such a case, the answer must, it is conceived, set up the variant contract and submit to a decree upon it, otherwise it would contravene that sound, salutary and well established rule, that a party is not to be *surprised* by proof offered by his adversary, at the trial or hearing, which is not in accord ance with some charge in the pleadings. "The rule, (say 567 the court in Small *et al.* vs. Oewns and Green, 1 Maryland Chancery Decisions, 368,) cannot be questioned that a complainant in his bill must put in issue whatever he intends proving, otherwise the evidence will be excluded.

The Court of Chancery decrees *secundum allegata et probata,'"* citing Haywood vs. Carroll, 4 H. & J., 518. "This rule is necessary (that court adds), to prevent *surprise,* but the abrogation of it would enable the complainant to take from his adversary the benefit of his answer, which, if responsive to the bill, would require a stronger measure of evidence to overcome, than if the fact to be proved was not noticed in the pleadings;" and Mr. Justice Story in his Eq. Pl., Sec. 264, says, "If an admission is made in the answer, it will be of no use to the plaintiff unless it is put in the issue by some charge in the bill, and the consequence is that the plaintiff is frequently obliged to ask leave to amend his bill, although a clear case for relief is apparent upon the face of the pleadings. So far, then, as this rule is relaxed, it is, we think, intended to be confined to cases where the defendant sets up a variant contract in his answer." Such is not this case: here the bill is for a partition. The right of the complainant is not admitted by the answer. She is bound, therefore, to make such proof as would entitle her to a recovery in an action of ejectment. 2 Barbour's Chy. Prac. 295; Larkin vs. Mann, 2 Paige, 27-28.

Let the decree of the court below be reversed, and the cause remanded with leave to the appellee to amend her bill or file a supplemental bill in that court, and for such other and further proceedings, not inconsistent with this opinion, as the interests of the parties may seem to require.

The costs to be taxed against the appellee.

DUNCAN MCDOUGALD, APPELLANT, VS. ARABELLA HEPBURN, 568 APPELLEE.

A wife is not entitled to dower in shares of stock of a land company disposed of during the life time of the husband.

Appeal from a decree of Franklin Circuit Court.

Arabella Hepburn filed her bill for dower in the court below, against the appellant and several others, defendants, in which she alleges that Burton Hepburn, deceased, of whom she is widow, during his life time and during the coverture of complainant was seized in fee simple of an undivided one fifth part or interest, in common with Daniel K. Dodge, James C. Watson, Daniel McDougald, and James S. Calhoun & Charles L. Bass composing the firm of Calhoun & Bass, of and in sundry lots in the city of Apalachicola; that said lots were conveyed to the above named parties and their heirs by the Trustees of the Apalachicola Land Company, by deed bearing date the first day of October, 1837. The bill claims dower in the premises conveyed by the deed aforesaid, and prays that one third part of the proportional share of Burton Hepburn be assigned to complainant as and for her dower therein.

McDougald in his answer, admits that during the coverture of complainant, Burton Hepburn, her late husband, took two deeds in fee simple, in common with said Dodge, Watson, Daniel McDougald, and Calhoun & Bass, of and unto certain lots in the city of Apalachicola, one dated the first day of October, 1837, and the other dated the 14th day of September, 1836, which deeds covered the property set out in the bill of complaint. The answer further alleges that prior to the execution of either of the deeds aforesaid, Daniel McDougald, Burton Hepburn, Daniel Dodge,

569 Calhoun & Bass, Jonathan A. Hudson, John W Campbell, John Dill, and others, formed themselves into a company, or co-partnership, by the name and style of the Franklin Land and Town Lot Company, in the city of Apalachicola, and the said company associated Daniel K. Dodge, Daniel McDougald, Burton Hepburn, and the other parties named in the deeds aforesaid, agents to make a contract for the purchase of lots in the city of Apalachicola; that their said agents, in pursuance of said trusts, did make a contract for the benefit of said company, for the lots conveyed in the two deeds aforesaid; that after the terms of said contract were complied with, the company directed Burton Hepburn, and the other parties named in said deeds, to receive from the trustees of the Apalachicola Land Company deeds for the lots in Apalachicola, which deeds were to be taken in the name of said Burton Hepburn, and the other parties therein named, as Trustees of the Franklin Land and Town Lot Company, for the uses and purposes set forth in their articles of association, but by mistake the said deeds were made to Burton Hepburn, and the other parties therein named, in fee simple, instead of being made to them as Trustees aforesaid; that as well as himself, (the respondent,) said Hepburn and his co-Trustees were ignorant of the mistake, and always regarded said deeds as deeds of trust, and so regarding it, continued from time to time to execute the trusts reposed in them by the company.

The answer further alleges that the whole property of the company was divided into sixty-four fractional parts, and that scrip or certificates were given to each shareholder, defining his quantum of interest, and binding the Trustees to make title to each shareholder for his share, so soon as the liabilities of the company, then existing and therefore to accrue, in the erection of buildings, &c., should
570 be discharged, which liabilities were to be discharged by instalments, to be called in by the Trustees; that said scrip or certificates were transferable only on the books of the company; that Burton Hepburn received a certificate, signed by himself and his co-Trustees, for eight fractional shares, being eight sixty-fourths, or one full eighth, and that on the first day of February, 1851, Hepburn transferred to James C. Watson seven sixty-fourths of his share and on the sixth day of February, he transferred to S. R. Bonner his remaining one sixty-four, or one eighth of a share of one eighth, and that by other transfers, he, McDougald, became the owner of the share originally belonging to Hepburn, to which he afterwards obtained a deed. The answer further alleges that the share of Hepburn, after the transfer of his interest, was levied upon as the property of Hepburn, and sold under execution, and respondent, McDougald, was obliged to purchase the same to quiet his title previously acquired.

The answer also alleges that the interest of Hepburn was indebted for improvements made, &c., and that a decree was rendered against said interest by Franklin Circuit Court, and paid off and discharged by respondent, McDougald; and it is insisted, by reason of the premises, complainant is not entitled to the prayer of her bill.

The answer of the other defendants admits the coverture of complainant, and that Hepburn was seized of one eighth of said real estate; that the conveyance on its face seemed to be in fee simple, in his own right, for one fifth, but that as to all except one eighth, they believe he held in trust for others. These defendants allege that the interest of Burton Hepburn has been set apart, and can be traced into the hands of the present owner, and they insist that if complainant is entitled to dower, the same must be allotted from the separate interest of Burton Hepburn, where- 571
fore they pray to be dismissed, &c.

There appears in the record a copy of the minutes of a meeting of the Franklin Land and Town Lot Company, purporting to be held on the 2d April, 1836, composed of Daniel McDougald, Burton Hepburn, Daniel K. Dodge, and others, at which was adopted the articles of association referred to in the answer of McDougald, accompanied by a copy of said articles of association, by which Daniel McDougald, James C. Watson, Burton Hepburn, D. K. Dodge, and James S. Calhoun, were appointed agents and Trustees for all concerned, and were authorized to receive titles in their names, for the lots purchased, and to sell and dispose of the same on such terms as they might think most to the advantage of the company.

It was further stipulated that the Trustees should issue scrip, as stated in the answer of McDougald, and after payment of the purchase money, the Trustees were to distribute the remainder of the lots to the company, according to their respective shares and interests. No transfer of such interest was to be binding unless entered on the books of the company.

No other evidence appears in the record.

On the 16th April, 1851, and order was made by the court below, directing McDougald to employ counsel in the stead of his former counsel, who had died, and on his failing to do so, the complainant was allowed to proceed *ex parte*. At the April Term, 1853, the court below, by decree, awarded dower to complainant as prayed in her said bill, from which decree McDougald appealed.

By consent of counsel in this court, it was agreed that the general replication to the answer of the defendants be considered as having been filed in the court below, and deemed to be inserted in the record.

T. J. Eppes for Appellant. 572

W. G. M. Davis for Appellee.

1. The bill alleges the seizure of Hepburn during the coverture; this is all that is necessary to give dower.

2. The answer admits this allegation and no proof was necessary to sustain what the answer admitted.

3. The matters set up in the answer to avoid the fact of seizure alleged in the bill and admitted in the answer, not being supported by any proof, cannot be considered by the court. This is decided at this term, in the case of Orman vs. Barnard, Adams & Co.

BALTZELL, C. J., delivered the opinion of the Court.

This is a suit in chancery, instituted by Mrs. Arabella Hepburn, to obtain dower in certain land and lots lying in and near Apalachicola, which she claims through her deceased husband, the late Burton Hepburn.

The counsel of McDougald having died, a rule was taken upon him to employ new counsel, which he failing to do, complainant was allowed to proceed *ex parte*. It does not appear how the case was submitted to the court no order for the hearing having been made. In the final decree rendered it would seem to have been tried upon "the bill, answer of the defendants, and evidence." In this court, it was agreed that a replication had been filed in the court below, so that we are to treat the case as if tried upon bill, answer, replication and evidence. If the object of the plaintiff was to establish his case by proof, not satisfied with the admissions in the answer, he has most signally failed, as there is not, independent of the answer, a word of proof in the record, no deposition of a witness, and no writing of any character. Reliance seems to have been placed

573 in argument upon the answer of the other defendants, but we think it very clear that this is not evidence. The other defendants were but nominal parties, and had no identity of interest with plaintiff. "It is a general and almost universal rule that the answer of one defendant cannot be read as evidence against another." 1 Green., § 178; 2 Dan'l Ch. Pr., 981.

If the answer of McDougald is to be excluded as evidence, as has been contended in argument here, there is not the slightest foundation for the decree. We, however, proceed to ascertain the extent to which it may be used, desirous of disposing of the case as far as possible on the merits. "If a replication be filed, the answer is not evidence in the defendant's favor, but the plaintiff may use any portion of it, without admitting the remainder to be read, except so far as it is explanatory of the portion used." Adams' Equity, 20, 21. A difficulty arises in the present case from the want of the order submitting the case to the court. If part only of the answer was read, it should have been so stated, and then the question would arise of reading the other passages, or of throwing the burthen of proving independent facts upon defendant. As the case was tried *ex parte*, the presumption is against complainant, that the entire answer was read. Regarding it in this point of view, we proceed to examine if plaintiff has shown an equity, for in this event we should incline to remand the case, with permission to amend the pleadings, and for further hearing.

The answer, whilst admitting that Hepburn and others took deeds in fee, alleges "that prior to their execution, a company was formed by these parties, and others, to be called the Franklin Land and Town Lot Company, and that they appointed Hepburn, Dodge and others, agents to purchase lots in Apalachicola; that these agents did make a pur-
574 chase of the lands and lots, and were directed to take deeds in their names, as trustees of said association, and they file copy of the articles of the association; that by mistake the deeds were made to them in fee simple, and not as Trustees; that they always regarded it as a trust; that the whole property was divided into 64 fractional parts, and that said trustees gave certificates, or scrip, to each shareholder for his share, binding themselves to make titles to each share holder, so soon as the liabilities of the company, then existing or to accrue in the erection of buildings, &c., should be discharged; that Hepburn took a certificate, signed by himself and co-trustees, for one full eighth which was assigned and transferred by him, in his life time, to Bonner & Watson, and by them to others, who transferred to defendant."

McDougald vs. Hepburn.—Opinion of Court.

The complainant has confirmed this view of the answer, by taking her decree not for an interest to the extent which she would be entitled to by the deeds, but regulated by the extent of the shares which her husband held. Is this interest or ownership of shares in a company, such as is here described, subject to dower of the wife? In the case of Blake vs. Jones, the Supreme Court of South Carolina treated "a certificate of this kind as nothing more than an equitable agreement, a chose in action," although the land vested in the scripholder by the original grant. 1 Bailey, 147.

In Gilman vs. Brown, Jr., which involved the validity of the title to shares in the land of the New England Mississippi Land Company, plaintiff was declared entitled to shares of the common stock of the company, and not to the interest of one of the original grantees. 1 Mason, 210. It is there stated that one amongst many reasons for the forming a company, was to give a negotiable quality to the stock or property, which without impairing the great objects of the association, might facilitate the transfer of shares 575
in the property, and give it a marketable value. Now it is readily perceived that if certificates of shares were liable to a claim for dower in the hands of every assignee to whom they might be transferrd, the very objects designed in forming such an association would be dedeated.

These authorities, with those cited in the very conclusive argument of defendant's counsel, and which were not controverted on the other side, leave no room to doubt that the complainant is not entitled to the relief she prays.

It is therefore decreed and ordered that the decree of the Circuit Court be reversed and set aside, with costs, and the cause remanded to that court, with direction to dismiss the bill, with costs.

A petition for a re-hearing was presented by the appellee in this cause, which was refused by the court.